



Australian
Human Rights
Commission

Native Title Report 2011

ABORIGINAL AND TORRES STRAIT ISLANDER
SOCIAL JUSTICE COMMISSIONER



Aboriginal & Torres Strait Islander
Social Justice Commissioner

© Australian Human Rights Commission 2011

This work is protected by copyright. Apart from any use permitted under the *Copyright Act 1968* (Cth), no part may be used or reproduced by any process without prior written permission from the Australian Human Rights Commission. Enquiries should be addressed to Public Affairs at: paffairs@humanrights.gov.au.

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

This publication can be found in electronic format on the Australian Human Rights Commission's website at: www.humanrights.gov.au/social_justice/nt_report/ntreport11/.

For further information about the Australian Human Rights Commission, please visit: www.humanrights.gov.au or email paffairs@humanrights.gov.au. You can also write to: Social Justice Unit, Australian Human Rights Commission, GPO Box 5218, Sydney NSW 2001

Acknowledgments

The Aboriginal and Torres Strait Islander Social Justice Commissioner acknowledges the drafting contributions of Katie Kiss, Louise Bygrave and Nick Burrage.

The Social Justice Commissioner also thanks the following staff and interns of the Australian Human Rights Commission: Allyson Campbell, Hannah Donnelly, Andy Gargett, Louise McDermott, Danielle Noble and Emilie Priday (staff); Muzna Al Abed and Carolina Simpson (interns).

The Social Justice Commissioner especially thanks all those who assisted with the preparation of this Report. A full list of acknowledgements is contained at Appendix 1.

Design and layout JAG Designs

Printing Paragon Printers Australasia

Cover photography Thinkstock

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



**Australian
Human Rights
Commission**

28 October 2011

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

Dear Attorney

Native Title Report 2011

I am pleased to present to you the *Native Title Report 2011* (the Report), which I have prepared in accordance with section 209 of the *Native Title Act 1993* (Cth).

The Report reviews developments in native title law and policy from 1 July 2010 to 30 June 2011 (the Reporting Period).

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 during the Reporting Period. I have done so in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth). I have considered these changes in Chapter 1.

The theme of the Social Justice and Native Title Reports for 2011 will relate directly to my priorities concerning the relationships between Aboriginal and Torres Strait Islander peoples within their communities and giving full effect to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration). This is also in line with the Australian Human Rights Commission's priority of tackling violence, harassment and bullying.

In Chapter 2 I start a conversation about lateral violence in the native title system and the ways that we, as Aboriginal and Torres Strait Islander peoples, can create the foundations for strong relationships with each other.

In Chapters 3 and 4 I explore how a human rights framework, particularly the Declaration, can assist both Aboriginal and Torres Strait Islander communities and governments address lateral violence within the native title system.

The Report provides 11 recommendations for your consideration.

I look forward to discussing the Report with you.

Yours sincerely

Mick Gooda

Aboriginal and Torres Strait Islander Social Justice Commissioner

Australian Human Rights Commission

Level 3, 75 Pitt Street, Sydney, NSW 2000
GPO Box 5218, Sydney, NSW 2001

Telephone: 02 9284 9600

Facsimile: 02 9284 9611

Website: www.humanrights.gov.au

About the

Aboriginal and Torres Strait Islander Social Justice Commissioner

The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established in 1993. The office of the Social Justice Commissioner is located within the Australian Human Rights Commission.

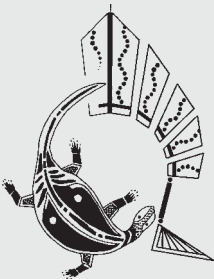
The Social Justice Commissioner:

- reports annually on the enjoyment and exercise of human rights by Aboriginal Torres Strait Islander peoples, and recommends action that should be taken to ensure these rights are observed
- reports annually on the operation of the *Native Title Act 1993* (Cth) and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples
- promotes awareness and discussion of human rights in relation to Aboriginal and Torres Strait Islander peoples
- undertakes research and educational programs for the purpose of promoting respect for, and the enjoyment and exercise of, human rights by Aboriginal Torres Strait Islander peoples
- examines and reports on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal and Torres Strait Islander peoples.

Office holders

- Mick Gooda: 2010 – present
- Tom Calma: 2004 – 2010
- William Jonas AM: 1999 – 2004
- Zita Antonios: 1998 – 1999 (Acting)
- 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 Torres Strait Islander 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 Social Justice Commissioner and the support, strength and unity which the Commissioner 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.

© Leigh Harris

Mick Gooda

Aboriginal and Torres Strait Islander Social Justice Commissioner

Mick Gooda is the Aboriginal and Torres Strait Islander Social Justice Commissioner. Mick commenced his term in February 2010.

Mick Gooda is a descendent of the Gangulu people of central Queensland. He is a senior executive with 25 years experience and a record of attaining high-level goals and leading multi-million dollar service programs and organisational reform.

Immediately prior to taking up the position of Aboriginal and Torres Strait Islander Social Justice Commissioner, Mick was the Chief Executive Officer of the Cooperative Research Centre for Aboriginal Health (CRAH) for close to five and a half years. Here, he drove a research agenda which placed Aboriginal and Torres Strait Islander people 'front and centre' in the research agenda, working alongside world leading researchers. His work at the CRAH empowered Aboriginal and Torres Strait Islander people to lead the research agenda in areas including: chronic disease management; skin infections; and promoting cultural change in hospitals to make them more appropriate to the needs of Aboriginal and Torres Strait Islander people.

Mick has extensive knowledge of the diversity of circumstance and cultural nuances of Aboriginal and Torres Strait Islander peoples throughout Australia. He has been actively involved in advocacy in Indigenous affairs throughout Australia and has delivered strategic and sustainable results in remote, rural and urban environments. Mick has played a leadership role in a range of areas including: Acting Chief Executive Officer of the Aboriginal and Torres Strait Islander Commission and Senior Consultant to the Aboriginal Legal Service (WA).

He is highly experienced in policy and program development in the public and community sectors.

Mick is also currently a Board Member of the Centre for Rural and Remote Mental Health Queensland, and is the Australian representative on the International Indigenous Council which focuses on healing and addictions. He also has an interest in the Lateral Violence Program in Canada and has been working closely with the First Nation people of Canada on the relevance of this program to Australia.



For information on the work of the Social Justice Commissioner, please visit:
www.humanrights.gov.au/social_justice/index.html

Contents

Executive Summary	7
Recommendations	14
Chapter 1: Reviewing key developments in the Reporting Period	16
1.1 Introduction	18
1.2 Legislative changes	19
(a) Creating a just and fair native title system	19
(b) Native Title Amendment (Reform) Bill 2011	20
(c) <i>Carbon Credits (Carbon Farming Initiative) Act 2011</i> (Cth)	22
(d) <i>Native Title Amendment Act 2009</i> (Cth)	30
(e) <i>Native Title Amendment Act (No 1) 2010</i> (Cth)	36
(f) <i>Traditional Owner Settlement Act 2010</i> (Vic)	38
1.3 Australian Government discussion papers	41
(a) Draft Indigenous Economic Development Strategy Discussion Paper	41
(b) Leading practice agreements: maximising outcomes from native title benefits discussion paper	44
(c) Native Title, Indigenous Economic Development and Tax Consultation Paper	49
(d) Northern Territory Emergency Response and the Stronger Futures in the Northern Territory Discussion Paper	51
1.4 Marking progress in the native title system	53
(a) Milestone for agreement-making	53
(b) Compensation for the extinguishment of native title rights and interests	54
1.5 International mechanisms addressing Indigenous human rights	56
(a) Expert Mechanism on the Rights of Indigenous Peoples 2010	56
(b) United Nations Permanent Forum on Indigenous Issues 2011	58
(c) Australia's appearance at the Universal Period Review	60
(d) Australia's appearance before the Committee on the Elimination of Racial Discrimination	61
1.6 Reviewing the recommendations from the <i>Native Title Report 2010</i>	64
(a) An annual 'Report Card'	64
(b) The Australian Government's Report Card	64
1.7 Assessing the Reporting Period	71
1.8 Recommendations	73
Chapter 2: Lateral violence in native title: our relationships over lands, territories and resources	74
2.1 Introduction	76
(a) What is lateral violence?	78
(b) Why is lateral violence associated with native title?	80
2.2 How does the native title process contribute to lateral violence?	85
(a) Completing a native title claimant application	87
(b) Mediating a native title claim	94
(c) Establishing a Prescribed Body Corporate (PBC)	98

(d) Negotiating Indigenous Land Use Agreements (ILUAs)	102
(e) Alternate legislation affecting land, territories and resources	103
2.3 Case studies: communities minimising lateral violence	107
(a) Quandamooka Peoples native title consent determination	107
(b) Right People for Country Project: Victoria	111
2.4 Conclusion	115

Chapter 3: Giving effect to the Declaration 116

3.1 Introduction	118
3.2 Lateral violence – a human rights issue	120
3.3 The Declaration on the Rights of Indigenous Peoples	123
(a) Self-Determination	124
(b) Participation in decision-making and free, prior and informed consent	129
(c) Non-discrimination and equality	138
(d) The respect for and the protection of culture	141
3.4 Conclusion	145

Chapter 4: Options for addressing lateral violence in native title 148

4.1 Introduction	150
4.2 Naming lateral violence	152
4.3 Legislative and policy review and reform	153
(a) The National Human Rights Framework	154
(b) Constitutional Reform	154
(c) Native Title Reform	155
4.4 Culturally relevant frameworks	160
(a) Development with culture and identity	163
(b) Cultural safety and security	168
(c) Cultural competence	173
(d) Culturally appropriate decision-making and conflict management	175
(e) Creating strong and sustainable governance	182
4.5 Conclusion	188

Appendices 190

Appendix 1: Acknowledgments	192
Appendix 2: Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011	193
Appendix 3: Recommendations from the <i>Native Title Report 2010</i>	202



Executive Summary

It is with great pleasure that I present my second *Native Title Report* as the Aboriginal and Torres Strait Islander Social Justice Commissioner. I launched my first Report, the *Native Title Report 2010* in February 2011. These reports are produced each year in accordance with the requirement under the *Native Title Act 1993* (Cth) (Native Title Act) for me to report annually on the impact of the Native Title Act on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.¹

In last year's *Native Title Report* and *Social Justice Report* I identified the priorities to guide me in my work as Social Justice Commissioner.² These priorities include ensuring the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) are given full effect in Australia and also promoting the development of stronger and deeper relationships:

- between Aboriginal and Torres Strait Islander peoples and the broader Australian community
- between Aboriginal and Torres Strait Islander peoples and governments
- within Aboriginal and Torres Strait Islander communities.

In the *Native Title Report 2010*, I built on this framework in the context of our rights to our lands, territories and resources and outlined four broad themes in native title and land rights that I will focus on during my term. In the *Native Title Report 2011*, I concentrate on two of these themes:

- creating a just and fair native title system through law and policy reform
- enhancing our capacity to realise our social, cultural and economic development aspirations, including through strengthening our communities.³

1 *Native Title Act 1993* (Cth), s 209.

2 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011); M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2010*, Australian Human Rights Commission (2011), ch 1. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport10/index.html (viewed 18 July 2011).

3 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

Chapter 1: Reviewing key developments in the Reporting Period

In this Chapter, I review key developments within the native title system that occurred throughout the Reporting Period (1 July 2010 to 30 June 2011) and consider the impact of these events on the exercise and enjoyment of Aboriginal and Torres Strait Islander peoples' human rights.

Guided by the Declaration I review a number of legislative changes and consultation papers in light of whether they contribute to the creation of a fair and equitable system to recognise and adjudicate our rights to our lands, territories and resources. I also review some significant moments which mark the ongoing operation of the Native Title Act and consider developments at the international level which impact on our rights to our lands, territories and resources.

At the national level the Reporting Period was quiet in terms of legislative amendment to the Native Title Act. However, there were a number of proposals which, if enacted, could prove to have a substantial effect on the native title system.

Senator Siewert of the Australian Greens introduced a private Senators Bill which, if passed, would significantly reform the Native Title Act.⁴ In addition, the Australian Government introduced a bill to give legislative effect to its Carbon Farming Initiative.⁵

In the previous reporting period, two other pieces of native title reform legislation were introduced but not enough time had passed for me to effectively report on their operation in last year's Report.⁶ Now that sufficient time has passed, we are able to have a better understanding of their effect during the Reporting Period.

At the State level, the State of Victoria passed the *Traditional Owner Settlement Act 2010* (Vic) which sets the benchmark for other states to meet when resolving native title claims.

I also discuss a number of consultation papers which have relevance to our rights to our lands, territories and resources. Given the possible effect of the proposed changes on our rights, it is important that the Australian Government engages meaningfully and effectively in order to obtain our free, prior and informed consent. These include:

- Draft Indigenous Economic Development Strategy Discussion Paper
- Leading practice agreements: maximising outcomes from native title benefits Discussion Paper
- Native Title, Indigenous Economic Development and Tax Consultation Paper
- Stronger Futures in the Northern Territory Discussion Paper.

Independent of the legislative changes and proposals, the native title system continues to lumber on. Whether the system is fair or delivers justice is questioned, however until appropriate reform is progressed we must make the best of what we have. Native title parties continue to make applications for native title, continue to reach agreements, and continue tirelessly, to seek remedy in some way to the injustices of the past. In this Chapter I note two milestones worthy of reflection:

- the registration of the 500th Indigenous Land Use Agreement
- South Australia's first compensation application for the extinguishment of native title.

4 Native Title Amendment (Reform) Bill 2011 (Cth).

5 The Government's Bill received assent on 15 September 2011 and is now the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).

6 *Native Title Amendment Act (No 1) 2010* (Cth), *Native Title Amendment Act 2009* (Cth).

I also consider developments in international human rights law that concern native title and our rights to our lands, territories and resources. I urge the Australian Government to consider these developments and further implement its commitment to supporting human rights. These developments include:

- Expert Mechanism on the Rights of Indigenous Peoples 2010
- United Nations Permanent Forum on Indigenous Issues 2011
- Australia's appearance at the Universal Periodic Review
- Australia's appearance before the Committee on the Elimination of Racial Discrimination.

Finally, in what will be the first in a series of annual 'Report Cards', I provide an assessment of the Australian Government's performance across a range of issues, including its progress towards implementing my recommendations from the *Native Title Report 2010*, and draw some concluding observations about progress made during the Reporting Period. In all, the Reporting Period has been a mixed bag for our communities trying to navigate the native title system.

Throughout my term I will continue to advocate for a system that allows us to fully realise our rights as set out in the Declaration and I will continue to use the Native Title Report as a tool to monitor and assess developments that impact on our rights.

Chapter 2: Lateral violence in native title: our relationships over lands, territories and resources

In Chapter 2, I start a conversation about lateral violence and the ways that we, as Aboriginal and Torres Strait Islander peoples, can create the foundations for strong relationships with each other.

Lateral violence is often described as 'internalised colonialism' and according to Richard Frankland includes:

[T]he organised, harmful behaviours that we do to each other collectively as part of an oppressed group: within our families; within our organisations; and within our communities. When we are consistently oppressed we live with great fear and great anger and we often turn on those who are closest to us.⁷

These behaviours might include bullying, gossiping, jealousy, shaming, social exclusion, family feuding and organisational conflict, which can and often does escalate into physical violence.

The theory behind lateral violence explains that this behaviour is often the result of disadvantage, discrimination and oppression, and it arises from working within a society that is not designed for our way of doing things.

Our history of colonisation in Australia has created an environment where Aboriginal and Torres Strait Islander peoples are relatively powerless and lateral violence is able to thrive.⁸ This history, including the dispossession of our lands and waters, is an ongoing experience for many Aboriginal and Torres Strait Islander peoples as non-Indigenous peoples and organisations continue to control the structures, processes and policies that provide access to wealth and power.

Lateral violence occurs in native title because the non-Indigenous process imposed by government reinforces their position of power and reignites questions about our identity. Concepts of power and identity are aggravated in native title because of the inherent contradiction between past government policies in Australia

7 R Frankland and P Lewis, *Presentation to Social Justice Unit staff*, Australian Human Rights Commission, 14 March 2011.

8 R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 19.

that removed our peoples from our country⁹ and the current requirement under the Native Title Act for us to prove continuing connection to our lands and waters since the arrival of the British.

Native title can reinforce the imbalance of power between non-Indigenous peoples and Aboriginal and Torres Strait Islander peoples as well as positions of authority within our communities. For government and industry, the native title process can be used to affirm their control, access to and use of lands and resources. Within our communities, native title can be used to promote positions of authority as we deal with our history of powerlessness and oppression, and questions about our identity.

I argue in Chapter 2 that native title itself can generate positive outcomes for Aboriginal and Torres Strait Islander peoples by recognising our rights to and interests in our lands and waters.

However, often this potential is not realised and the process that we need to follow to prove our native title provides opportunities for lateral violence within our families, communities and organisations. I set out the native title process and explain how – at each stage of the native title process – lateral violence can be generated.

I also report on two case studies that demonstrate how Aboriginal and Torres Strait Islander communities themselves can minimise the impact of lateral violence in native title: the Quandamooka People's native title consent determination on North Stradbroke Island in Queensland; and the *Right People for Country* Project in Victoria.

Chapter 3: Giving effect to the Declaration

In Chapter 3, I examine how the Declaration can guide the development of healthier relationships, not only with governments, industry and the wider Australian community but also within our Aboriginal and Torres Strait Islander families, communities and organisations.

I consider how the Declaration can build legislative and policy frameworks such as native title to ensure that they comply with international human rights standards and principles and as a result, empower Aboriginal and Torres Strait Islander peoples to reach their full potential and to respond to lateral violence when it occurs.

Lateral violence requires a human rights based response that uses the following key principles that underpin the Declaration.

Self-determination

Self-determination as it applies to Indigenous peoples 'is the right of a group of peoples to meet the human needs¹⁰ of that group, including the means to preserve that group's identity and culture'.¹¹

Achieving self-determination is difficult because of the dichotomy of a government that focuses on the pursuit of individual wealth creation and Aboriginal and Torres Strait Islander peoples who may pursue self-determination as individuals or groups within a cultural context that focuses more broadly on social, cultural and environmental as well as economic benefits.

9 The Protection Acts that governed the removal of Aboriginal and Torres Strait Islander peoples can be found at AIATSIS, *To Remove and Protect*, <http://www1.aiatsis.gov.au/exhibitions/removeprotect/index.html> (viewed 21 September 2011).

10 For a discussion on human needs theory, see Chapter 2 of the *Social Justice Report 2011*.

11 UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag (ed) *The implementation of the right to self-determination as a contribution to conflict prevention*, 1999, p 19.

Participation in decision-making and free, prior and informed consent

The denial of our right to participate in decision-making and the deterioration of our community norms and protocols increases the potential for conflict resulting in lateral violence. In order to avoid this outcome, our participation in decision-making must be underpinned by the principle of free, prior and informed consent.

This principle should be the basis upon which to develop all frameworks of engagement with Aboriginal and Torres Strait Islander peoples and is fundamental to ensuring our effective participation in decision-making on issues that affect us. Securing commitment to these key principles early on in the native title process also ensures that the frameworks and processes do not further exacerbate existing conflicts or create new ones.

Non-discrimination and equality

Discrimination and inequality perpetuates lateral violence in three ways:

- Racial discrimination reinforces negative stereotypes about Aboriginal and Torres Strait Islander peoples, which can become internalised and generate lateral violence.
- Lateral violence thrives in environments where our human needs (such as acceptance, access and security needs) are not met.
- Equality requires acknowledgement of cultural difference and recognition that historical discrimination has continuing negative impacts.

Governments need to remove existing structural and systemic impediments to healthy relationships within our communities and reinforce protections against race discrimination. In the native title context, this will improve relationships between traditional owners and governments, and facilitate positive relationships between traditional owners and external parties to native title negotiations.

Respect for and protection of culture

The native title system and other land rights and cultural heritage processes directly question our culture and our cultural identities. This has been a source of considerable conflict and lateral violence and this will continue until appropriate structures are established with Aboriginal and Torres Strait Islander peoples that promote, maintain and protect our culture.

Therefore, the recognition of Aboriginal and Torres Strait Islander cultures and cultural differences must be a key consideration in policy development and implementation in Australia. The Declaration provides a strong basis from which Aboriginal and Torres Strait Islander peoples can affirm their rights and define their aspirations in their relations with governments and other stakeholders around development with culture and identity.

In relation to native title, the Declaration assists us to develop responses to lateral violence that:

- empower us to take control of our community and community aspirations
- promote and develop our community decision-making and dispute resolution protocols
- address discrimination and negative stereotypes by promoting equality that recognises difference
- build culture as a form of resilience and strength that promotes healthy cultural norms and recognises differences and diversity.

Chapter 4: Options for addressing lateral violence in native title

Chapter 4 considers options for addressing lateral violence in environments concerning our lands, territories and resources. These options aim to provide Aboriginal and Torres Strait Islander peoples and communities with some ideas about how to address lateral violence through the establishment of strong structural foundations and principles.

The Chapter also discusses options for governments to provide support to Aboriginal and Torres Strait Islander peoples to address lateral violence played out in native title processes. It demonstrates how the Declaration can be applied as a human rights framework to guide the creation and maintenance of an environment where Aboriginal and Torres Strait Islander communities can reach their full potential.

In applying a human rights-based approach, the following options may assist to address lateral violence in the native title and land rights environment.

Naming lateral violence

Naming lateral violence is essentially a process of education. It is about giving our communities:

- the language to name lateral violence behaviour
- the space to discuss its impact
- the tools to start developing solutions.

The native title system must foresee when lateral violence is likely to occur and be equipped to identify it and address it. This means that engaging in native title processes requires solid preparation and robust frameworks to accommodate the potential for disagreement and conflict, and enable people to work through it.

Legislative and policy review and reform

Legislative and policy review and reform can assist Aboriginal and Torres Strait Islander communities to address lateral violence by creating structures that promote healthy relationships both within our communities and with external stakeholders. These structures should involve a strengths based approach that is informed by human rights standards and applied to both governments and communities.

The Attorney General's Department has progressed a number of native title reforms to move towards a more flexible approach that encourages negotiated outcomes and discourages litigation and adversarial approaches. However, it is my view that we cannot simply reform the native title system in isolation to the broader legislative and policy framework and hope that this will 'fix' the native title system. In order for the native title system to be as effective as possible, the legislative and policy framework within which it exists must also support its operation.

On 27 January 2011, Australia appeared before the Human Rights Council Universal Periodic Review (UPR).¹² The Human Rights Council recommended that Australia revise its Constitution, legislation, public policies and programs to enable the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.¹³

12 The Universal Periodic Review is a unique process, established by the Human Rights Council to review the human rights records of every country, see United Nations Office of the High Commissioner for Human Rights, *Universal Periodic Review*, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (viewed 20 September 2011).

13 Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (2011), rec 106. At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 8 September 2011).

We currently have three opportunities to progress legislative and policy reform that would respond to this recommendation and significantly improve the operation of the native title system. These are to:

- ensure that the unique and inherent rights of Aboriginal and Torres Strait Islander peoples are protected under the National Human Rights Framework
- reform the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples, and prohibit discrimination on the basis of race
- maintain efforts aimed to create a just and equitable native title system.

Culturally relevant frameworks

The process to recognise our native title must be culturally relevant if it is to achieve successful outcomes for Aboriginal and Torres Strait Islander peoples. Otherwise, the native title system will continue to operate in ways that exclude and divide Aboriginal and Torres Strait Islander peoples and communities. We will continue to be disempowered and struggle amongst ourselves to define our own destinies.

Whether commencing a native title claim process, negotiating an Indigenous Land Use Agreement or establishing a Prescribed Body Corporate, we need appropriate frameworks for participation, decision-making and conflict management to prevent behaviours that result in lateral violence. These preventative measures need to be negotiated with the affected groups as early on in the process as possible:

... at the outset of any native title agreement-making process, there is a need for the negotiation of an agreed decision-making and dispute management framework amongst the Indigenous parties as a prerequisite to the successful implementation and sustainability of agreements.¹⁴

These measures will assist those involved to set up guidelines for engagement, identify historical and contemporary issues and possible points of contention, and establish protocols for managing conflict that can lead to lateral violence behaviours.

Conclusion

In conclusion, I highlight the need to ensure that legislative and policy frameworks advance the rights of Aboriginal and Torres Strait Islander peoples and empower us to reach our full potential in accordance with the Declaration.

The recognition of our native title provides a unique opportunity for many Aboriginal and Torres Strait Islander peoples to overcome disadvantage.

But the native title system must operate in a way that empowers us to achieve this outcome. It must be supported by strong foundations that ensure our self-determination and enable our effective participation in decision-making.

14 Visiting Research Fellow, Toni Bauman has published a Native title Research Unit Issues paper which sets out some of the process issues, practical implications and techniques arising out of IFAMP's case study. See T Bauman, 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute Management Frameworks' (2006) Vol. 3, Issues Paper No. 6. *Land, Rights, Laws: Issues of Native Title*, p 1. At <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip06v3n6.pdf> (viewed 12 October 2011).

Recommendations

Review of the Native Title Act

1. That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the *United Nations Declaration on the Rights of Indigenous Peoples*. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. This inquiry could form part of the Australian Government's National Human Rights Action Plan.

International human rights mechanisms

2. That the Australian Government take steps to formally respond to, and implement, recommendations which advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, made by international human rights mechanisms including:
 - Special Rapporteur on the rights of indigenous peoples
 - Expert Mechanism on the Rights of Indigenous Peoples
 - United Nations Permanent Forum on Indigenous Issues
 - treaty reporting bodies.

Statement or Charter of Engagement

3. That the Australian Government develop a 'Statement or Charter of Engagement' to complement *Engaging Today, Building Tomorrow: A framework for engaging with Aboriginal and Torres Strait Islander Australians*. This document should include the Government's commitment to be guided by the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* when engaging with Aboriginal and Torres Strait Islander peoples, including the right to participate in decision-making, and the principle of free, prior and informed consent.

Implementation of the recommendations from Native Title Reports

4. That the Australian Government should implement outstanding recommendations from the *Native Title Report 2010* and provide a formal response for next year's Report which outlines the Government's progress towards implementing the recommendations from both the *Native Title Report 2010* and *Native Title Report 2011*.

Implementation of the Declaration

5. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect.

Lateral violence, cultural safety and security in the native title system

6. That targeted research is undertaken to develop the evidence base and tools to address lateral violence as it relates to the native title system. This research should be supported by the Australian Government.
7. That Aboriginal and Torres Strait Islander communities and their organisations work together to develop engagement and governance frameworks that promote cultural safety and comply with the *United Nations Declaration on the Rights of Indigenous Peoples*.
8. That all governments working in native title ensure that their engagement strategies, policies and programs are designed, developed and implemented in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*. In particular, this should occur with respect to the right to self-determination, the right to participate in decision making guided by the principle of free, prior and informed consent, non-discrimination, and respect for and protection of culture.
9. That the Australian Government pursue legislative and policy reform that empowers Aboriginal and Torres Strait Islander peoples and their communities, in particular:
 - a) reforming the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples, and address the provisions that permit discrimination on the basis of race
 - b) ensuring that the National Human Rights Framework includes the *United Nations Declaration on the Rights of Indigenous Peoples* to guide its application of human rights as they apply to Aboriginal and Torres Strait Islander peoples
 - c) creating a just and equitable native title system that is reinforced by a Social Justice Package.
10. That all governments, key organisations and industry partners working in native title conduct an audit of cultural safety and security in relation to their programs and policies that impact on Aboriginal and Torres Strait Islander peoples; and in consideration of the results, develop strategies to increase cultural competence within their agencies and organisations.
11. That all governments, key organisations and industry parties working in native title, conduct education and awareness raising sessions on lateral violence for both Aboriginal and Torres Strait Islander and non-Indigenous staff.

Chapter 1:

Reviewing key developments in the Reporting Period

- 1.1 Introduction **18**
- 1.2 Legislative changes **19**
- 1.3 Australian Government discussion papers **41**
- 1.4 Marking progress in the native title system **53**
- 1.5 International mechanisms addressing Indigenous human rights **56**
- 1.6 Reviewing the recommendations from the *Native Title Report 2010* **64**
- 1.7 Assessing the Reporting Period **71**
- 1.8 Recommendations **73**



1.1 Introduction

In this Chapter I review key developments within the native title system that occurred throughout the Reporting Period (1 July 2010 to 30 June 2011) and consider the impact of these events on the exercise and enjoyment of Aboriginal and Torres Strait Islander peoples' human rights.

In the *Native Title Report 2010* I discussed how the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration)¹ will be the overarching framework to inform my work relating to our rights to our lands, territories and resources.² In particular, I committed to be guided by the Declaration in fulfilling my responsibility to report annually on the operation of the *Native Title Act 1993* (Cth) (Native Title Act) and the effect that it has on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples.³

Guided by the Declaration I review a number of legislative changes, consultation papers, and some significant moments which mark the ongoing operation of the Native Title Act. I also consider developments at the international level which impact on our rights to our lands, territories and resources.

In the following pages I highlight many, but not all, developments in the native title sphere during the Reporting Period. I have drawn attention to those which I believe have a significant impact, or the potential to have a significant impact, on the human rights of Aboriginal and Torres Strait Islander peoples, particularly those with national effect.

Finally, in what will be the first in a series of annual 'Report Cards', I provide an assessment of the Australian Government's performance across a range of issues, including its progress towards implementing my recommendations from the *Native Title Report 2010*, and draw some concluding observations about progress made during the Reporting Period.

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 12 July 2011).

2 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 3–8. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

3 *Native Title Act 1993* (Cth), s 209.

1.2 Legislative changes

At the national level the Reporting Period was quiet in terms of legislative amendment to the Native Title Act. However there were a number of proposals which, if enacted, could prove to have a substantial effect on the native title system.

Senator Siewert of the Australian Greens introduced a private Senators Bill which, if passed, would significantly reform the Native Title Act.⁴ In addition, the Australian Government introduced a bill to give legislative effect to its Carbon Farming Initiative,⁵ however it did not pass during the Reporting Period.

In the previous reporting period two other pieces of native title reform legislation were introduced but not enough time had passed for me to effectively report on their operation in last year's Report.⁶ Now that sufficient time has passed we are able to have a better understanding of their effect during the Reporting Period.

At the State level, the State of Victoria passed the *Traditional Owner Settlement Act 2010* (Vic) which sets the benchmark for other states to meet when resolving native title claims.

In this subsection I consider these developments:

- Native Title Amendment (Reform) Bill 2011
- *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth)
- *Native Title Amendment Act 2009* (Cth)
- *Native Title Amendment Act (No 1) 2010* (Cth)
- *Traditional Owner Settlement Act 2010* (Vic).

(a) Creating a just and fair native title system

In the *Native Title Report 2010* I outlined four broad themes in native title and land rights that I will focus on during my term. One of these themes is 'creating a just and fair native title system through law and policy reform'.⁷

I adopted this theme because the Native Title Act does not create a fair process for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples⁸ and does not deliver on the promise of the preamble to 'rectify the consequences of past injustices'.

International human rights mechanisms have noted with concern our inability to fully exercise and enjoy our rights to our lands, territories and resources.⁹ Within the native title system there are significant obstacles

4 Native Title Amendment (Reform) Bill 2011.

5 Carbon Credits (Carbon Farming Initiative) Bill 2011.

6 *Native Title Amendment Act (No 1) 2010* (Cth), *Native Title Amendment Act 2009* (Cth).

7 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 12–14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

8 See, for example, M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 12–14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).

9 See, for example, 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://www2.ohchr.org/english/bodies/cerd/cerds66.htm> (viewed 18 July 2011); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At <http://www2.ohchr.org/english/bodies/hrc/hracs95.htm> (viewed 18 July 2011).

to the full realisation of our rights, including, for example, the onerous burden of proof, the injustices of extinguishment, the weakness of the good faith requirements, and limitations on our ability to use our lands, territories and resources to develop and determine priorities for our own development.¹⁰

Article 27 of the Declaration states:

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.¹¹

The Australian Government has formally supported the Declaration. It now needs to ensure these articles are given their full effect in Australia. While the Government has introduced some reforms to the native title system in recent years, they have been minor and have failed to address the most significant obstacles within the native title system to the full realisation of our land rights.

I now consider some legislative amendments and proposals from the Reporting Period in light of whether they contribute to the creation of a fair and equitable system to recognise and adjudicate our rights to our lands, territories and resources.

(b) Native Title Amendment (Reform) Bill 2011

On 21 March 2011 Senator Siewert from the Australian Greens introduced a private Senators Bill, the Native Title Amendment (Reform) Bill 2011 (Reform Bill). On 12 May 2011 the Reform Bill was referred to the Senate Legal and Constitutional Affairs Committee (Senate Committee) for inquiry and report.

The aim of the Reform Bill is to 'enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples' by addressing two key areas:

- the barriers claimants face in making the case for a determination of native title rights and interests
- procedural issues relating to the future act regime.¹²

I strongly support the aim of the Reform Bill. The proposed amendments are primarily drawn from the *Native Title Report 2009*¹³, however these are reforms that many have advocated for years, and it is as a result of these combined voices that the Reform Bill is now before the Senate.

I congratulate Senator Siewert for introducing the Reform Bill and commend those who have campaigned for these proposals. While at the time of writing, these reforms were yet to be considered by the Senate or House of Representatives, the Reform Bill has encouraged debate on native title reform and put pressure on the Australian Government to consider more robust changes than it may ordinarily have pursued.

10 See further discussion in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).

11 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 27. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 12 July 2011).

12 Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth), p 2.

13 For a discussion of these proposals, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).

The Australian Human Rights Commission prepared a submission in response to the Senate Committee's Inquiry into the Reform Bill. This submission considered a number of substantial reforms proposed by the Reform Bill which aim to address the inequities in the Native Title Act. The submission broadly supported the intent of the following reforms:

- inserting additional objects into the objects clause, including for Australia to take all necessary steps to implement principles of the Declaration¹⁴
- reverting to the original wording of s 24MD(2)(c) of the Native Title Act which states that compulsory acquisition itself does not extinguish native title¹⁵
- enabling prior extinguishment of native title rights and interests to be disregarded¹⁶
- repealing s 26(3) of the Native Title Act to recognise procedural rights over offshore areas¹⁷
- strengthening the good faith requirements under the right to negotiate provisions¹⁸
- shifting the onus of proof to the respondent to rebut presumptions that support native title interests¹⁹
- amending the definitions of 'traditional laws acknowledged', 'traditional customs observed' and 'connection with the land or waters' in s 223(1) of the Native Title Act²⁰
- amending s 223(2) of the Native Title Act to clarify that native title rights and interests can include commercial rights and interests.²¹ I discuss this point further in Text Box 1.1.

I attach the Commission's submission at **Appendix 2** which outlines the reasons for the Commission's position.

In line with the Commission's view I support the stated intention of the Reform Bill. Further I reiterate my recommendation from last year's Native Title Report – that the Australian Government should commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the Declaration. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples.

Text Box 1.1:

Torres Strait Regional Seas Claim – commercial rights and interests

One of the proposals in the Reform Bill is an amendment to the Native Title Act to specify that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'.²² Currently, the Native Title Act does not clearly specify that native title rights and interests can be of a commercial nature although the Federal Court has recently found native title rights may include commercial rights and interests.

14 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A.

15 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 3, proposed ss 24MD(2)(bb), (c).

16 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 11, proposed s 47C.

17 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 4.

18 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, items 5–9, proposed ss 31(1)(b), 31(1)(1A), 31(2A), 35(1A).

19 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed ss 61AA, 61AB.

20 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 13, proposed ss 223(1A)–(1D).

21 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 14, proposed s 223(2).

22 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 14, proposed s 223(2).

This reform is worthy of highlighting because during the Reporting Period, the Federal Court handed down its decision in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*²³, in which Justice Finn found that in some cases, native title rights may include the right to access, take and use resources for trading or commercial purposes.²⁴

This is important given the Declaration affirms our right to self-determination and by virtue of that right, we 'freely determine their political status and freely pursue their economic, social and cultural development'.²⁵

At the time of writing the Senate Committee was still considering submissions to its Inquiry. I will monitor the outcome of the Senate Committee's Inquiry and continue to advocate for native title reform that strengthens the native title system.²⁶

(c) *Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)*

During the Reporting Period the Australian Government initiated consultations on draft legislation to give effect to its Carbon Farming Initiative (CFI). The CFI is:

a carbon offsets scheme being established by the Australian Government to provide new economic opportunities for farmers, forest growers and Indigenous landholders while also helping the environment by reducing carbon pollution.²⁷

The Government introduced the Carbon Credits (Carbon Farming Initiative) Bill 2011 (CFI Bill) on 24 March 2011 in order to provide a legislative framework for the CFI.²⁸ The CFI Bill received assent on 15 September 2011 and is now the *Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)* (CFI Act).²⁹

In this section I outline the key dates for the development of the CFI Act (Table 1.1), the purpose of the Act, stakeholder concerns regarding the Act's treatment of Aboriginal and Torres Strait Islander land, and finally I give some consideration to the next steps that should be taken.

23 [2010] FCA 643 (2 July 2010).

24 [2010] FCA 643 (2 July 2010), 752–757. This decision has been appealed and judgment reserved: *Commonwealth of Australia v Leo Akiba & George Mye on behalf of the Torres Strait Regional Seas Claim & Ors*: Full Federal Court QUD387/2010.

25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 3. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 29 August 2011). Indigenous peoples also have the right to 'determine and develop priorities and strategies for exercising their right to development': art 32.

26 The Senate Committee's Report is due 3 November 2011.

27 Department of Climate Change and Energy Efficiency, *Enabling Indigenous participation in the Carbon Farming Initiative*, <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

28 The CFI Bill passed the Senate on 22 August and passed the House of Representatives on 23 August 2011.

29 I note the CFI Act came into being outside the Reporting Period, however the process leading to the CFI Act occurred throughout the Reporting Period.

Table 1.1: Key dates – Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)

Date	Event
October 2010 – February 2011	The Government consulted on the CFI Bill. ³⁰
22 November 2010	The Australian Government released the <i>Design of the Carbon Farming Initiative Consultation Paper</i> . The Government received approximately 280 submissions from a diverse range of stakeholders. ³¹
24 March 2011	The CFI Bill was introduced into the House of Representatives.
24 March 2011	The CFI Bill was referred to the House Standing Committee on Climate Change, Environment and the Arts (House Standing Committee). ³²
25 March 2011	The CFI Bill was referred to the Senate Standing Committees on Environment and Communications (Senate Standing Committee). ³³
23 May 2011	The House Standing Committee tabled its final report.
27 May 2011	The Senate Standing Committee tabled its final report.
15 July 2011	The Australian Government released <i>Carbon Farming Initiative Consultation Paper – Enabling Indigenous participation: native title and land rights land issues</i> . This paper was released as part of a process to give further consideration to the complexities of carbon farming on Aboriginal and Torres Strait Islander land. I discuss this further below.
22 August 2011	The CFI Bill passed the Senate. ³⁴
23 August 2011	The CFI Bill passed the House of Representatives. ³⁵
15 September 2011	The CFI Bill received assent.

³⁰ Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), pp 8–9.

³¹ Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), pp 8–9.

³² Note: the CFI Bill was jointly referred with the Australian National Registry of Emissions Units Bill 2011 and the Carbon Credits (Consequential Amendments) Bill 2011.

³³ Note: the CFI Bill was jointly referred with the Australian National Registry of Emissions Units Bill 2011 and the Carbon Credits (Consequential Amendments) Bill 2011.

³⁴ Minister for Climate Change and Energy Efficiency, 'Carbon farming brings fields of opportunity for regional Australia' (Media Release, 23 August 2011). At <http://www.climatechange.gov.au/en/minister/greg-combet/2011/media-releases/August/mr20110823.aspx> (viewed 29 August 2011).

³⁵ Minister for Climate Change and Energy Efficiency, 'Carbon farming brings fields of opportunity for regional Australia' (Media Release, 23 August 2011). At <http://www.climatechange.gov.au/en/minister/greg-combet/2011/media-releases/August/mr20110823.aspx> (viewed 29 August 2011).

(i) What is the CFI Act?

Objectives of the CFI Act

Broadly, the objectives of the CFI Act are to:

- help Australia 'meet its international obligations under the United Nations Convention on Climate Change and the Kyoto Protocol, to reduce its emissions of greenhouse gases'
- create incentives for landholders to undertake 'land sector abatement projects'
- achieve carbon abatement or reduction 'in a manner that is consistent with the protection of Australia's natural environment and improves resilience to the impacts of climate change'.³⁶

What does the CFI Act do?

The CFI is intended to create financial incentives for reducing emissions or storing carbon.³⁷ The CFI Act establishes a legislative framework for the CFI.

Under the CFI Act, individuals or companies are able to cancel out 'their greenhouse gas emissions by purchasing carbon credits from others'. This is called a 'carbon offset scheme'.³⁸

Carbon credits represent a reduction (abatement) in greenhouse gas emissions. Abatements can be achieved by:

- reducing or avoiding emissions or
- removing carbon from the atmosphere and storing it in soil or trees.³⁹

Emissions which may be offset include those generated during normal daily activities, for example, by consuming electricity.⁴⁰ Emissions can be offset voluntarily or to meet regulatory requirements.⁴¹

The CFI Act establishes certain criteria projects must meet before they can be declared an 'eligible offsets project' and be issued Australian Carbon Credit Units (ACCU).⁴² I discuss the eligibility of these projects in greater detail below.

The impact of the CFI Act on Aboriginal and Torres Strait Islander peoples

The Government has stated that it is committed to facilitating Aboriginal and Torres Strait Islander participation in carbon markets.⁴³ Aboriginal and Torres Strait Islander peoples will be able to conduct carbon abatement projects on land rights land or native title land as part of the CFI and be issued with ACCUs for any carbon reduction or removal achieved. However, as I discuss below, the participation of Aboriginal and Torres Strait Islander peoples in carbon markets is currently limited by the CFI Act's treatment of non-exclusive native title land.

36 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 3.

37 Australian Government, *Carbon Farming Initiative Consultation Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 2. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

38 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 2. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

39 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 5.

40 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 5.

41 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 5.

42 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 5, 53–56.

43 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 37.

What projects are eligible?

There are three types of projects that may be eligible for ACCUs under the CFI Act:

- ‘emission reduction projects’ – these are projects that reduce emissions of greenhouse gases (such as savannah fire management which reduces emissions caused by wildfires)
- ‘sequestration projects’ – these are projects which remove carbon by storing it in the land, soil or trees (such as growing a forest)
- ‘native forest protection projects’ – these are projects that protect native forests from, for example, clearing, clear felling and logging.⁴⁴

To be eligible a project must have a methodology approved by an independent committee (Domestic Offsets Integrity Committee).⁴⁵ A methodology contains detailed rules for ‘implementing and monitoring specific abatement activities and generating carbon credits under the scheme’.⁴⁶ Methodologies are already being developed for savannah fire management, feral camel management and environmental plantings.⁴⁷ In Text Box 1.2 I discuss an example of savannah fire management as an emissions reduction project.

Further, projects must deliver new and ‘additional’ abatement (reduction) of carbon. This means that ACCUs won’t be available for abatement activities that are already widely in use.⁴⁸ To be considered ‘additional’, an abatement project must not be common practice in the relevant industry.⁴⁹

The Minister may determine that certain activities or types of projects are not common practice and should be recognised as ‘additional’ for the purposes of eligibility for ACCUs. Those activities or types of projects that are determined to be ‘additional’ will be registered on a ‘positive list’ in the regulations to the CFI Act.⁵⁰

Activities which pose a risk to the environment or employment will not be eligible for ACCUs and will be on the ‘negative list’.⁵¹

44 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), paras 1.8–1.55. *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 53–56.

45 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 2. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

46 Department of Climate Change and Energy Efficiency, *Offset methodologies*, <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/methodology-development.aspx> (viewed 3 September 2011).

47 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 2. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011). The list of methodologies currently being considered by the Domestic Offsets Integrity Committee is available at <http://www.climatechange.gov.au/en/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration.aspx> (viewed 12 October 2011).

48 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), p 7.

49 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 41(3).

50 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 3. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

51 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 3. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

Text Box 1.2:

Western Arnhem Land Fire Abatement Project (WALFA): emissions reduction project⁵²

In the *Native Title Report 2007* my predecessor profiled the Western Arnhem Land fire management (WALFA) project. This project is an example of savannah fire management.

The WALFA project began in 2006 and is a partnership between the Aboriginal Traditional Owners, Indigenous Ranger Groups, Darwin Liquefied Natural Gas, the Northern Territory Government and the Northern Land Council (NLC).

The WALFA project area is populated by tropical savannah which is particularly prone to fire. The project reduces the amount of country that is burnt in the project area each year as a result of wildfires. This in turn reduces the emission of greenhouse gases that would have been released in the wildfires.

The project achieves this is by reintroducing traditional Aboriginal fire management techniques which have been absent as a result of Aboriginal people moving off their traditional lands since European settlement.

Traditionally Aboriginal land managers would burn much of the country in the early dry season, thereby creating firebreaks which would prevent large wildfires in the late dry season. Fires that burn in the early dry season are relatively 'cool' due to the lack of 'fuel' and do not significantly damage the landscape. On the other hand, late dry season fires burn 'hot' because the landscape has completely dried and there is more 'fuel'. These fires damage the canopy of the trees and can burn out of control emitting greenhouse gases that account for 48% of the Northern Territory's total greenhouse gas emissions.

The project burning is carried out under the management of the NLC in conjunction with community ranger groups of five partner communities.⁵³ It is now reducing greenhouse gas emissions from the area by the equivalent of over 100,000 tonnes of carbon dioxide each year.⁵⁴

This landmark project not only meets government environmental objectives in terms of reduced greenhouse gas emissions but also economic outcomes in the form of sustainable employment for Aboriginal rangers and land managers. The project also promotes the maintenance and protection of cultural knowledge through the application of traditional land management practices.⁵⁵

Who can carry out projects?

Every eligible project under the CFI Act must have a 'project proponent'.⁵⁶ A project proponent is the person who is responsible for the project, has the legal right to carry out the project and, in relation to carbon

52 This text box contains extracts from the case study in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 12. At http://www.humanrights.gov.au/social_justice/nt_report/index.html#2007 (viewed 14 September 2011).

53 These include Adjumarllarl Rangers, Djelk Rangers, Jawoyn Rangers, Jawoyn Association, Manwurrk Rangers, Mimal Ranges.

54 Tropical Savannas CRC, *The West Arnhem Land Fire Abatement Project* (WALFA), http://www.savanna.org.au/savanna_web/information/arnhem_fire_project.html (viewed 14 September 2011).

55 Domestic Offsets Integrity Committee has considered the use of controlled fire management across savannas in the fire prone tropical north of Australia for eligibility under the CFI Bill, see <http://www.climatechange.gov.au/en/government/initiatives/carbon-farming-initiative/methodology-development/methodologies-under-consideration/savanna-burning.aspx> (viewed 12 October 2011).

56 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.10.

sequestration projects, hold the legal right to store carbon in the project area.⁵⁷ The project proponent also receives the carbon credits.⁵⁸

‘Sequestration projects’ require the right to benefit from sequestration (storage) activities on the land (a ‘carbon sequestration right’) because these projects must be maintained for a long period of time and may impact on the rights of others.

Because a project proponent must have the legal right to carry out the project, there must be a determination of native title before native title holders can undertake a project on their land.⁵⁹ However the CFI Act applies differently to land held under exclusive native title as distinct from land held under non-exclusive native title.⁶⁰

Exclusive native title holders

If the native title holders hold exclusive native title rights, there is no need to establish that the native title includes the right to carbon. The Registered Native Title Body Corporate (RNTBC) will be automatically taken to be the ‘project proponent’ and to hold the carbon sequestration right.⁶¹

Consistent with the objective of treating Aboriginal and Torres Strait Islander land as similar as practicable to freehold land, where a project takes place on exclusive possession native title land, the Crown’s consent is not required.⁶²

Non-exclusive native title holders

The CFI Act does not provide any special treatment for non-exclusive native title.⁶³ The Replacement Explanatory Memorandum states:

The bill does not provide any special treatment for non-exclusive native title holders with respect to carbon sequestration rights or the right to carry out a project. It would not be appropriate for the bill to provide an automatic right to benefit from carbon sequestration or to carry out the project for non-exclusive native title holders in circumstances where there may be other interests in the land.⁶⁴

Holders of non-exclusive native title do not have an automatic right to benefit from eligible sequestration projects under the CFI.⁶⁵ If the native title is non-exclusive native title holders would need to establish that

57 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 5.

58 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 4. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

59 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.10.

60 The CFI Act defines native title land according to entries on the National Native Title Register. Native title and native title holder have the same meaning as in the *Native Title Act 1993: Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 5.

61 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 43(9), 43(10), 46. Also see Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 4. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011). Also see Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), paras 4.20–4.21.

62 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 45(2), 46. See also Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.24.

63 Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.28.

64 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.28.

65 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 6. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

their native title includes a right to carbon, for example, through a consent determination, to undertake a recognised sequestration project.⁶⁶

Who can consent to projects?

Any person with an 'eligible interest' in the project area must give their consent in writing to a sequestration offsets project.⁶⁷ The CFI Act provides that an 'eligible interest' includes any native title land for which there is a registered native title body corporate.⁶⁸ This would include land held under non-exclusive native title.⁶⁹ Consent to a sequestration project may be set out in a registered ILUA.⁷⁰

This means that in addition to undertaking projects, native title holders can also participate in the CFI by providing their consent to 'project proponents' carrying out carbon sequestration projects on land in which they have an 'eligible interest'. This could enable native title holders to negotiate for a benefit in return for their consent to a sequestration project being carried out on their native title land.⁷¹

(ii) Concerns about the effect of the CFI Act on Aboriginal and Torres Strait Islander land

In commenting on the CFI Bill, before it passed, the National Native Title Council (NNTC) acknowledged 'that the Carbon Farming Bill provides an appropriate treatment of exclusive possession native title, as near as practicable to that of freehold'.⁷² However it has concerns about the way the Bill might apply to non-exclusive native title land.⁷³ The NNTC states:

The failure to provide a clear pathway for non-exclusive native title holders into participation in offset projects is a major weakness in the Carbon Farming Bill. The Bill fails to treat non-exclusive native title rights as valuable property.⁷⁴

The Senate Standing Committee also concluded in its Report into the CFI Bill that it was a failure of the Bill not to 'specifically address the ability of non-exclusive native title holders to participate in the CFI'.⁷⁵ The

66 Australian Government, *Carbon Farming Initiative Discussion Paper Enabling Indigenous participation: native title and land rights land issues* (July 2011), p 4. At <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011). Also see *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 43(9).

67 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 27(4)(k).

68 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 45A.

69 Note also that, in the case of non-exclusive native title, the Crown lands Minister of the State or Territory also holds an eligible interest and their consent to a sequestration project is required: *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), ss 45(2), 27(4)(k).

70 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 27(19).

71 Replacement Explanatory Memorandum, *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth), para 4.42. I note that outside the Reporting Period the Australian Greens moved an amendment (which passed in the final version) to the CFI Bill which would require determined native title holders to consent to 'carbon sequestration' projects on native title land. This was not included in the original Bill. This allowed non-exclusive native title holders can also participate in the scheme.

72 National Native Title Council, *Submission to the Senate Standing Committees on Environment and Communications Inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) and other bills* (11 April 2011), para 28. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/submissions.htm (viewed 29 August 2011). Also see para 9.

73 Other stakeholders also raised these concerns, see: Senate Environment and Communications Legislation Committee, Parliament of Australia, *Report of inquiry into Carbon Credits (Carbon Farming Initiative) Bill 2011 [Provisions] and other bills* (2011), paras 4.2–4.14. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/report/index.htm (viewed 29 August 2011).

74 National Native Title Council, *Submission to the Senate Standing Committees on Environment and Communications Inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) and other bills* (11 April 2011), para 11. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/submissions.htm (viewed 29 August 2011).

75 Senate Environment and Communications Legislation Committee, Parliament of Australia, *Report of inquiry into Carbon Credits (Carbon Farming Initiative) Bill 2011 [Provisions] and other bills* (2011), para 4.13. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/report/index.htm (viewed 29 August 2011).

Australian Greens' amendment to the CFI Bill,⁷⁶ which requires the consent of non-exclusive native title holders for sequestration projects, offers some protection for non-exclusive native title holders, however it does not address all concerns.

For example, with respect to the right to carry out a 'carbon sequestration project' the NNTC submitted to the Senate Standing Committee that there is no mechanism to recognise co-ownership of carbon sequestration rights between non-exclusive native title holders and others, such as the State. They submitted that where non-exclusive native title holders have the rights to use flora or timber, and forgo these rights (to reduced carbon emissions), this should be translated into a corresponding share of the total carbon sequestration rights.⁷⁷

The NNTC also suggested that there is no recognition in the CFI Bill that native title holders could contribute to emissions avoidance by foregoing activities covered by their non-exclusive native title rights, such as burning or managing natural resources.⁷⁸

These issues should be addressed because even though non-exclusive native title rights may not be recognised as full legal ownership of the land, native title rights holders in many instances will continue to care for country and promote environmental sustainability.

(iii) Where to from here?

The Senate Standing Committee recommended that the Australian Government address obstacles to the participation of Aboriginal and Torres Strait Islander peoples in the CFI, such as resolving the uncertainties in relation to non-exclusive native title land.⁷⁹ In response the Government agreed with this recommendation.⁸⁰

Just outside the Reporting Period the Australian Government released an additional consultation paper which canvasses how Aboriginal and Torres Strait Islander landholders can participate in the CFI and outlines outstanding issues in relation to Indigenous land.⁸¹ These issues include, for example, the participation of non-exclusive native title holders in 'carbon sequestration projects' and whether registered native title claimants should have the ability to consent to projects. The Government has committed to completing a detailed legal analysis of the interaction of the CFI scheme with native title before making amendments to the CFI Act.⁸²

This consultation process must be informed by affected stakeholders including Native Title Representative Bodies (NTRBs), Prescribed Bodies Corporate (PBCs), Land Trusts and organisations such as the National Indigenous Climate Change working group.

76 *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth), s 45A.

77 National Native Title Council, *Submission to the Senate Standing Committees on Environment and Communications Inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) and other bills* (11 April 2011), para 10. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/submissions.htm (viewed 29 August 2011).

78 National Native Title Council, *Submission to the Senate Standing Committees on Environment and Communications Inquiry into the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth) and other bills* (11 April 2011), para 10. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/submissions.htm (viewed 29 August 2011).

79 Senate Environment and Communications Legislation Committee, Parliament of Australia, *Report of inquiry into Carbon Credits (Carbon Farming Initiative) Bill 2011 [Provisions] and other bills* (2011), rec 7. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/report/index.htm (viewed 29 August 2011).

80 Australian Government, *Government Response to the Senate Environment and Communications Legislation Committee inquiry on the: Carbon Credits (Carbon Farming Initiative) Bill 2011 [Provisions]; Carbon Credits (Consequential Amendments) Bill 2011 [Provisions]; Australian National Registry of Emissions Units Bill 2011 [Provisions]* (2011), p 5. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/index.htm (viewed 29 August 2011).

81 Department of Climate Change and Energy Efficiency, *Enabling Indigenous participation in the Carbon Farming Initiative*, <http://www.climatechange.gov.au/government/initiatives/carbon-farming-initiative/enabling-indigenous-participation.aspx> (viewed 29 August 2011).

82 Replacement Explanatory Memorandum, *Carbon Credits (Carbon Farming Initiative) Bill 2011* (Cth), para 4.51.

In the *Native Title Report 2010* I outlined one of the themes of my tenure as Social Justice Commissioner as ‘enhancing our capacity to realise our social, cultural and economic development aspirations’.

We must have access to opportunities that enable us to realise our social, cultural and economic aspirations. Access to carbon markets is one such opportunity. It has the potential to leverage economic benefits for Aboriginal and Torres Strait Islander peoples through participation in carbon abatement projects. I urge the Government to support conservation efforts of Traditional Owners through joint-management of national park arrangements under ILUAs or State land rights regimes, and recognise these practices as eligible projects under the CFI.

Given the number of issues raised by native title stakeholders concerning the way the CFI Act may apply to Aboriginal and Torres Strait Islander land I outlined above, I am pleased that the Government is committed to considering these issues further in order to get it right.

Governments must work with us to remove the barriers which deny us the same access as other landholders to the CFI scheme. I hope this further consultation process will enable the Government to fulfil its commitment to facilitate the full participation of Aboriginal and Torres Strait Islanders in carbon markets.⁸³ One way of doing this would be to consider Aboriginal and Torres Strait Islander economic development under the CFI as part of the draft Indigenous Economic Development Strategy.

In addition to addressing legislative barriers, there is also a need for education and capacity building initiatives to enable Aboriginal and Torres Strait Islander peoples to participate effectively in carbon market opportunities. The Australian Government has recently announced that support will be provided to assist the participation of Aboriginal and Torres Strait Islander peoples in the CFI through the \$22 million Indigenous Carbon Farming Fund, and funding provided for specialists to assist Aboriginal and Torres Strait Islander peoples with projects.⁸⁴

I encourage ongoing support to build Aboriginal and Torres Strait Islander peoples’ capacity to fully access the benefits under the CFI. A number of organisations suggested an independent statutory authority could assist with this.⁸⁵

At the time of writing this Report the submission process was still open concerning the further consideration of Indigenous land issues. I will continue to monitor this process.

(d) *Native Title Amendment Act 2009 (Cth)*

The *Native Title Amendment Act 2009 (Cth)* (Amendment Act) commenced on 18 September 2009. The aim of the Amendment Act is to amend the Native Title Act to ‘contribute to broader, more flexible and quicker

83 Replacement Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth), para 4.6. This is consistent with the recommendation from the *Native Title Report 2008* for Government departments to explore how native title and land rights can help facilitate opportunities arising from climate change and carbon markets: T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), p 167. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 21 September 2011).

84 Minister for Climate Change and Energy Efficiency, ‘Clean energy programs for Indigenous Australians’ (Media Release, 10 July 2011). At <http://www.climatechange.gov.au/minister/greg-combet/2011/media-releases/July/mr20110710lf.aspx> (viewed 24 August 2011).

85 Commonwealth, *Official Committee Hansard: Reference: Australian National Registry of Emissions Units Bill 2011; Carbon Credits (Carbon Farming Initiative) Bill 2011; Carbon Credits (Consequential Amendments) Bill 2011*, Senate Environment and Communications Legislation Committee (20 April 2011), p 45 (P Agius, National Native Title Council). At http://www.aph.gov.au/hansard/senate/commtee/committee_transcript.asp?MODE=YEAR&ID=186&YEAR=2011 (viewed 12 September 2011); Centrefarm Aboriginal Horticulture Limited, *Submission Senate Standing Committee on Environment and Communications Inquiry into Carbon Credits (Carbon Farming Initiative) Bill 2011; Carbon Credits (Consequential Amendments) Bill 2011 and Australian National Registry of Emissions Units Bill 2011* (15 April 2011), p 3. At http://www.aph.gov.au/senate/committee/ec_ctte/carbon_farming/submissions.htm (viewed 12 September 2011).

negotiated settlements of native title claims' which will 'result in better outcomes for participants in the native title system'.⁸⁶

I reported on some aspects of the Amendment Act in the *Native Title Report 2010*, however, in preparing that Report I was advised that while the Attorney General's Department, the Federal Court of Australia and the National Native Title Tribunal were monitoring the effect of the Amendment Act, it was too soon to determine the impact of these amendments on the disposition of native title claims.⁸⁷

One year on I seek to review how the amendments have been implemented, and the impact they have made, during the Reporting Period. In Text Box 1.3 I outline the amendments.

Text Box 1.3:

Native Title Amendment Act 2009 (Cth)

As I reported last year, the Amendment Act amended the Native Title Act to:

- allow the Federal Court to determine whether it, the NNTT or another individual or body, should mediate a claim,⁸⁸ which gives the Federal Court 'the central role in managing native title claims'⁸⁹
- enable the Federal Court to rely on an agreed statement of facts between the parties in consent determinations⁹⁰
- provide for the application of recent amendments to the *Evidence Act 1995* (Cth) to native title proceedings that began before 1 January 2009 and where evidence has been heard, if the parties consent or the Federal Court orders that it is in the interests of justice to do so⁹¹
- empower the Federal Court to make orders to give effect to the terms of an agreement that involve matters other than native title.⁹²

(i) Management of claims by the Federal Court

Following the introduction of the Amendment Act, the Federal Court implemented a number of initiatives to give effect to the reforms and to improve the time which it takes to resolve a Native Title case.⁹³

86 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3248 (The Hon R McClelland MP, Attorney-General). At <http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf> (viewed 19 September 2011).

87 For last year's discussion, see: M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 25 September 2011).

88 *Native Title Act 1993* (Cth), s 86B(1).

89 Attorney-General's Department, *Native Title Amendment Act 2009: Information Sheet* (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_NativeTitle_NativeTitlereform (viewed 29 September 2010).

90 *Native Title Act 1993* (Cth), ss 87(8)–(11), 87A(9)–(12).

91 *Native Title Act 1993* (Cth), s 214. For example, the *Evidence Act 1995* (Cth) (as amended by the *Evidence Amendment Act 2008* (Cth)) now includes exceptions to the hearsay rule regarding evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group: *Evidence Act 1995* (Cth), s 72. These amendments are reviewed in 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 29 September 2010).

92 *Native Title Act 1993* (Cth), ss 87(4)–(7), 87A(5)–(7). Regulations may specify the kinds of matters other than native title that an order of the Federal Court under these provisions may give effect to: ss 87(7), 87A(7).

93 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

List of native title mediators

One of the Federal Court's new powers is to refer a claim to 'another individual or body'. To facilitate this, the Federal Court decided to establish a panel of suitably qualified mediators which the parties or the Court could refer to when considering the reference of a matter or part of a matter to a mediator.⁹⁴

Expressions of interest for the list were sought in early 2010.⁹⁵ The list was finalised in July 2010 with over 60 mediators expressing an interest being on the list. The list, which is to be updated annually, is available on the Federal Court's website.⁹⁶

The Federal Court has advised me that parties and the Court have adopted a cautious approach, with only five referrals having been made. However, all referrals have resulted in settlement of the dispute subject to the mediation.⁹⁷

Prioritisation of cases

In order to improve the length of time taken to resolve native title cases, the Federal Court established a list of priority cases across each state and within the area of each NTRB or NTSP.⁹⁸ This list was first published on the Federal Court's website on 1 July 2010 and is regularly updated to reflect changing priorities and the finalisation of matters.⁹⁹

The criteria used to determine priorities includes whether the case involves:

- a matter of the public interest
- whether the resolution of the case will impact on other cases or the attitudes of the parties and in turn speed up the resolution of other related cases
- the level of future activity
- the views of the parties
- the level of preparedness of the Applicant
- the age of the case.¹⁰⁰

The Federal Court has advised that 45 matters on the priority list were finalised in the Reporting Period. Of these, 28 were determined by the court of which 24 were by consent.¹⁰¹

94 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

95 Federal Court of Australia, *Native title list of mediators*, http://www.fedcourt.gov.au/litigants/native/litigants_nt_mediator.html, (viewed 25 July 2011)

96 Federal Court of Australia, *Native title list of mediators*, http://www.fedcourt.gov.au/litigants/native/litigants_nt_mediator_list.html, (viewed 25 July 2011)

97 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

98 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

99 The Federal Court's list of priority native title cases can be found at: http://www.fedcourt.gov.au/litigants/native/litigants_nt_cases_current.html (viewed 25 September 2011).

100 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

101 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

Matters beyond native title

The Amendment Act also extended the powers of the Federal Court to make orders to give effect to the terms of an agreement that involve matters other than native title.¹⁰² The Court has advised me that these provisions are often brought to the attention of the parties as a ‘vehicle for promoting agreement making and efficiency’.¹⁰³

(ii) What has been the impact of the Amendment Act?

Have there been broader, more flexible and quicker negotiated settlements of native title claims and better outcomes for participants in the native title system?

The answer to this question, as yet, is not clear. The Attorney-General has said that there has been an increase in the number of native title consent determinations¹⁰⁴ and a significant increase in the number of native title claims resolved, particularly through negotiated agreements. He has argued that it is a direct result of the amendments that a ‘threefold increase in the number of native title claims settled by consent determinations in 2010–11 (twenty seven) compared to 2009–10 (nine)’ has been seen.¹⁰⁵

The statistics do demonstrate that there has been an increase in consent determinations however it is not yet clear whether the amendments are contributing to broader and more flexible settlements and are resulting in better outcomes. Graeme Neate, President of the National Native Title Tribunal, has also said:

It is difficult to state to what extent the amendments or their implementation have promoted agreement-making, in particular as to determinations of native title or broader, more flexible settlements.¹⁰⁶

There is evidence from some NTRBs that the amendments are having a positive effect. One NTRB in the Northern Territory has said that the Federal Court having the central role of managing claims given has been a welcome development which enables ‘effective and more rapid determinations’.¹⁰⁷ Central Desert Native Title Services (CDNTS) has also remarked that the Federal Court’s management of claims ‘is proving constructive in that it demands that parties meet milestones within timeframes. This has forced the State to progress matters that had been stalling under NNTT direction’.¹⁰⁸ However CDNTS has also reported that the effect of these amendments has been limited in terms of the rate of resolution because of the ‘current State government’s hard line approach to native title’.¹⁰⁹

Comments from other representative bodies have been less favourable about the amendments. Kevin Smith, CEO of Queensland South Native Title Services (QSNTS), says the new approach by the Federal Court has

102 *Native Title Act 1993* (Cth), ss 87(4)–(7), 87A(5)–(7). Regulations may specify the kinds of matters other than native title that an order of the Federal Court under these provisions may give effect to: ss 87(7), 87A(7).

103 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

104 Attorney-General, ‘Gunditjmara and Eastern Maar Peoples’ native title recognition in Victoria’, (Media Release, 27 July 2011). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_ThirdQuarter_27July2011-GunditjmarandEasternMaarPeoplesnativetitle recognition in Victoria (viewed 26 September 2011).

105 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

106 G Neate, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 August 2011.

107 P D’Arango, Manager Native Title Program, Central Land Council, Email correspondence to Australian Human Rights Commission, 12 July 2011.

108 I Rawlings, Chief Executive Officer, Central Desert Native Title Services Limited, Email correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2011.

109 I Rawlings, Chief Executive Officer, Central Desert Native Title Services Limited, Email correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2011.

placed another layer of complexity on an already burdensome workload. Responding to the Federal Court's approach in Queensland of resolving all existing claims within 10 years and all new claims within 5 years, he comments that while this

might sound like a measured staged approach but the reality is if connection is not accepted as a threshold issue then the matter can only go in one direction and that is straight to trial without too many happy outcomes.¹¹⁰

What has been the impact on resources?

Governments and NTRBs have a different view on the impact the Amendment Act has had on the resources of participants. For example, the Australian Government acknowledges that a result of the Federal Court's prioritising of matters to achieve a faster resolution of claims has been escalated pressure on all parties. It also contends that the quantum of resources available to NTRBs was increased in the 2009 Budget (by \$62 million over four years) and 'with some reordering of priorities from time to time, NTRBs have so far been able to accommodate the additional pressures'.¹¹¹

However comments from NTRBs suggest this is not the case. QSNTS has said:

Another important matter that the court does not fully appreciate from a capacity perspective is the time and energy needed to negotiate ILUAs and other agreements to make the consent determination work on the ground; time, energy and resources on doing claim resolution ILUAs can almost be equivalent to the time, energy and resources of preparing for trial.¹¹²

While there has been an increase of funding to NTRBs and Native Title Service Providers (NTSPs), the comments from NTRBs suggest that additional resources would assist them to improve the rate of resolving claims.

Relationship between the NNTT and the Federal Court

Most stakeholders have commented that they have observed an increase in the intensive case management of native title matters by the Federal Court. In this section I have also discussed the Court's new list of native title mediators and its prioritisation of cases.

The NNTT also has a significant role in this process. The NNTT has committed to continue to work with the Court and the parties to assist parties:

- to reach agreement on relevant matters such as whether native title exists and who holds native title
- to negotiate any other forms of agreement that might be conditions of, or associated with, a determination of native title
- to negotiate agreements that do not involve a determination of native title.¹¹³

The NNTT has suggested that much of the success of individual claimant applications to date has resulted from a 'closely coordinated approach to mediation and related matters between the Court and the Tribunal'.¹¹⁴

110 K Smith, Chief Executive Officer, Queensland South Native Title Services, Email correspondence to the Australian Human Rights Commission, 10 October 2011.

111 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

112 K Smith, Chief Executive Officer, Queensland South Native Title Services, Email correspondence to the Australian Human Rights Commission, 10 October 2011.

113 National Native Title Tribunal, *Annual Report 2009–2010* (2010), p 21. At http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Annual_reports.aspx (viewed 26 September 2011).

114 National Native Title Tribunal, *Annual Report 2009–2010* (2010), p 21. At http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Annual_reports.aspx (viewed 26 September 2011).

Next steps

While there were more consent determinations in this Reporting Period than the last, there doesn't appear to be evidence that suggests the agreements are broader, more flexible or resulting in better outcomes. This isn't to suggest it is not the case, however it appears that we are yet to see the full effect of the amendments and most parties have adopted the attitude of 'let's wait and see'.

For example, the Federal Court has set a target of finalising all cases on their priority claim list within two years of their allocation to the list. The result of this would be resolution of almost a third of native title claims in the system by May 2013.¹¹⁵ It will take some time to know whether the amendments have this effect.

I agree with the NNTT that there are numerous factors that delay the resolution of claims.¹¹⁶ Any amendments to the Native Title Act or improvement to the NNTT and Federal Court's processes will have a negligible effect if the parties are 'unwilling or unable to participate productively or in a timely manner'.¹¹⁷

The NNTT's characterisation of parties as being potentially 'unwilling or unable' is consistent with the feedback I have received for this year's Report.

For parties to be 'willing' to negotiate more timely, flexible and broader native title settlements, there often needs to be a cultural change, from one of litigation to one of interest-based negotiation. Even the Attorney-General has acknowledged that these amendments alone will be insufficient. He said:

The effect of the amendments contained in this bill, combined with a dedication to behavioural change by all participants in the system in the interests of those that the system is intended to benefit, will improve both the operation of the system and the outcomes we can achieve under it.¹¹⁸

For parties to be 'able' to benefit from the amendments, they must have the resources to do so. The Government must ensure that all parties are appropriately funded to participate effectively in the new Court processes.

So where to from here?

The Federal Court advised that senior officers of the Court, through membership of the Commonwealth Native Title Coordination Committee, meet with representatives of FaHCSIA and the Attorney-General's Department to consider how all agencies involved can be best supported to 'achieve results in a timely and efficient manner as well as to consider the impact and effectiveness of the 2009 amendments'.¹¹⁹

I urge this Committee to engage with NTRBs and NTSPs to evaluate the impact the amendments are having on resources in comparison with the gains that are being achieved by way of broader, more flexible and more timely agreements.

-
- 115 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.
- 116 G Neate, *Resolving native title issues: travelling on train tracks or roaming the range?* (Paper for the Native Title and Cultural Heritage Conference, 26 October 2009), p 39. At http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Pages/Resolving_native_title_issues_travelling_on_train_tracks_or_roaming_the_range_by_Graeme_Neate.aspx (viewed 26 September 2011).
- 117 G Neate, *Resolving native title issues: travelling on train tracks or roaming the range?* (Paper for the Native Title and Cultural Heritage Conference, 26 October 2009), p 39. At http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Pages/Resolving_native_title_issues_travelling_on_train_tracks_or_roaming_the_range_by_Graeme_Neate.aspx (viewed 26 September 2011).
- 118 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, pp 3250–3251 (The Hon R McClelland MP, Attorney-General). At <http://www.aph.gov.au/hansard/rep/dailys/dr190309.pdf> (viewed 19 September 2011).
- 119 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011. The National Native Title Tribunal is also a member of this Committee: Australian Government, Attorney-General's Department, *Native title system coordination and consultation*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Native_title_Nativetitlesystemcoordinationandconsultation (viewed 25 September 2011).

I will continue to monitor the impact of these amendments. Furthermore, I agree with the South West Aboriginal Land & Sea Council's suggestion that the impact of these reforms be reviewed in a few years to determine their effectiveness.¹²⁰

(e) *Native Title Amendment Act (No 1) 2010 (Cth)*

(i) **What is the *Native Title Amendment Act (No 1) 2010 (Cth)*?**

The *Native Title Amendment (No 1) Act 2010* (Cth) (Amendment Act (No 1)) commenced on 15 December 2010. The Amendment Act (No 1) creates a new future act process which aims to provide 'a process to assist the timely construction of public housing, staff housing and a limited class of public facilities...for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land'.¹²¹

In the *Native Title Report 2010* I reported on the Native Title Amendment Bill (No 2) 2009 (Cth) (the Amendment Bill (No 2)) and the consultation process leading to its introduction.¹²² Because of the federal election in August 2010, this Bill lapsed on 28 September 2010. This Bill was almost identical to the Amendment Act (No 1), which was introduced following the election.¹²³

In that report I suggested that the reforms, now contained in the Amendment Act (No 1), were unnecessary as the Native Title Act already provides mechanisms for 'facilitating the construction of housing and infrastructure with the consent of Traditional Owners – that is, through the use of ILUAs'.¹²⁴ I was concerned that:

- the new future act process may encourage governments to circumvent agreement-making processes¹²⁵
- the process will diminish the ability of Aboriginal and Torres Strait Islander peoples to exercise their rights, including their rights to self-determination; to participate in decision-making; and to determine and develop strategies and priorities for the development or use of their lands or territories and other resources.¹²⁶

120 M Aranda, Principal Legal Officer, South West Aboriginal Land & Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2011.

121 Explanatory Memorandum, Native Title Amendment Bill (No 1) 2010, p 2.

122 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 44–51, 72–79. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

123 For a discussion on s 24JAA notices, see M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 44–51, 72–79. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

124 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 44. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

125 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 44. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

126 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 44. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011). Also see: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 32(1). At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 29 August 2011). For a summary of other concerns also see: C Stacey & J Fardin, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Housing on native title lands: responses to the housing amendments of the Native Title Act*, Native Title Research Unit Issues Paper No. 6, Vol 4. At <http://aiatsis.gov.au/ntru/documents/IPHousing.pdf> (viewed 3 September 2011).

The Australian Government suggested that this process is ‘most relevant’ to Queensland and Western Australia.¹²⁷ While I am not aware of any issues with the new process in Western Australia, a number of NTRBs in Queensland have advised me that they have received s 24JAA notices and have noted concerns with the application of the new future act process.

(ii) Has the use of s 24JAA circumvented the free, prior and informed consent of Aboriginal and Torres Strait Islander landholders?

The Queensland Government has advised me that, while the State has not issued any s 24JAA notices, it is aware of a number of notices being issued by Indigenous Councils as the ‘action body’.¹²⁸

The Cape York Land Council (CYLC) has said:

Native Title holders were led to believe that Section 24JAA was introduced to be used as a measure of last resort where there was unreasonable recalcitrance on the part of Native Title holders to give required consents...no attempt to obtain voluntary Native Title holder consent to the acts that it proposes; it has simply used Section 24JAA as a measure of first resort with the clear intention of not seeking to deal voluntarily with Native Title holders.¹²⁹

Similarly the Torres Strait Regional Authority (TSRA) has reported that:

Section 24JAA provides expropriation without consent of native title rights and interests. It is in clear and fundamental breach of the letter and spirit of human rights principals and interests. There has been no effective consultation of 24JAA procedures to date. The consultation procedures are not effective as they aim to merely inform as opposed to also gain consent by agreement.¹³⁰

In the *Native Title Report 2010* I recommended that governments commit to only using the new future act process as a measure of last resort.¹³¹ This does not appear to have happened. The experiences of CYLC and TSRA suggest that in far north Queensland the new future act process is not being used as a measure of last resort.

Fortunately, this does not appear to be uniform practice across Queensland. Queensland South Native Title Services (QSNTS) has advised that it has established an in principle agreement with the relevant state Minister that ensures free, prior and informed consent is obtained via an ILUA rather than use s 24JAA.¹³²

In addition, the Queensland Government has advised me that the State is ‘in the process of seeking to negotiate throughout Queensland a number of other Indigenous Land Use Agreements which have native title consent for public housing and infrastructure for Aboriginal and Torres Strait Islander peoples as their subject matter’.¹³³

127 Attorney-General’s Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631> (viewed 24 September 2010).

128 R Nolan, Minister for Finance, Natural Resources and The Arts, Queensland Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 August 2011.

129 Cape York Land Council Aboriginal Corporation, Email correspondence to the Australian Human Rights Commission, 16 June 2011.

130 J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2010.

131 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 19 August 2011).

132 Woorabinda Social Housing ILUA. K Smith, Chief Executive Officer, Queensland South Native Title Services, Email correspondence to the Australian Human Rights Commission, 10 October 2011.

133 R Nolan, Minister for Finance, Natural Resources and The Arts, Queensland Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 August 2011.

ILUAs are the product of agreement-making under the Native Title Act. Agreement-making can be an expression of free, prior and informed consent and the beginning of cooperative relationships with governments and other parties.¹³⁴ This is the preferable approach under the Native Title Act. As the Australian Government has said:

...agreement-making can play an important role in helping to close the gap between Indigenous and non-Indigenous Australians. Native title negotiations can also provide opportunities to facilitate the reconciliation process and to forge new, enduring relationships.¹³⁵

Further, it is evident from QSNTS and the Queensland Government's comments that the ILUA process is still an appropriate option for the construction of public housing and public infrastructure on Indigenous-held land.

Given this, I remain unconvinced that the new future act process is necessary. As an alternative, if parties are still encountering barriers to effective agreement-making in the case of building public infrastructure, I reiterate my recommendation from last year and urge the Australian and State Governments to work with native title stakeholders, in particular those NTRBs and councils most affected, to explore options of streamlining agreement-making, such as template agreements.¹³⁶

Finally, if 'action bodies' are utilising the new process, in consulting with a claimant or RNTBC, they are required to comply with requirements determined by the Minister by legislative instrument.¹³⁷ Last year I recommended the Australian Government begin a process to establish these consultation requirements in conjunction with Aboriginal and Torres Strait Islander peoples.¹³⁸ At the time of writing I am not aware of this process being established. I urge the Government to consult with Aboriginal and Torres Strait Islander peoples to develop these consultation requirements.¹³⁹

(f) *Traditional Owner Settlement Act 2010 (Vic)*

(i) **The Settlement Act**

The *Traditional Owner Settlement Act 2010 (Vic)* (Settlement Act) commenced on 23 September 2010.

The Settlement Act gives legislative effect to the Victorian Native Title Settlement Framework.¹⁴⁰ The Framework 'provides for out of court settlement packages that allow Traditional Owners to settle their

134 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 23. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 19 August 2011).

135 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 4. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

136 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 19 August 2011).

137 *Native Title Act 1993* (Cth), s 24JAA(15).

138 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.6. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 19 August 2011).

139 A revised Native Title (Notices) Determination 2011 (No 1) has been issued which is the new instrument which determines how notice is to be given for the purpose of various provisions of the *Native Title Act 1993* (Cth) including s 24JAA(10). However this does not go to the consultation requirements referred to in s24JAA(15).

140 David Yarrow and Chris Marshall, *Traditional Owner Settlement Bill 2010 (Vic) An Information paper for Victorian Traditional Owners* (3 September 2010), p 1. At <http://www.landjustice.com.au/?t=3> (viewed 29 August 2011).

land claim directly with the State outside the Federal Court processes'.¹⁴¹

The Settlement Act reflects the relevant parts of the Framework report, however there are some matters that will be detailed in policy rather than legislation.¹⁴² One matter that is not reflected is the 'Right People for Country Project' which facilitates the resolution of Traditional Owner boundary and membership issues.¹⁴³ I discuss this project further in Chapters 2 and 4.

(ii) Land justice: recognition by agreement

The Settlement Act facilitates a process which 'recognise[s] traditional owners of land based on their traditional and cultural associations to certain crown land in Victoria'.¹⁴⁴ It does so by authorising the creation of a series of agreements between the State of Victoria and entities which represent traditional owner groups.¹⁴⁵

The principal agreement is a recognition and settlement agreement (RSA) for an area of public land. An RSA 'will primarily provide recognition for traditional owners and will record a settlement of a native title claim'.¹⁴⁶ The RSA will also be composed of a number of sub-agreements including a land transfer agreement, land use activity agreement, natural resources agreement, funding agreement and an Indigenous Land Use Agreement (ILUA).¹⁴⁷ The ILUA will provide native title certainty to the State and give security to Traditional Owners.¹⁴⁸

In the *Native Title Report 2010* I discussed the Australian Government's funding commitment towards the first two settlements under the Framework and the Victorian Government's progress in developing the legislative and policy detail required to bring the Framework into operation.¹⁴⁹ I am pleased to see that these efforts have now come to fruition in the form of the Settlement Act and congratulate all parties for their efforts. This is an example of reforms made in partnership with Aboriginal and Torres Strait Islander peoples which begins to create a fairer process for land justice.

I encourage other states and territories to follow the lead of Victoria and work with the Australian Government to explore options for more flexible and less costly ways to achieve land justice. The Australian Government has advised me that future assistance to State and Territories will be considered on a case-by-case basis.¹⁵⁰

141 Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework*, Department of Justice (Victoria) (2008), p 10. At <http://www.landjustice.com.au/> (viewed 7 October 2010). See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 47–51. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

142 D Yarrow and C Marshall, *Traditional Owner Settlement Bill 2010 (Vic) An Information paper for Victorian Traditional Owners* (3 September 2010), p 1. At <http://www.landjustice.com.au/?t=3> (viewed 29 August 2011).

143 D Yarrow and C Marshall, *Traditional Owner Settlement Bill 2010 (Vic) An Information paper for Victorian Traditional Owners* (3 September 2010), p 1. At <http://www.landjustice.com.au/?t=3> (viewed 29 August 2011).

144 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic), p 1.

145 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic), p 1.

146 Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic), p 1.

147 D Yarrow and C Marshall, *Traditional Owner Settlement Bill 2010 (Vic) An Information paper for Victorian Traditional Owners* (3 September 2010), pp 1–2. At <http://www.landjustice.com.au/?t=3> (viewed 29 August 2011).

148 D Yarrow and C Marshall, *Traditional Owner Settlement Bill 2010 (Vic) An Information paper for Victorian Traditional Owners* (3 September 2010), p 4. At <http://www.landjustice.com.au/?t=3> (viewed 29 August 2011).

149 See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 37. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

150 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

The first settlement achieved under the Settlement Act was the Gunaikurnai consent determination. I discuss this agreement in Text Box 1.4.

Text Box 1.4: Gunaikurnai native title determination

The Gunaikurnai consent determination is the first settlement reached under the new Victorian Native Title Settlement Framework. The determination was accompanied by the signing of a *Recognition and Settlement Agreement* with the Victorian Government at a ceremony after the hearing.¹⁵¹ Native Title Services Victoria has said the agreement has been enabled by the new *Traditional Owner Settlement Act 2010* (Vic) (Settlement Act).¹⁵²

The determination recognises the Gunaikurnai people's traditional ownership across much of Gippsland, including rights to some 22,000 square kilometres of lands.¹⁵³

The agreement includes the return of land to the Gunaikurnai people through a 'grant of Aboriginal [t]itle with the condition of joint management over 10 key sites of cultural significance'. Aboriginal title is a new form of land tenure created under the Settlement Act.¹⁵⁴ It also includes new protocols for welcomes to country and cross cultural training.¹⁵⁵

Importantly it allows for funding for the Gunaikurnai people to manage their affairs and obligations under the settlement.¹⁵⁶ The Australian and Victorian Governments both contributed \$6 million towards the \$12 million settlement package.¹⁵⁷

Senior Gunaikurnai Elder Albert Mullett said that 'his people had finally won the respect and recognition they had been struggling hundreds of years for'.¹⁵⁸

The Attorney-General said that 'today's settlement is a significant achievement for all involved and is a good example of the approach we can and should be taking to resolve native title claims, which result in enduring benefits'.¹⁵⁹

151 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

152 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

153 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

154 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

155 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

156 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

157 Attorney-General, 'Gunaikurnai native title recognition' (Media Release, 22 October 2010). At http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FourthQuarter_22October2010-Gunaikurnainativetitolerecognition (viewed 29 August 2011).

158 Native Title Services Victoria, 'Gunaikurnai people win respect and recognition in Native Title Consent Determination' (Media Release, 22 October 2010). At <http://www.ntsv.com.au/who/index.php?t=6> (viewed 29 August 2011).

159 Attorney-General, 'Gunaikurnai native title recognition' (Media Release, 22 October 2010). At http://www.ema.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FourthQuarter_22October2010-Gunaikurnainativetitolerecognition (viewed 29 August 2011).

1.3 Australian Government discussion papers

In this section I discuss four consultation papers released by the Australian Government during the Reporting Period:

- Draft Indigenous Economic Development Strategy Discussion Paper
- Leading practice agreements: maximising outcomes from native title benefits Discussion Paper
- Native Title, Indigenous Economic Development and Tax Consultation Paper
- Stronger Futures in the Northern Territory Discussion Paper.

In last year's Native Title Report I outlined a number of principles for meaningful and effective engagement.¹⁶⁰ One of the principles is that consultation processes should be coordinated across government departments in order to ease the consultation burden.¹⁶¹ Last year a number of stakeholders raised that governments did not do this well.¹⁶²

During the Reporting Period I have seen more of the same. Submissions for the *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* and the *Native Title, Indigenous Economic Development and Tax Consultation Paper* were both due on 30 November 2010. Submissions for the Draft Indigenous Economic Development Strategy discussion paper were due two weeks later on 17 December 2010.

I discuss each of these consultation papers as they have relevance to our rights to our lands, territories and resources. Given the possible effect of the proposed changes on our rights, it is important that the Government engages meaningfully and effectively in order to obtain our free, prior and informed consent.

(a) Draft Indigenous Economic Development Strategy Discussion Paper

The Australian Government released its Draft Indigenous Economic Development Strategy (IEDS) for consultation on 24 May 2010.¹⁶³ The IEDS is accompanied by the Indigenous Economic Development Framework and the Action Plan 2010–2012.¹⁶⁴ The Government received approximately 98 submissions and held 20 public consultation workshops.¹⁶⁵

The aim of the IEDS is to 'increase the wellbeing of Indigenous Australians by supporting greater economic participation and self-reliance'.¹⁶⁶ The IEDS states that economic development requires the interaction of a

160 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 58–66. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

161 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 65. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

162 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 65. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

163 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010). At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

164 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p1. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

165 Department of Families, Housing, Community Services and Indigenous Affairs, *Indigenous Economic Development Strategy Draft for Consultation*, <http://resources.fahcsia.gov.au/IEDS/> (viewed 2 September 2011).

166 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p1. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

range of interdependent areas and requires new partnerships between Aboriginal and Torres Strait Islander peoples, the private sector, governments and the community.¹⁶⁷

The IEDS focuses on five key priorities for action:

- education and building the capacity of individuals
- creating and realising job opportunities
- business and enterprise development
- financial security and independence
- creating the incentives and environment for full Indigenous economic participation.¹⁶⁸

On 17 December 2010 the Australian Human Rights Commission made a submission to the Department of Families, Housing, Community Services and Indigenous Affairs.¹⁶⁹ The Commission outlined a principle-based framework to guide the future development of the IEDS that is consistent with the Declaration and highlighted key issues for inclusion in the IEDS which are based on community decision-making and control.

In this section I briefly outline some of the key points from this submission that have relevance for the native title system. This includes our right to development with the Declaration being used as a guide for the IEDS, and the importance of being able to leverage economic development opportunities from our lands, territories and resources.

(i) Our right to development

The design of the IEDS should be consistent with the Declaration. The Declaration affirms our right to self-determination. By virtue of that right, we freely determine our political status and freely pursue our economic, social and cultural development'.¹⁷⁰

We also have the right to maintain and strengthen our own 'distinct political, legal, economic, social and cultural institutions', and to 'determine and develop priorities and strategies' for exercising our right to development.¹⁷¹

To ensure the IEDS reflects the 'priorities and strategies' of Aboriginal and Torres Strait Islander peoples to pursue our own approaches to economic development, we need to be actively involved, in the design, development, implementation, monitoring and evaluation of the IEDS.¹⁷²

As identified in the IEDS, one of the specific ways of pursuing economic development is to '[i]ncrease the capacity of native-title holders and claimants to identify and exploit economic opportunities through improved

167 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p iii. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

168 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p iv. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

169 Australian Human Rights Commission, *Submission to the Minister for Families, Housing, Community Services and Indigenous Affairs: Draft Indigenous Economic Development Strategy* (17 December 2010). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101217_draft_Indigenous_dev.html (viewed 13 September 2011).

170 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 3. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 9 December 2010).

171 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 23. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 9 December 2010). Also see arts 4, 20 and 31(1).

172 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 18. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 9 December 2010).

agreements and procedural rights¹⁷³. However more fundamentally, our rights to our lands, territories and resources must first be recognised and strengthened before economic development can occur.

(ii) Addressing barriers to economic development in the native title system

Economic development is hindered by obstacles in the native title system. In particular, the previous Social Justice Commissioner identified six specific aspects of native title law and policy that can act as inhibitors to economic development. These include:

- the test for the recognition of native title
- the test for the extinguishment of native title
- the nature of native title: a bundle of rights
- the rules that regulate future development affecting native title rights
- inadequate resourcing for Aboriginal and Torres Strait Islander bodies in the native title system
- the goals of governments' native title policies.¹⁷⁴

Most of these issues have also been identified in Senator Siewert's Native Title Amendment (Reform) Bill 2011 (Cth) as being in need of reform to deliver land justice for Aboriginal and Torres Strait Islander peoples.

I support the Commission's recommendation that the IEDS should include a commitment from the Australian Government to work with Aboriginal and Torres Strait Islander peoples to identify and address barriers to economic development within the *Native Title Act 1993* (Cth) and the broader native title system.

In particular, the Australian Government should commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards.¹⁷⁵ Further, the IEDS should commit to this review as necessary to facilitate economic development opportunities through native title.

(iii) Strengthening governance and capacity

Developing capacity of Aboriginal and Torres Strait Islander peoples

A further aim in the IEDS is to strengthen governance and capacity 'to improve policy, economic, financial and social decision-making'.¹⁷⁶ In this area, the Government will:

- encourage more sustainable and transparent management of native title benefits for current and future generations

173 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p 18. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

174 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), p 35. At http://www.humanrights.gov.au/social_justice/sj_report/index.html#2005 (viewed 13 December 2010).

175 See: Australian Human Rights Commission, *Submission to the Minister for Families, Housing, Community Services and Indigenous Affairs: Draft Indigenous Economic Development Strategy* (17 December 2010), p 11. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101217_draft_Indigenous_devt.html (viewed 13 September 2011); M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 55. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

176 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p 19. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 29 August 2011).

- help build corporate governance experience in Indigenous corporations that manage assets on behalf of a community or group.

I support Government initiatives to assist native title groups to negotiate beneficial agreements and improve governance structures. However this support should focus on capacity development rather than regulation. I discuss this further below in section 1.3(b).

Ensuring Government capacity to facilitate economic development

It is also important for government departments to develop their own capacity to deliver on the objectives of the IEDS.

This includes cultural competence to ensure policies and programs under the IEDS support the sustainability and self-determination of Aboriginal and Torres Strait Islander communities and effective coordination across departments and within the various levels of Government.¹⁷⁷ This is supported by the Australian Government's *Strategic Review of Indigenous Expenditure* which was released under Freedom of Information laws. It recommended that a 'renewed commitment should be made within the Commonwealth to a coordinated, whole-of-government approach to the delivery of programs and services to Indigenous people'.¹⁷⁸

(iv) Where to next?

FaHCSIA has advised me that it has considered the more than 100 submissions, met with identified key stakeholders to discuss the IEDS, engaged with over 700 participants in public consultation workshops, and engaged in additional discussions with Aboriginal and Torres Strait Islander communities through the Indigenous Coordination Centres (ICC). It also advised me that the Indigenous Economic Development Strategy will be released shortly.¹⁷⁹

I am hopeful that the final version of the IEDS incorporates the feedback of Aboriginal and Torres Strait Islander stakeholders. I look forward to working with Aboriginal and Torres Strait Islander peoples, governments and the private sector to facilitate greater participation by Aboriginal and Torres Strait Islander peoples in economic development.

(b) Leading practice agreements: maximising outcomes from native title benefits discussion paper

On 3 July 2010 the Australian Government released the *Leading practice agreements: maximising outcomes from native title benefits* Discussion Paper (the Agreements Discussion Paper)¹⁸⁰ which aims to 'explore measures to enhance the sustainability of benefits in agreements for native title groups'.¹⁸¹

177 See Australian Human Rights Commission, *Submission to the Minister for Families, Housing, Community Services and Indigenous Affairs: Draft Indigenous Economic Development Strategy* (17 December 2010), p 8. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101217_draft_Indigenous_dev.html (viewed 13 September 2011); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), p 59. At http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 26 September 2011).

178 Australian Government, *Strategic Review of Indigenous Expenditure* (February 2010), p 289. At http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 4 September 2011).

179 Native Title and Leadership Branch, Department of Families, Housing, Community Services and Indigenous Affairs, Email correspondence to Australian Human Rights Commission, 12 October 2011.

180 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010). At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

181 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 5. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

The Government's approach involves 'improving the future acts regime and promoting leading practice in agreement making, including through a review mechanism'.¹⁸² The specific mechanisms explored in the Agreements Discussion Paper include:

- encouraging governance measures
- creating a review function for native title agreements
- developing a leading practice agreements toolkit
- streamlining ILUA processes
- clarifying good faith requirements.¹⁸³

Public consultations were held in seven cities in July and November 2010.¹⁸⁴ Written submissions in response to the Agreements Discussion Paper closed on 30 November 2010. The Australian Government received 29 submissions.¹⁸⁵

The Australian Human Rights Commission prepared a submission which focused on the options for:

- encouraging entities that receive native title payments to adopt measures to strengthen their governance
- creating a new statutory function to review native title agreements, with the objective of improving the sustainability of these agreements
- clarifying the requirements for good faith negotiation under the Native Title Act.¹⁸⁶

(i) Governance measures

The Agreements Discussion Paper outlines that the Government is considering measures to encourage entities that receive native title payments to adopt measures to strengthen governance, including:

- incorporating under either the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* or the *Corporations Act 2001*
- appointing one or two independent directors
- adopting enhanced democratic controls.¹⁸⁷

182 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 5. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

183 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), pp 6–14. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

184 Attorney-General's Department, *Consultation on possible governance and future acts reforms*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (viewed 29 August 2011).

185 Attorney-General's Department, *Consultation on possible governance and future acts reforms*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms (viewed 29 August 2011).

186 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), rec 1. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

187 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 6. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

The Agreements Discussion Paper also suggests that a way to encourage the adoption of governance measures is to mandate them or make any new tax benefit conditional on the adoption of the measures and leading practice principles.¹⁸⁸

These are options that some organisations may choose to utilise. However I am concerned at the suggestion that these measures will be mandated or linked to beneficial tax treatment. This approach would not 'empower Aboriginal and Torres Strait Islander peoples to develop governance arrangements that are legitimate, effective, and appropriate to their circumstances'.¹⁸⁹ Governance arrangements need to be the product of consensus and should be focused on community development.¹⁹⁰

The Commission outlined that effective, sustainable governance is more likely to be achieved when Aboriginal and Torres Strait Islander peoples are able to exercise genuine decision-making authority.¹⁹¹ This was supported by a key finding from the Indigenous Community Governance Project (the Governance Project)¹⁹², conducted by Reconciliation Australia and the Centre for Aboriginal Economic Policy Research, which stated:

[G]overnance is greatly strengthened when Indigenous people create their own rules, policies, guidelines, and codes, as well as design mechanisms for enforcing those rules and holding leaders accountable.¹⁹³

The Commission considered that a community development model, rather than regulation, was the preferred approach to supporting and strengthening this governance. For example, the Government should ensure sufficient training, resources and access to expertise are available to ensure Aboriginal and Torres Strait Islander peoples are able to:

- develop effective and sustainable governance mechanisms
- understand their rights as members of a native title entity
- understand their duties within the entity (particularly as directors)
- implement governance mechanisms or amend them where necessary.¹⁹⁴

188 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 7. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

189 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 16. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

190 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), ss 4.1, 4.2. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

191 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 19. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

192 For information on the Indigenous Community Governance Project, see Reconciliation Australia, *The Indigenous Community Governance Research Project*, <http://www.reconciliation.org.au/home/projects/indigenous-governance-research-project> (viewed 26 November 2010); Centre for Aboriginal Economic Policy Research, *Indigenous Community Governance*, <http://caep.ranu.edu.au/governance/index.php> (viewed 26 November 2010).

193 J Hunt & D Smith, *Indigenous Community Governance Project: Year Two Research Findings*, Centre for Aboriginal Economic Policy Research, Working Paper No 36/2007 (2007), p 34. At <http://www.reconciliation.org.au/extras/file.php?id=256&file=Indigenous+Community+Governance+Research+Project+-+File+1.pdf> (viewed 23 November 2010).

194 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 28. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

One way of supporting this approach would be for the Australian Government to help establish an 'Indigenous Governance Institute' to develop the capacity of communities to design and implement effective governance mechanisms.¹⁹⁵ This would be consistent with the Declaration which provides that '[i]ndigenous peoples have the right to have access to financial and technical assistance from States...for the enjoyment of the rights contained' in the Declaration.¹⁹⁶

(ii) A new statutory review function

The Agreements Discussion Paper also includes a proposal for a new statutory review function. This would require native title parties to register 'future act' agreements with a review body which may be assessed against 'leading practice principles'.¹⁹⁷

The Government proposes that this new function could support native title parties to maximise the benefits from native title agreements now and in the future.¹⁹⁸ However the Commission submitted that a statutory review function was not the way to achieve these benefits. In particular it said:

- the Government has not adequately demonstrated the need for a new statutory review function
- the statutory function will do little to empower, and may possibly undermine the capacity of, Aboriginal and Torres Strait Islander peoples and their representatives to negotiate or enforce compliance with 'sustainable' agreements
- the potential elements of the review function, as explored in the Agreements Discussion Paper, are problematic and should be reconsidered.¹⁹⁹

Instead the Government should focus on capacity development.²⁰⁰ Aboriginal and Torres Strait Islander peoples face a number of barriers to achieving effective and beneficial agreements, including inadequate skills levels within the community, resources and access to expert advice. Aboriginal and Torres Strait Islander peoples will be unable to enter into or benefit from agreements if capacity issues are not addressed, regardless of a review function.

In a joint submission The National Native Title Council and the Minerals Council of Australia agreed. They said:

195 For further discussion see: Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 30. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

196 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 29 August 2011).

197 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), pp 8–10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

198 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 8. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

199 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 34. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

200 See generally: Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), paras 40–51. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

...rather than seeking to specify those aspects of agreements which determine that they are leading practice, or establishing any specific review function to assess the sustainability of agreements, that Government would be better placed by focusing on a range of capacity building initiatives...²⁰¹

The Government should consider options for the provision of appropriate resources to build the capacity of Aboriginal and Torres Strait Islander peoples to:

- determine, develop and administer projects pursuing their priorities and aspirations
- negotiate and enter into new agreements
- access expert advice
- monitor and enforce compliance with the terms of agreements.²⁰²

The Government could also consider providing further support to existing capacity-development initiatives such as the NTRB Knowledge Management: Agreement-making project undertaken by the Australian Institute of Aboriginal and Torres Strait Islander Studies.²⁰³

(iii) Reforms to clarify the requirement to negotiate in good faith

The Agreements Discussion Paper outlines the Government's decision to clarify the good faith requirements in the Native Title Act.²⁰⁴ I welcome this decision as the good faith requirements in the Native Title Act should be strengthened.

I discuss this in greater detail in section 1.6, in my Report Card of the Government's progress against my recommendations from last year. These reforms are also considered in a section of the Commission's response to the Reform Bill which I have included at **Appendix 2**.

(iv) Next steps

The Attorney-General has advised me that it is considering the 29 written submissions it has received. I will monitor the outcome of this process. In doing so I urge the Government to take heed of the Commission's recommendation:

201 Minerals Council of Australia and National Native Title Council, *Submission in response to Government consultation on Indigenous Economic Development from mining agreements* (30 November 2010), p 23. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Consultationonpossiblegovernanceandfutureactsreforms#submissions (viewed 21 September 2011).

202 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), paras 42–51. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

203 The pilot phase of the project has resulted in the development and launch of a prototype version of a secure, online database, which contains over 100 mining and exploration-related precedents. For information on the project, see J Fardin, 'NTRB Knowledge Management Pilot: Agreement Making', *Native Title Newsletter*, No 5/2010 (September/October 2010), p 11. At <http://www.aiatsis.gov.au/ntru/docs/publications/newsletter/SepOct10.pdf> (viewed 23 November 2010). Also see Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), para 46. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

204 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 14. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

That the Australian Government consult and cooperate with affected Aboriginal and Torres Strait Islander peoples in order to obtain their free, prior and informed consent before adopting or implementing any legislative or administrative measure in response to the Agreements Discussion Paper.²⁰⁵

(c) Native Title, Indigenous Economic Development and Tax Consultation Paper

On 18 May 2010 the Australian Government released a consultation paper entitled *Native Title, Indigenous Economic Development and Tax* (Tax Consultation Paper).²⁰⁶ This consultation process was suspended due to the 2010 federal election. On 20 October 2010 the Government resumed consultations.

The interaction between native title and the income tax system is complex and uncertain.²⁰⁷ In its Tax Consultation Paper the Government outlines that it 'intends to consider reforms that provide greater clarity and certainty' on how these systems interact.²⁰⁸ These proposed reforms consider:

- the introduction of an income tax exemption for payments received pursuant to a native title agreement
- the introduction of a new tax exempt vehicle
- a native title withholding tax.²⁰⁹

I strongly support the general aims set out in the Tax Consultation Paper to reduce complexity and improve certainty. I discuss the particular proposals below.

(i) Income tax exemption

One option suggested is that legislation could provide that payments under a native title agreement are exempt from income tax.²¹⁰ I support the introduction of a specific income tax exemption for all payments flowing from native title agreements. This is because all native title payments, monetary and non-monetary, are in effect a form of compensation and should not be subject to taxation.²¹¹ An exemption will provide certainty of treatment for those in receipt of these payments. This should be introduced in combination with a new tax exemption vehicle.

205 Australian Human Rights Commission, *Submission to the Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs on the Leading practice agreements: maximising outcomes from native title benefits discussion paper* (30 November 2010), rec 1. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 29 August 2011).

206 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010). At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

207 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), p 1. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

208 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), p 1. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

209 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), pp 8–16. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

210 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), p 8. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

211 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), para 10. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011). Also see Australian Human Rights Commission, *Submission to the Australian Government's Native Title Payments discussion paper – Optimising Benefits from Native Title Agreements* (4 March 2009), paras 199–205. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20090304_ntpayments.html (viewed 29 August 2011).

(ii) Introduction of a new tax exemption vehicle

A second option proposed is the establishment of a new tax exemption vehicle, an 'Indigenous Community Fund'. Legislation could specify features such as the types of payments into the fund that would be tax exempt if used for certain purposes.²¹²

I support the establishment of a new tax exemption vehicle for 'use by Aboriginal and Torres Strait Islander peoples in receiving and utilising payments under native title agreements for the benefit of those peoples'.²¹³ In the design of such a vehicle, the Government should ensure that the payments received by the fund and the purposes for which those funds can be used should be as broad as possible to ensure maximum benefit for the Aboriginal and Torres Strait Islander peoples who access the resources of the fund.²¹⁴

(iii) Native title withholding tax

A third option is a withholding tax. In essence this would require parties who make payments for the suspension of native title rights and interests to withhold an amount of tax and pass it onto the Australian Taxation Office before the payment goes to the native title holders.²¹⁵

In addition to being inconsistent with the position that native title payments are in effect a form of compensation and should not be taxable, a withholding tax is also inequitable given the nature of a flat tax on all payments.²¹⁶ For example, because a withholding tax would apply to all, an individual recipient of a native title payment will be taxed even if they may be under the tax-free threshold and would ordinarily not be liable for income tax.²¹⁷

(iv) Deductible Gift Recipient concessions

Aboriginal and Torres Strait Islander organisations provide a range of services. Some of these services will fall within existing categories of Deductible Gift Recipient (DGR) categories, but others will not.

One way to address this is to have a specific category for Aboriginal and Torres Strait Islander organisations that operate for the public benefit to generally advance the conditions and welfare of Aboriginal and Torres

212 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), p 10. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

213 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), para 14. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

214 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), paras 16–17. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

215 Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010), p 14. At <http://www.treasury.gov.au/contentitem.asp?NavId=037&ContentID=1890> (viewed 29 August 2011).

216 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), para 20. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

217 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), para 20. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

Strait Islander peoples.²¹⁸ This category should also be defined to allow business development activities.²¹⁹ This will assist to give effect to our right to development.²²⁰

(v) Next steps

The Attorney-General has advised that the Government is currently considering the 33 submissions received in response to the Tax Consultation Paper.²²¹ As the Government considers its position I encourage it to design the new tax exempt vehicle with the flexibility required to accommodate the distinct needs of Aboriginal and Torres Strait Islander peoples.

(d) Northern Territory Emergency Response and the Stronger Futures in the Northern Territory Discussion Paper

(i) Background

The Northern Territory Emergency Response (NTER) is a series of measures announced by the Howard Government on 21 June 2007 in response to the *Little Children are Sacred* report.²²²

A key concern for Aboriginal and Torres Strait Islander peoples was the deeming of the NTER measures to be special measures for the purposes of the *Racial Discrimination Act 1975* (Cth) (RDA) and the suspension of the RDA in relation to the provisions of the NTER legislation and any acts done under or for the purposes of those provisions.²²³ This meant that individuals had no right to bring a complaint under the RDA with respect to provisions of the legislation.

From June to August 2009 the Australian Government consulted with Aboriginal communities on ways that certain identified NTER measures could be 'redesigned', including lifting the suspension of the RDA. The result of this consultation was the passage of the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth).

218 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), paras 21–27. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

219 Australian Human Rights Commission, *Submission to the Treasury on the Native Title, Indigenous Economic Development and Tax consultation paper* (30 November 2010), para 24. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_NativeTitle.html (viewed 29 August 2011).

220 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 23. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 29 August 2011). Also see arts 3, 4, 20. Also see *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 29 August 2011).

221 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

222 P Anderson and R Wild, *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.inquiriesaac.nt.gov.au/> (viewed 21 September 2011).

223 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4; *Northern Territory National Emergency Response Act 2007* (Cth), s 132; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4, 6. The original NTER legislation also exempted the operation of the Northern Territory's anti-discrimination laws: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 5; *Northern Territory National Emergency Response Act 2007* (Cth), s 133; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 5, 7. But see *Northern Territory National Emergency Response Act 2007* (Cth), Notes, Table A: 'Application, saving or transitional provisions' (*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4(3)).

In the *Native Title Report 2010* I discussed the redesigned measures relating to land, in particular the compulsory acquisition of five-year leases and analysed the Government's consultation process.²²⁴

Most NTER measures were enacted for a period of five years. Many of these legislative measures under the NTER are due to cease in August 2012, and funding measures are set to end on 30 June 2012.²²⁵

On 22 June 2011 the Australian Government released the *Stronger Futures in the Northern Territory* discussion paper (*Stronger Futures*) detailing its process for the next stage of the NTER.²²⁶ I discuss this process further in the *Social Justice Report 2011*.

(ii) NTER measures affecting our rights to our lands, territories and resources

Measures relating to our land, territories and resources are not covered in the eight *Stronger Futures* priority areas.

The Australian Government has said that it will retain the existing five-year leases until they expire in August 2012. However, it has also committed to progressively transition to voluntary leases during this period.²²⁷ In addition the Government announced on 25 May 2010 that it had started to pay rent to Aboriginal land owners in 45 of the 64 communities subject to five-year leases and that rent will be backdated to the commencement of the leases in 2007.²²⁸

While I welcome the Government's commitment to progressively transition to voluntary leases in these communities, and pay rent, I am concerned by comments that the Government has not paid 'fair rent' to the communities affected by the compulsory five-year leases.²²⁹

In *Wurridjal v Commonwealth*²³⁰ the High Court found that the Australian Government is required to pay just terms compensation for the five-year leases.²³¹ I therefore encourage the Government to work with the Northern and Central Land Councils to ensure there is agreement on valuation of land and a fair amount of rent is paid to the communities affected by the five-year leases. I discuss this further in section 1.5(b)(iii) below.

224 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 80–98. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

225 See *Northern Territory National Emergency Response Act 2007* (Cth), s 6. Also see: Australian Government, *Stronger Futures in the Northern Territory* (June 2011), p 4. At <http://www.indigenous.gov.au/index.php/stronger-futures-in-the-northern-territory/> (viewed 29 August 2011).

226 Australian Government, *Stronger Futures in the Northern Territory* (June 2011). At <http://www.indigenous.gov.au/index.php/stronger-futures-in-the-northern-territory/> (viewed 29 August 2011).

227 Commonwealth, *Parliamentary Debates*, House of Representatives, 25 November 2009, p 12787 (The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs). At <http://www.aph.gov.au/hansard/reps/dailys/dr251109.pdf> (viewed 1 August 2011); Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), pp 10–11. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 1 August 2011).

228 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon W Snowdon MP, Minister for Indigenous Health, Rural and Regional Health and Regional Services Delivery, 'Rent payments for NTER five-year leases' (Media Release, 25 May 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/rent_nter_25may10.aspx (viewed 1 August 2011). The amount of rent was determined by the Northern Territory Valuer-General. The Government also stated that it was 'standing by' to make payments to the remaining 16 Aboriginal corporations which hold title to community living areas, and that the lease over Northern Territory Crown land at Canteen Creek did not involve a rent payment.

229 M Schliebs, 'Community money remains frozen', *The Australian*, 25 June 2011. At <http://www.theaustralian.com.au/national-affairs/community-money-remains-frozen/story-fn59niix-1226080880791> (viewed 1 August 2011).

230 (2009) 237 CLR 309.

231 For discussion of this decision, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), pp 26–31, 153. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 1 August 2011).

1.4 Marking progress in the native title system

Throughout this chapter I have discussed a number of legal and policy initiatives which have impacted, or may have an impact, on the operation of the native title system.

Independent of this, the native title system continues to lumber on. Whether the system is fair, or delivers justice, is questioned, however until appropriate reform is progressed we must make the best of what we have. Native title parties continue to make applications for native title, continue to reach agreements, and continue tirelessly, to seek remedy in some way to the injustices of the past. In this section I note two milestones worthy of reflection:

- the registration of the 500th Indigenous Land Use Agreement
- South Australia's first compensation application for the extinguishment of native title.

(a) Milestone for agreement-making

In last year's Native Title Report I considered reforms related to agreement-making in the native title system. I also reported the registration of the 400th Indigenous Land Use Agreement (ILUA) by the NNTT and celebrated a number of significant agreements that occurred in the previous reporting period.²³²

On 31 March 2011, the NNTT registered the 500th ILUA.²³³ I profile this agreement in Text Box 1.5. This is a significant milestone and is illustrative of the continuing trend for parties to negotiate agreements to resolve native title and other matters. Seventy-one ILUAs were added to the Register of Indigenous Land Use Agreements in 2010–11.²³⁴ The President of the NNTT, Graeme Neate, has reported that this is the most new ILUAs registered in one year since the Act was amended to create the ILUA scheme in 1998.²³⁵

While I am encouraged by the increasing trend in ILUAs being negotiated, the road to reach agreement is not always easy. Our people continue to face barriers to reaching just and equitable agreements, such as inadequate financial resources and legislative barriers within the native title system.²³⁶

Conflict within our own communities can also be a barrier to reaching just and equitable agreements. Native title structures and processes can serve as platforms for this conflict to manifest. I am concerned that during the Reporting Period disputes within our communities have been publicised in the media. This public attention is not positive for the healing of divisions or the resolution of agreements. In Chapters 2–4 of this Report I consider certain types of conflict within native title and options for addressing them.

232 See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 19 August 2011).

233 National Native Title Tribunal, 'Milestone for native title agreements' (Media Release, 31 March 2011). At http://www.nntt.gov.au/news-and-communications/media-releases/pages/milestone_for_native_title_agreements.aspx (viewed 25 July 2011).

234 G Neate, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 August 2011. Also see National Native Title Tribunal, *National report: native title* (August 2011), p 4. At http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Corp_publications.aspx (viewed 9 September 2011).

235 G Neate, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 August 2011.

236 For further discussion see: M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 23. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 19 August 2011).

Text Box 1.5:

500th Indigenous Land Use Agreement (ILUA)

Dja Dja Wurrung People and Charlton Harness Racing Club

The ILUA is an Area Agreement between the Dja Dja Wurrung People and Charlton Harness Racing Club in Victoria.²³⁷

The agreement relates 'to the proposed expansion of the Charlton Harness Racing Club in regional Victoria. It records the consent of the Dja Dja Wurrung people to those developments in exchange for certain benefits, including the establishment of an annual Spring race to be known as the Dja Dja Wurrung Cup which will be presented by a Dja Dja Wurrung Elder'.²³⁸

The agreement is spread across an area of approximately 8.6 hectares²³⁹ and provides for certain future acts in relation to harness racing in the ILUA area.²⁴⁰

The NNTT sees this milestone as a reflection of the increased collaboration between the different parties,²⁴¹ and the Minister for Families, Housing, Community Services and Indigenous Affairs, described it as a 'significant milestone in the history of native title in Australia'.²⁴²

(b) Compensation for the extinguishment of native title rights and interests

Under the *Native Title Act 1993* (Cth), there is an entitlement to compensation for the extinguishment of native title in certain circumstances.²⁴³ However there have been no successful compensation applications for the extinguishment of native title rights and interests. It is also significant that almost 20 years since the commencement of the Native Title Act the relevant legal principles for calculating this compensation have not yet been determined.²⁴⁴

This could change with the recent compensation application by the De Rose Hill native title holders in South Australia. I briefly outline this claim in Text Box 1.6.

237 National Native Title Tribunal, 'Dja Dja Wurrung People and Charlton Harness Racing Club ILUA – Extract from Register of Indigenous Land Use Agreements' (2011). At <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/ILUA%20Register/2010/VI2010.002/ILUARRegisterExport.pdf> (viewed 25 July 2011).

238 National Native Title Tribunal, 'Milestone for native title agreements' (Media Release, 31 March 2011). At http://www.nntt.gov.au/news-and-communications/media-releases/pages/milestone_for_native_title_agreements.aspx (viewed 25 July 2011).

239 National Native Title Tribunal, 'Dja Dja Wurrung People and Charlton Harness Racing Club ILUA – Extract from Register of Indigenous Land Use Agreements' (2011). At <http://www.nntt.gov.au/Indigenous-Land-Use-Agreements/Search-Registered-ILUAs/ILUA%20Register/2010/VI2010.002/ILUARRegisterExport.pdf> (viewed 25 July 2011).

240 Agreements, Treaties and Negotiated Settlements Project, *Dja Dja Wurrung People and Charlton Harness Racing Club Indigenous Land Use Agreement (ILUA)*, <http://www.atns.net.au/agreement.asp?EntityID=5375> (viewed 25 July 2011).

241 National Native Title Tribunal, 'Milestone for native title agreements' (Media Release, 31 March 2011). At http://www.nntt.gov.au/news-and-communications/media-releases/pages/milestone_for_native_title_agreements.aspx (viewed 25 July 2011).

242 Attorney-General and Minister for Families, Housing, Community Services and Indigenous Affairs, '500th Indigenous Land Use Agreement registered today' (Media Release, 31 March 2011). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_FirstQuarter_31March2011-500thIndigenousLandUseAgreementregisteredtoday (viewed 19 August 2011).

243 See for example, *Native Title Act 1993* (Cth), ss 17, 18, 22E, 53.

244 G Neate, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 August 2011.

Text Box 1.6:

De Rose Hill compensation application

In 1994 a group of 12 Yankunytjatjara and Pitjantjatjara or Antikirinya people made the original claim for native title on behalf of themselves and others who are Nguraritja people over 1865 square kilometres of land subject to three perpetual pastoral leases at De Rose Hill Station in South Australia. The full Federal Court delivered its determination on 8 June 2005, awarding non-exclusive native title rights to the Nguraritja people. These included the rights to use and enjoy the land and waters in accordance with traditional laws and customs of the Western Desert Bloc people.²⁴⁵

However the determination area did not extend to any area that was a house, shed, building, airstrip or any adjacent area where exclusive use was necessary for the enjoyment of that improvement.²⁴⁶

On 9 June 2011 the native title holders for De Rose Hill in South Australia made a compensation application for these native title rights which were held to be extinguished. This is the first such claim in South Australia.²⁴⁷

A successful determination of native title compensation in *De Rose Hill* will set a positive example for other native title compensation claims. It will also be 'a proper recognition of the loss and suffering that De Rose Hill native title holders have suffered as a result of those acts that have "extinguished" native title'.²⁴⁸

I will continue to monitor the progress and outcome of this application.

245 See *De Rose v State of South Australia (No.2)* [2005] FCAFC 110. Also see Australian Institute for Aboriginal and Torres Strait Islander Studies, *Background report – De Rose Hill South Australia* (undated), pp 1, 4. At www.aiatsis.gov.au/ntru/docs/resources/resourceissues/derose.pdf (viewed 14 July 2011).

246 Australian Institute for Aboriginal and Torres Strait Islander Studies, *Background report – De Rose Hill South Australia* (undated), p 4. At www.aiatsis.gov.au/ntru/docs/resources/resourceissues/derose.pdf (viewed 14 July 2011).

247 *De Rose Hill-Ilpalka Aboriginal Corporation RNTBC v State of South Australia*: Federal Court SAD140/2011. Also see South Australian Native Title Services, 'De Rose Hill authorises first native title compensation application' (May 2011) 44 *Aboriginal Way*, p 1. At <http://www.nativetitlesa.org/publications2/listing/aboriginal-way/> (viewed 30 August 2011). The De Rose Hill – Ilpalka Aboriginal Corporation (DRHIAC) is the Prescribed Body Corporate for these rights and interests.

248 South Australian Native Title Services, 'De Rose Hill authorises first native title compensation application' (May 2011) 44 *Aboriginal Way*, p 5. At <http://www.nativetitlesa.org/publications2/listing/aboriginal-way/> (viewed 30 August 2011).

1.5 International mechanisms addressing Indigenous human rights

In this section, I consider developments in international human rights law that concern native title and our rights to our lands, territories and resources. I urge the Australian Government to consider these developments and further implement its commitment to supporting human rights. These developments include:

- Expert Mechanism on the Rights of Indigenous Peoples 2010
- United Nations Permanent Forum on Indigenous Issues 2011
- Australia's appearance at the Universal Periodic Review
- Australia's appearance before the Committee on the Elimination of Racial Discrimination.

(a) Expert Mechanism on the Rights of Indigenous Peoples 2010

The third session of the Expert Mechanism on the Rights of Indigenous Peoples (the Expert Mechanism) took place from 12 to 16 July 2010. The Expert Mechanism is a United Nations mechanism that provides thematic expertise on the rights of Indigenous peoples to the Human Rights Council, the main human rights body of the United Nations.²⁴⁹

A delegation of Aboriginal and Torres Strait Islander representatives attended the third session of the Expert Mechanism. The two key agenda items for the third session were:

- a study on Indigenous peoples' right to participate in decision making
- implementing the *United Nations Declaration on the Rights of Indigenous Peoples*.

(i) Right to participate in decision making

As Social Justice Commissioner, I provided a submission to the Expert Mechanism on the right to participate in decision making.

I asserted my belief that the Declaration is an instrument that can create institutional structures, arrangements and processes needed for Indigenous peoples to effectively engage with Governments. This is based on collective rights to self-determination and decision-making powers through the principle of free, prior and informed consent.²⁵⁰

I am concerned that the Australian Government does not understand what constitutes genuine consultation and effective engagement. In light of the Australian Government's support for the Declaration, governments at all levels need to change their approaches towards engaging with us.²⁵¹

249 For further information about the Expert Mechanism see United Nations Human Rights Office of the High Commissioner for Human Rights, *The Expert Mechanism on the Rights of Indigenous Peoples*, <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx> (viewed 21 September 2011).

250 Australian Human Rights Commission, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda at the third session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 12–16 July 2010*. At http://www.hreoc.gov.au/social_justice/international_docs/2010_EMRIP_Gooda.html (viewed 14 September 2011).

251 Australian Human Rights Commission, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda at the third session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 12–16 July 2010*. At http://www.hreoc.gov.au/social_justice/international_docs/2010_EMRIP_Gooda.html (viewed 14 September 2011).

The Expert Mechanism conducted a study on Indigenous peoples and the right to participate in decision-making. At its third session, the Expert Mechanism adopted the progress report on this study.²⁵² This progress report encompasses the international human rights framework and outlines Indigenous peoples' internal decision-making and our participation in decision-making with State and non-State institutions.²⁵³ It provides guidance for governments when developing ways to give full effect to the principles of the Declaration. Subsequently at its fourth session the Expert Mechanism adopted the final report on the study of Indigenous peoples and the right to participate in decision-making and of proposals.²⁵⁴

(ii) United Nations Declaration on the Rights of Indigenous Peoples

In my statement on implementing the Declaration I suggested that the Declaration should be given the same status as the *Universal Declaration on Human Rights*²⁵⁵ to ensure that the rights of Indigenous peoples are explicitly considered in the development of domestic laws and policy. The next step is for the Government to work with Aboriginal and Torres Strait Islander peoples to develop a national implementation strategy that is committed to, by all levels of government, and ensures the principles of the Declaration are given full effect in Australia.²⁵⁶

The Expert Mechanism recommended to the Human Rights Council that the Council encourage States to adopt appropriate measures to achieve the objectives of the Declaration.²⁵⁷

(iii) Progressing the studies of the Expert Mechanism

The thematic expertise of the Expert Mechanism focuses mainly on studies and research-based advice to the Human Rights Council.²⁵⁸ As a result, the Expert Mechanism doesn't make specific recommendations to States such as Australia.

However the expertise developed around these agenda items is integral to the recognition and exercise of our rights to our lands, territories and resources. I encourage the Government to consider the Expert Mechanism's thematic report on our right to participate in decision-making, in particular its guidance on ensuring we are involved in all stages of decision-making, when introducing legislative, policy or administrative proposals which affect our rights to our lands, territories and resources.²⁵⁹

252 Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its third session, Geneva, 12–16 July 2010*, UN Doc A/HRC/15/36 (2010), para 2. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

253 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

254 Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its fourth session (Geneva, 11–15 July 2011)*, UN Doc A/HRC/18/43 (2011), para 2. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 11 October 2011).

255 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948).

256 Australian Human Rights Commission, *Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda at the third session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 12–16 July 2010*. At http://www.hreoc.gov.au/social_justice/international_docs/2010_EMRIP_declaration_Gooda.html (viewed 14 September 2011).

257 Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its third session, Geneva, 12–16 July 2010*, UN Doc A/HRC/15/36 (2010), para 8. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

258 See for example Human Rights Council, *Report of the Expert Mechanism on the Rights of Indigenous Peoples on its third session, Geneva, 12–16 July 2010*, UN Doc A/HRC/15/36 (2010), para 1. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

259 This study should be read in conjunction with Human Rights Council, *Final study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples* (Advance Edited Version), UN Doc A/HRC/EMRIP/2011/2. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session4.aspx> (viewed 26 September 2011).

(b) United Nations Permanent Forum on Indigenous Issues 2011

The United Nations Permanent Forum on Indigenous Issues (the Permanent Forum) meets in New York each year. The Permanent Forum is an advisory body to the Economic and Social Council (ECOSOC) with a mandate to discuss Indigenous issues relating to economic and social development, culture, the environment, education, health and human rights.²⁶⁰ Its role is to provide advice and recommendations on these issues to ECOSOC and other UN agencies and programmes through ECOSOC.

The Permanent Forum has a program of work where every second year is devoted to a particular theme and the alternating year is a review year. The tenth session was a review year of previous recommendations.²⁶¹

In May 2011, a delegation of Aboriginal and Torres Strait Islander peoples attended the tenth session of the Permanent Forum. A majority of the delegation attended as part of the Indigenous Peoples Organisation (IPO) Network of Australia. The delegation made a number of statements relevant to issues of native title and our rights to our lands, territories and resources.²⁶²

(i) Environment

The IPO Network presented a statement on the environment covering four critical issues that require attention in Australia: forests, climate change, mining, and transportation and storage of toxic waste. In particular the statement focused on the need for governments to adopt new processes of consultation with Indigenous peoples based on collaboration and participation.²⁶³

The Permanent Forum made a number of recommendations to States under this agenda item concerning our rights to our lands, territories and waters including that:

- States should recognise Indigenous peoples' rights to forests and should review and amend laws that are not consistent with the Declaration and other international standards.²⁶⁴
- States should develop mechanisms to 'promote the participation of indigenous peoples in all aspects of the international dialogue on climate change'.²⁶⁵
- States should adopt a human rights-based approach to the rights of Indigenous peoples.²⁶⁶
- Best practices of the application of the right of free, prior and informed consent regarding corporations and Indigenous peoples be documented and shared.²⁶⁷

260 *Establishment of a Permanent Forum on Indigenous Issues*, ECOSOC Resolution 2000/22, UN Doc E/2000/INF/2/Add.2 (2000). At http://www.un.org/esa/socdev/unpfii/en/resolution_2000_22.html (viewed 26 September 2011).

261 United Nations Permanent Forum on Indigenous Issues, *Tenth Session of the United Nations Permanent Forum on Indigenous Issues*, http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 21 September 2011).

262 Australian Human Rights Commission, *United Nations Permanent Forum on Indigenous Issues (UNPFII)*, http://www.humanrights.gov.au/social_justice/international_docs/pfii.html (viewed 26 September 2011).

263 B Wyatt, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia on Agenda Item 3b* (Delivered at the tenth session of the United Nations Permanent Forum on Indigenous Issues New York, 16–27 May 2011). At http://www.humanrights.gov.au/social_justice/international_docs/pfii.html (viewed 7 September 2011).

264 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 18. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

265 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 21. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

266 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 25. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

267 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 32. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

(ii) Water

Recommendations from the IPO Network's statement on water were adopted in the Final Report of the Permanent Forum's tenth session.²⁶⁸ In particular the Permanent Forum urged:

- States to 'recognise and protect' Indigenous peoples' cultural right to water and, through legislation and policy, to support the right of Indigenous peoples 'to hunt and gather food resources from waters used for cultural, economic and commercial purposes', consistent with article 25 of the Declaration.²⁶⁹
- States should include Indigenous peoples in 'decision-making processes in all areas of water management, including commercial use, irrigation and environmental management', consistent with the principles of the Declaration.²⁷⁰

In addition to reflecting the IPO Network's recommendations, the Permanent Forum also urged States to:

- Guarantee Indigenous peoples' distinct rights to water, including the right to access to safe, clean, accessible and affordable water for personal, domestic and community use.²⁷¹

(iii) Implementation of the Declaration

Recommendations from the Australian Human Rights Commission's statement on 'Implementing the Declaration' were also reflected in the Final Report. This included a recommendation for the Permanent Forum to explore options for collaboration with the Expert Mechanism and Special Rapporteur on the rights of indigenous peoples to develop guidelines on the implementation of free, prior and informed consent.²⁷² It was also a recommendation from the Commission that States should establish national initiatives and programs to implement the Declaration with 'clear timelines and priorities'.²⁷³

Finally, the Permanent Forum recommended that States 'systematically monitor, evaluate, assess and report on how free, prior and informed consent has or has not been recognised and applied with respect to the lands, territories and resources of the Indigenous peoples concerned'.²⁷⁴

Giving full effect to the principles of the Declaration, in particular free, prior and informed consent, is important to ensure that Governments do more than just 'consult' with us or only provide information when making decisions that affect our rights to our lands, territories and resources.

268 S Ross, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia on Agenda Item 7* (Delivered at the tenth session of the United Nations Permanent Forum on Indigenous Issues New York, 16–27 May 2011). At http://www.humanrights.gov.au/social_justice/international_docs/pfii.html (viewed 7 September 2011).

269 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 82. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

270 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 83. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

271 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 79. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

272 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 37. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

273 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 47. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

274 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 38. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

(iv) Progressing the recommendations from the Permanent Forum

I urge the Australian Government to formally respond to, and implement, the recommendations made by the Permanent Forum for action by States. It would be a sign of good faith, and a demonstration of the Government's determination to improve the protection of our rights in Australia, for the Australian Government to report its progress towards implementing these recommendations at the eleventh session of the Permanent Forum in 2012.

(c) Australia's appearance at the Universal Period Review

Australia appeared before the United Nations Human Rights Council's Working Group on the Universal Periodic Review (UPR) on 27 January 2011. The UPR process involves a review of the human rights records of all 192 Member States once every four years. The aim of the review is to improve the human rights situation in all countries.²⁷⁵

Participating countries made 145 recommendations to the Australian Government.²⁷⁶ Thirty of the 145 recommendations for Australia to improve its human rights record referred directly to Aboriginal and Torres Strait Islander peoples. Many other recommendations will also impact on Aboriginal and Torres Strait Islander peoples.²⁷⁷

Many of these recommendations will impact on our rights to our lands, territories and resources, such as those that relate to our ability to participate in decision-making that affects our rights. However there was one recommendation that related specifically to the native title system. The United Kingdom recommended that the Australian Government:

Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life.²⁷⁸

On 8 June 2011 Australia formally responded to these recommendations and accepted, at least in part, 90 per cent of the recommendations.²⁷⁹ In particular, Recommendation 102 outlined above, was accepted-in-part. The Government said:

275 United Nations Human Rights Office of the High Commissioner for Human Rights, *Universal Period Review*, <http://www.ohchr.org/en/hrbodies/upr/pages/uprmain.aspx> (viewed 26 September 2011).

276 Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (2011). At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 8 September 2011).

277 Aboriginal Legal Service of Western Australia, *UPR Fact Sheet*, http://www.als.org.au/images/stories/UPR_Fact_Sheet.pdf (viewed 8 September 2011). Also see Aboriginal Legal Service of Western Australia, *Recommendations submitted to the Australian Government relating to Aboriginal and Torres Strait Islander Peoples*, http://www.als.org.au/images/stories/UPR_Reccommendations_on_the_rights_of_Aboriginal_and_Torres_Strait_Islander_peoples.pdf (viewed 8 September 2011).

278 Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (2011), rec 86.102. At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 8 September 2011).

279 See Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc A/HRC/17/10/Add.1 (2011). At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 26 September 2011). Also see: Attorney-General and Minister for Foreign Affairs, 'Australia's response to its Universal Periodic Review at the UN' (Media Release, 6 June 2011). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_SecondQuarter_6June2011-AustraliasresponcetoitsUniversalPeriodicReviewattheUN (viewed 27 September 2011).

The Australian Government continually reviews the operation of the native title system through practical, considered and targeted reforms. Legislation provides for Indigenous Australians to access, and to perform cultural activities on, their traditional lands through statutory regimes and cultural heritage laws.²⁸⁰

The Government has made the commitment that the UPR recommendations accepted by the Government will inform the development of an updated National Human Rights Action Plan.²⁸¹ In responding to this recommendation, the Government should consider commissioning an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, as part of its National Human Rights Action Plan.

(d) Australia's appearance before the Committee on the Elimination of Racial Discrimination

The Australian Government appeared before the Committee on the Elimination of Racial Discrimination (CERD) on 10 and 11 August 2010.²⁸² The Australian Human Rights Commission made a submission for CERD's consideration when assessing Australia's compliance with the articles under the *International Convention on the Elimination of All Forms of Racial Discrimination*.²⁸³ The submission noted a number of concerns regarding our rights to our lands, territories and resources, including:

- the compulsory acquisition of land under the Northern Territory Emergency Response (NTER)
- the practical limitations on the reinstatement the RDA under the NTER²⁸⁴
- limitations of the Native Title Act including the burden of proof.²⁸⁵

In its concluding observations, CERD expressed ongoing concern, and made a number of recommendations, specifically relating to our rights to our lands, territories and resources.

280 Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia: Addendum: Views on conclusions and/or recommendations, voluntary commitments and replies presented by the State under review*, UN Doc A/HRC/17/10/Add.1 (2011), para 4. At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 26 September 2011).

281 Attorney-General and Minister for Foreign Affairs, 'Australia's response to its Universal Periodic Review at the UN' (Media Release, 6 June 2011). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2011_SecondQuarter_6June2011-AustraliasresponcetoitsUniversalPeriodicReviewattheUN (viewed 27 September 2011).

282 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/15-17 (2010), para 1. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

283 Australian Human Rights Commission, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination* (8 July 2010). At http://www.humanrights.gov.au/legal/submissions/united_nations/ICERD2010.html (viewed 30 August 2011).

284 Legislative amendments have formally lifted the suspension of the RDA in relation to the NTER legislation. This means that s 9 of the RDA will apply to decisions and actions done under or for the purposes of the NTER legislation. Section 10 of the RDA will also apply in relation to the NTER legislation itself. However, the amendments did not expressly state that the RDA would prevail even if contrary to the NTER legislation. The amendments also included retrospective application provisions. The result of this is that if the NTER legislation cannot be read so as to be consistent with the RDA, the NTER legislation, being the later legislation, will prevail. In other words, if there is a conflict, the NTER legislation will override the RDA. Any remaining discriminatory measures under the NTER, such as the compulsory acquisition of five-year leases, cannot be challenged under the RDA. Furthermore, measures the Government considers to be 'special measures' under the RDA, may not in fact be compliant with the requirements of a special measure under the RDA. See Australian Human Rights Commission, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination* (8 July 2010), paras 61-64. At http://www.humanrights.gov.au/legal/submissions/united_nations/ICERD2010.html (viewed 30 August 2011).

285 Australian Human Rights Commission, *Information concerning Australia and the International Convention on the Elimination of All Forms of Racial Discrimination* (8 July 2010), paras 65-66. At http://www.humanrights.gov.au/legal/submissions/united_nations/ICERD2010.html (viewed 30 August 2011).

(i) Corporate social responsibility

In noting its concern with regard to extractive industries, the Committee encouraged the Australian Government to

take appropriate legislative or administrative measures to prevent acts of Australian corporations which negatively impact on the enjoyment of rights of indigenous peoples domestically and overseas and to regulate the extra-territorial activities of Australian corporations abroad. The Committee also encourages the State party to fulfil its commitments under the different international initiatives it supports to advance responsible corporate citizenship.²⁸⁶

(ii) Northern Territory Emergency Response

CERD also expressed concern that the package of legislation under the NTER continues to discriminate on the basis of race. It recommended that the Australian Government:

guarantee that all special measures in Australian law, in particular those regarding the NTER, are in accordance with the Committee's general recommendation No. 32 (2009) on the meaning and scope of special measures. It encourages the State party to strengthen its efforts to implement the NTER Review Board recommendations...²⁸⁷

In addition CERD requested that Australia provide information to the Committee on its progress against this recommendation within a year.²⁸⁸ At the time of writing the Government was in the process of consulting stakeholders on its draft response to CERD.

(iii) Native Title Act

Finally the Committee reiterated its concerns regarding the Native Title Act and its amendments, and the persisting high standard of proof required for recognition of the relationship between Indigenous peoples and their traditional lands. It recommended that Australia

provide more information on this issue, and take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve "better native title claim settlements in a timely manner". It also recommends that the State party enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources.²⁸⁹

The Committee also drew attention to this particular recommendation and requested that Australia provide detailed information on concrete measures to implement the recommendation in its next periodic report.²⁹⁰

286 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/15-17 (2010), para 13. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

287 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/15-17 (2010), para 16. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

288 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/15-17 (2010), para 32. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011). CERD also requested information to be provided with respect to paras 11 and 23.

289 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/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

290 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/15-17 (2010), para 33. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011). CERD also requested detailed information with respect to paras 22 and 26.

Australia is required to submit its next periodic reports on 30 October 2012 and address all points raised in the concluding observations.²⁹¹

Limitations of the Native Title Act, such as the onerous burden of proof, may be addressed by Senator Siewert's Native Title Amendment (Reform) Bill 2011 discussed above.

Regardless of the outcome, I will continue to advocate an equitable and just native title system and monitor the Government's progress against this concluding observation.

291 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/15-17 (2010), para 34. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

1.6 Reviewing the recommendations from the *Native Title Report 2010*

(a) An annual 'Report Card'

This is my second Native Title Report. I launched my first report, the *Native Title Report 2010*, in February 2011. These reports are produced each year in accordance with the requirement under the Native Title Act for me to report annually on the impact of the Native Title Act on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.²⁹²

In doing so I recommend action

that the Australian Government can take to ensure that our rights, as affirmed by the Declaration, are fully respected in laws and policies that affect our lands, territories and resources.²⁹³

In my first Native Title Report I also outlined that I will 'monitor and report on the Government's progress in implementing these recommendations'.²⁹⁴ In this section I conduct my first review of the Australian Government's progress against implementing the recommendations I make in my annual reports. This 'Report Card' will be a feature in each of the 'year-in-review' chapters in the remaining Native Title Reports of my term.

This reporting of the Government's progress is informed by monitoring developments throughout the year, consultation with stakeholders and discussions with the Government. In preparation for this year's Report I also wrote to the Attorney-General for a formal response on the Government's progress.

Unfortunately the Government did not provide a formal response in relation to progress against each of the recommendations but did provide 'information about Government actions that are progressing a number of the recommendations'.²⁹⁵

The Special Rapporteur on the rights of indigenous peoples (Special Rapporteur) has recommended that the reports of the Social Justice Commissioner 'should be given greater attention in government administration to promote a higher level of accountability and sensitivity to human rights commitments'.²⁹⁶ It is disappointing that such accountability has not been provided against all recommendations from the *Native Title Report 2010*. However I will continue to engage in a dialogue with the Attorney to progress these important reforms.

(b) The Australian Government's Report Card

Last year's Native Title Report examined two ways that governments can rebuild relationships with Aboriginal and Torres Strait Islander peoples, particularly, by improving agreement-making processes; and through meaningful and effective consultation and engagement. The 15 recommendations aimed to address these areas as well as progressing the implementation of the Declaration.

292 *Native Title Act 1993* (Cth), s 209.

293 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 8. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

294 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 8. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

295 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

296 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 78. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 9 September 2011).

I am disappointed that many of these recommendations have not been progressed. However the Government has reported that it is

undertaking a range of actions that progress its vision for the native title system and also progress recommendations from the Native Title Report 2010. The key focus of the Government's strategic approach to native title is to significantly increase claim resolution, streamline the claim and agreement-making process, and promote sustainable native title agreements which provide long term economic development opportunities for current and future generations instead of litigation wherever possible.²⁹⁷

I have attached the recommendations from the *Native Title Report 2010* at **Appendix 3**.

(i) Chapter 1: Working together in a 'spirit of partnership and mutual respect': My native title priorities

Implementing the Declaration

In Chapter 1 of the *Native Title Report 2010* I recommended that the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy for the implementation of the Declaration.²⁹⁸

In 2011 the Permanent Forum on Indigenous Issues also called on

States, in conjunction with indigenous peoples, to establish national initiatives, programmes and plans of work to implement the Declaration with clear timelines and priorities. States and indigenous peoples should report regularly to their national legislative bodies and to the Forum on the progress and shortcomings in implementing the Declaration.²⁹⁹

I continue to advocate this initiative with Government, however a commitment by Government has not been made. I am concerned that the Government continues to view the Declaration as non-binding and considers that it does not affect Australian law but contains principles to which the Government should aspire.³⁰⁰ The Declaration should be seen as reflecting how the human rights standards Australia has committed to in international treaties apply to the particular situation of Aboriginal and Torres Strait Islander peoples. It is also a concern that the Government is of the view that Australia's Indigenous policies are consistent with the spirit of the Declaration³⁰¹ even though, as I have argued in this Chapter, this does not appear to be the case.

I encourage the Government to commit in good faith to developing a strategy in partnership with Aboriginal and Torres Strait Islander peoples to ensure the principles of the Declaration are given full effect.

297 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

298 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 1.1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

299 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 47. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

300 Australian Government, *National Human Rights Action Plan Baseline Study Consultation Draft* (June 2011), p 20. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_AustraliasHumanRightsFramework_ConsultationDraftBaselineStudy (viewed 27 September 2011).

301 C Halbert, Deputy Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, *Statement on the Declaration on the Rights of Indigenous Peoples* (Statement delivered at the Tenth Session of the United Nations Permanent Forum on Indigenous Issues, New York, 18 May 2011). At <http://www.docip.org/gsd/cgi-bin/library?e=d-01000-00---off-0cendocdo--00-1--0-10-0---0---0prompt-10---4-----0-1--11-en-50---20-about---00-3-1-00-0-0-11-1-0utfZz-8-00&a=d&c=ce-ndocdo&cl=CL2.3.14.6> (viewed 9 September 2011).

Utilising the Native Title Report

I also made recommendations about how the Native Title Report can be given greater attention. This includes amending the Native Title Act to require the Attorney-General to table the Native Title Report within a set timeframe and also require the Attorney-General to provide a formal response to both the Native Title and Social Justice Reports.³⁰²

The Attorney-General has always tabled the Native Title Report with the Social Justice Report as a matter of courtesy. I appreciate this continued practice. However there is no legislative requirement for the Attorney to do so. Since the launch of last year's Report no legislative commitment to table the Report has been made.

As in previous years, this year I again asked the Attorney-General for a response to the recommendations in the Native Title Report. Unfortunately communications with the Attorney-General have not been provided as a formal response.

Chapter 2: 'The basis for a strengthened partnership': Reforms related to agreement-making

Reviewing the Native Title Act

In Chapter 2 I recommended the Australian Government commission an independent inquiry to review the operation of the native title system with a view to aligning it with international human rights standards.³⁰³ The Government has not made this commitment. I continue to advocate this recommendation as I believe it to be fundamental to achieving land justice for Aboriginal and Torres Strait Islander peoples. As I discuss above at section 1.5(c), this review could form part of the Government's National Human Rights Action Plan.

Finalising the Native Title National Partnership Agreement

Last year I recommended that the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement (NTNPA).³⁰⁴

The Australian Government's *Strategic Review of Indigenous Expenditure*, which was released under Freedom of Information laws, also endorsed moves towards the NTNPA with its emphasis on negotiated settlements and ILUAs.³⁰⁵ However the Government is yet to announce steps to finalise the NTNPA.

Reforming good faith requirements

I also recommended that the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations.³⁰⁶

302 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), recs 1.2, 1.3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

303 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

304 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

305 Australian Government, *Strategic Review of Indigenous Expenditure* (February 2010), p 275. At http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 4 September 2011).

306 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

On 3 July 2010 the Australian Government released the *Leading practice agreements: maximising outcomes from native title benefits* discussion paper which outlined 'possible reforms to the native title agreement process'.³⁰⁷ In the discussion paper the Government stated that it has

... decided to amend the Act to provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiation provisions.³⁰⁸

Public consultations were held in July and October 2010 and submissions for the review closed on 30 November 2010. The Government has advised me that it is currently considering the 29 written submissions it received.³⁰⁹

I am pleased to see the Australian Government reviewing the good faith requirements. I will monitor the outcome of this process.

Improvements to the Native Title Amendment Act (No 1) 2010 (Cth)

I made a number of recommendations to improve the amendments to the Native Title Act under the *Native Title Amendment Act (No 1) 2010 (Cth)*.³¹⁰ These included options for streamlining agreement-making processes, encouraging a commitment to only use the new future act process as a last resort and the establishment of consultation requirements.

I discuss these recommendations above in section 1.2(e).

The sustainability of native title agreements

In response to the *Leading Practice Agreements discussion paper* I recommended that before introducing reforms to ensure the 'sustainability' of native title agreements, the Australian Government should consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples. I also recommended that such reforms should have an evidence-based justification.³¹¹

The Government has advised that it is currently considering submissions to the *Leading Practice Agreements discussion paper*.³¹² I urge the Government to consider these recommendations prior to making a decision on these reforms.

307 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Government releases Native Title Discussion Paper' (Media Release, 3 July 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/government_releases_native_title_discussion_paper.aspx (viewed 29 August 2011).

308 Australian Government, *Leading practice agreements: maximising outcomes from native title benefits Discussion Paper* (July 2010), p 14. At http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 29 August 2011).

309 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

310 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), recs 2.2, 2.5, 2.6. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

311 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.7. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

312 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

Finally I recommended that the Australian Government ensure NTRBs, NTSPs, PBCs and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.³¹³

The Government has reported an increase in NTRB funding in 2009 by \$62 million over four years³¹⁴ and an overall increase in PBC basic support from \$1,479,300 in 2010–11 to \$1,640,631 in 2011–12.³¹⁵ However individual bodies may receive more or less than the previous year. The Government also reports an increase in funding for NTRB capacity building programs from \$3,378,145 in 2010–11 to \$3,655,308 in 2011–12.³¹⁶

I welcome increases to funding of native title bodies. However, I am still hearing that these groups are under resourced. This is particularly problematic as we are moving into a post-determination stage of the native title system.³¹⁷

I encourage the Government to continue discussions with these organisations to ensure gaps are identified and organisations are funded appropriately.

(iii) Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement

Improving consultation processes

In Chapter 3 I outlined a number of recommendations to improve the Government's approach to consultation with Aboriginal and Torres Strait Islander peoples.

The first recommendation was that any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples, should contain a statement that details whether the proposed measure is consistent with international human rights standards.³¹⁸

The Attorney-General has advised me that the Government will 'only undertake significant amendments to the Act after careful consideration and full consultation with affected parties to ensure that amendments do not unduly or substantially affect the balance of rights under the Act'.³¹⁹ However no commitment has been made to include a specific statement in consultation documents.

The Government should give this further consideration as it considers its proposed Bill for improved scrutiny of legislation for compatibility with international human rights obligations under the National Human Rights Framework.³²⁰

313 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 2.8. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

314 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

315 Native Title and Leadership Branch, Department of Families, Housing, Community Services and Indigenous Affairs, Email correspondence to Australian Human Rights Commission, 12 October 2011.

316 Native Title and Leadership Branch, Department of Families, Housing, Community Services and Indigenous Affairs, Email correspondence to Australian Human Rights Commission, 12 October 2011.

317 I Rawlings, Chief Executive Officer, Central Desert Native Title Services Limited, Email Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2011.

318 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 3.1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

319 R McClelland, Attorney-General, Australian Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 September 2011.

320 See Human Rights (Parliamentary Scrutiny) Bill 2010.

I also recommended that the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.³²¹

In the recently released *Stronger Futures in the Northern Territory* Discussion Paper concerning the future of the NTER, the Australian Government said '[a]ll future actions taken by the Government will comply with the Racial Discrimination Act, either because they are non-discriminatory, or because they are special measures'.³²² I will continue to monitor the Government's consultation processes in the Northern Territory to assess whether they meet the standard required for the implementation of a special measure under the RDA and ICERD.

The final recommendation regarding improving consultation processes was for the Australian Government to 'work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*'.³²³

There is a clear policy commitment across all governments in Australia to engage with Aboriginal and Torres Strait Islander peoples. The Council of Australian Governments' (COAG) *National Indigenous Reform Agreement* (NIRA) is the benchmark agreement for Indigenous policy activity in Australia and includes an Indigenous Engagement Principle.³²⁴

The Australian Government has also developed *Engaging Today, Building Tomorrow – A framework for engaging with Aboriginal and Torres Strait Islander Australians* (the Framework). The Framework has been designed to improve how Australian Public Service (APS) agencies 'engage with Aboriginal and Torres Strait Islander peoples on issues that affect them'.³²⁵

The Government has advised that Aboriginal and Torres Strait Islander peoples were involved in the development of the Framework. Input and advice were received through a Reference Group of Aboriginal and Torres Strait Islander government non-government representatives, as well as through engagement workshops held in regional South Australia and Queensland.³²⁶

More than 2,000 copies of the Framework have been distributed across APS agencies since its release in National Reconciliation Week 2011.³²⁷

The Framework states that it is consistent with the principles of the Declaration.³²⁸ While this statement is commendable it remains to be seen whether compliance with the Framework by APS agencies will result in

-
- 321 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 3.2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).
- 322 Australian Government, *Stronger Futures in the Northern Territory* (June 2011), p 3. At <http://www.indigenous.gov.au/index.php/stronger-futures-in-the-northern-territory/> (viewed 29 August 2011).
- 323 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 3.3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).
- 324 Department of Families, Housing, Community Services, and Indigenous Affairs, *Closing the Gap: National Indigenous Reform Agreement*, <http://www.fahcsia.gov.au/sa/indigenous/progserv/ctg/Pages/NIRA.aspx> (viewed 27 September 2011).
- 325 Australian Government, *Engaging Today, Building Tomorrow: A framework for engaging with Aboriginal and Torres Strait Islander Australians* (2011), p 3.
- 326 Department of Families, Housing, Community Services and Indigenous Affairs staff, Email correspondence to Australian Human Rights Commission, 14 September 2011.
- 327 Department of Families, Housing, Community Services and Indigenous Affairs staff, Email correspondence to Australian Human Rights Commission, 14 September 2011.
- 328 Australian Government, *Engaging Today, Building Tomorrow: A framework for engaging with Aboriginal and Torres Strait Islander Australians* (2011), p 4.

the full participation of Aboriginal and Torres Strait Islander peoples in decision-making that affects their rights. As the Government has said, the Framework is not prescriptive or mandatory in its application. Instead 'it encourages reflection on current practice across a broad range of mainstream and Indigenous business within agencies'.³²⁹

It is disappointing that compliance with the Framework is not mandatory. Given this, a reference within the Framework stating it is consistent with the Declaration rings hollow. Without implementation across the APS, the Framework has the potential to become more words we have heard before. I applaud the Government's attempts to improve engagement with Aboriginal and Torres Strait Islander peoples, however I encourage it to make compliance with the Framework mandatory across the APS.

Further, to demonstrate its commitment to the Declaration I recommend that the Government develop a 'Statement or Charter of Engagement' to complement the Framework. This document should include the Government's commitment to be guided by the principles of the Declaration when engaging with Aboriginal and Torres Strait Islander peoples, including the right to participate in decision-making, and the principle of free, prior and informed consent. This Government commitment is particularly important if the Framework does not become mandatory.

Ensuring free, prior and informed consent under the NTER

Finally I recommended that the power to compulsorily acquire any further five-year leases under the NTER be removed and that the Government implement its commitment to transition to voluntary leases with affected Indigenous peoples. In doing so the Government should ensure that existing leases are subject to the RDA.³³⁰

The Australian Government has confirmed that '[a]ll five-year leases will end in August 2012, to be replaced as soon as possible with voluntary arrangements'.³³¹ I welcome this commitment. In doing so I reiterate the concerns of APONT:

The Commonwealth Government must act decisively to re-set the relationship with Aboriginal people by working with the NT land councils to transition smoothly out of the five-year leases into voluntary leasing arrangements over communities.³³²

However, while the existing five-year leases will expire in August 2012, the sunset provision in section 6 of the NTNER Act does not apply to Part 4 of the NTNER Act (the five-year leasing provisions).³³³ Part 4 contains the provisions relating to the acquisition of rights, titles and interests in land, including the five-year lease provisions.

I encourage the Government to take appropriate action to remove the five-year lease provisions under the NTNER Act and to work with the Northern Territory land councils to transition to voluntary leases.

329 Department of Families, Housing, Community Services and Indigenous Affairs staff, Email correspondence to Australian Human Rights Commission, 14 September 2011.

330 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), rec 3.4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011).

331 Australian Government, *Stronger Futures in the Northern Territory* (June 2011), p 22. At <http://www.indigenous.gov.au/index.php/stronger-futures-in-the-northern-territory/> (viewed 29 August 2011).

332 Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (August 2011), p 33. At http://www.nlc.org.au/html/wht_pub.html (viewed 9 September 2011).

333 See *Northern Territory National Emergency Response Act 2007* (Cth), s 6.

1.7 Assessing the Reporting Period

In all, the Reporting Period has been a mixed bag for our communities trying to navigate the native title system. I have seen positive statements at the international level about the strength of our rights to our lands, territories and resources. For example, at its tenth session the Permanent Forum said it

emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of “consultation”.³³⁴

However this hasn't yet translated to a practical effect for Aboriginal and Torres Strait Islander peoples in Australia. As I discussed in this Chapter, the introduction of the new future act process under section 24JAA of the Native Title Act is an active move away from the Government trying to obtain the free, prior and informed consent to decisions that affect us.

This is not heartening news for the campaign to have governments work with us on a national strategy to give full effect to the principles of the Declaration. In last year's report I outlined my priorities for my tenure as Social Justice Commissioner. My overarching priority is to advance the implementation of the Declaration in laws, policies and programs.

While the Government has not committed to a national implementation strategy I am pleased to see the language of the Declaration is also being used by others in the native title sphere. For example, in his first reading for his private Member's Bill, Wild Rivers (Environmental Management) Bill 2011, Opposition Leader the Hon Tony Abbott said:

I should also remind the parliament of the United Nations Declaration on the Rights of Indigenous Peoples, to which the government subscribed in April last year, which provides for, amongst other things, the right of Indigenous peoples to own, use, develop and control their lands.³³⁵

Similarly the Reform Bill introduced by Senator Siewert proposes to insert a new object clause that would require governments to ‘take all necessary steps’ to implement specific articles of the Declaration. It would also require the provisions of the Native Title Act to be interpreted in a manner consistent with the Declaration.³³⁶

There have also been other positive measures from the Government – concerted efforts to ensure full participation by Aboriginal and Torres Strait Islander peoples in the CFI, a commitment to strengthen good faith requirements under the right to negotiate provisions of the Native Title Act and moves to address the uncertainty and complexity of the income tax system as it applies in the native title context.

So, are we there yet? Are we able to fully participate in all decisions that affect us? Do we have a fair and just native title system? The answer, clearly, is no.

But I have hope.

Senator Siewert's Reform Bill is an example of the legislative efforts needed to address some of the core obstacles to us being able to fully exercise and enjoy our rights to our lands, territories and resources.

334 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 36. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

335 Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 2010, p 2148 (The Hon Tony Abbott MP, Opposition Leader). At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3Ar4467%20Title%3A%22first%20reading%22%20Dataset%3Ahansardr;rec=0 (viewed 27 September 2011).

336 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A.

But we need more than legislative change. We need a cultural change.

Throughout my term I will continue to advocate for a system that allows us to fully realise our rights as set out in the Declaration and I will continue to use the Native Title Report as a tool to monitor and assess developments that impact on our rights.

1.8 Recommendations

Recommendations

1. That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the *United Nations Declaration on the Rights of Indigenous Peoples*. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. This inquiry could form part of the Australian Government's National Human Rights Action Plan.
2. That the Australian Government take steps to formally respond to, and implement, recommendations which advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, made by international human rights mechanisms including:
 - Special Rapporteur on the rights of indigenous peoples
 - Expert Mechanism on the Rights of Indigenous Peoples
 - United Nations Permanent Forum on Indigenous Issues
 - treaty reporting bodies.
3. That the Australian Government develop a 'Statement or Charter of Engagement' to complement *Engaging Today, Building Tomorrow: A framework for engaging with Aboriginal and Torres Strait Islander Australians*. This document should include the Government's commitment to be guided by the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* when engaging with Aboriginal and Torres Strait Islander peoples, including the right to participate in decision-making, and the principle of free, prior and informed consent.
4. That the Australian Government should implement outstanding recommendations from the *Native Title Report 2010* and provide a formal response for next year's Report which outlines the Government's progress towards implementing the recommendations from both the *Native Title Report 2010* and *Native Title Report 2011*.
5. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect.

Chapter 2:

Lateral violence in native title: our relationships over lands, territories and resources¹

2.1 Introduction **76**

2.2 How does the native title process contribute to
lateral violence? **85**

2.3 Case studies: communities minimising lateral
violence **107**

2.4 Conclusion **115**



2.1 Introduction

A key priority throughout my five year term as Social Justice Commissioner is to strengthen and rebuild relationships within our Aboriginal and Torres Strait Islander communities.

As Aboriginal and Torres Strait Islander peoples, we face many challenges and sadly some of the most divisive and damaging harms come from within our own communities. Ask any Aboriginal or Torres Strait Islander person and they will tell you stories of back stabbing, bullying and even physical violence perpetrated by community members against each other. When we already have so many of the odds stacked against us, it is tragic to see such destruction inflicted by our own people.

There is a name for this sort of behaviour: lateral violence. Lateral violence is often described as ‘internalised colonialism’ and according to Richard Frankland includes:

[T]he organised, harmful behaviours that we do to each other collectively as part of an oppressed group: within our families; within our organisations; and within our communities. When we are consistently oppressed we live with great fear and great anger and we often turn on those who are closest to us.²

The theory behind lateral violence explains that this behaviour is often the result of disadvantage, discrimination and oppression, and it arises from working within a society that is not designed for our way of doing things.

The *Native Title Report 2011*, in conjunction with the *Social Justice Report 2011*, will start a conversation about lateral violence and the ways that we, as Aboriginal and Torres Strait Islander peoples, can create the foundations for strong relationships with each other.

Although lateral violence is a relatively new concept and area of research in Australia, I have been told by Aboriginal and Torres Strait Islander peoples across the country that this is a critical issue within our communities. This is not an easy conversation to have, but it is one that is long overdue.

In drafting this section of the *Native Title Report 2011* and the *Social Justice Report 2011*, I have been concerned about achieving a balance between what may be seen as the promotion of yet more negative views about Aboriginal and Torres Strait Islander peoples and the need to address an issue that has serious implications for us as peoples.

I have had to think long and hard about being open and frank about the damage that lateral violence does in our communities and question whether I am further contributing to negative stereotypes of our peoples. While this is a view that some may possibly take, I believe that the risk of not doing anything about lateral violence is far greater.

In coming to this view, I’ve been encouraged by the responses I have received whenever I have raised this issue with Aboriginal and Torres Strait Islander people. There seems to be considerable agreement within our communities to confront and deal with lateral violence.

I have also been similarly challenged in how to confront this issue and get the balance right between painting lateral violence as another problem of a troubled people and explaining the contemporary system of native title without apportioning blame – both within and outside our communities.

Addressing lateral violence will require significant courage, goodwill and determination but I think the gains will be immense. While we continue to harm each other with lateral violence and while governments and industry operate within the native title system in a way that creates environments that foster lateral violence, there will

1 ‘Land, territories and resources’ is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*.

2 R Frankland and P Lewis, *Presentation to Social Justice Unit staff*, Australian Human Rights Commission, 14 March 2011.

be little progress in improving the indicators necessary to close the gap between Aboriginal and Torres Strait Islander peoples and the broader Australian community.

As I have consistently argued since becoming Social Justice Commissioner, real progress will only come from the basis of strong and respectful relationships.

There is currently very little research and formal evidence about the experience of lateral violence in our Aboriginal and Torres Strait Islander communities. To begin this process, in the *Social Justice Report 2011* I explain the theory underpinning lateral violence that supports the anecdotal evidence from our communities.

I first spoke about the concept of lateral violence and my concern that the native title process can affect the level of conflict and abuse within our communities at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference held in Brisbane in June 2011.³

It is my view that the *Native Title Act 1993* (Cth) (Native Title Act), which codifies a process that can lead to the recognition of our lands, has the potential to generate positive outcomes for our communities. But too often this potential is not realised and lateral violence fragments our communities as we navigate the native title system.

In this Chapter, I continue this conversation by examining how native title provides a contemporary system for lateral violence to be played out within our Aboriginal and Torres Strait Islander families, communities and organisations. I also report on two case studies that demonstrate how Aboriginal and Torres Strait Islander communities themselves can minimise the impact of lateral violence in native title: the Quandamooka People's native title consent determination on North Stradbroke Island in Queensland; and the *Right People for Country* Project in Victoria.

To further assist my understanding about the relationship between native title and lateral violence, I wrote to a number of native title stakeholders in July 2011 to request information about their experiences of lateral violence in Aboriginal and Torres Strait Islander communities in relation to native title processes. These stakeholders included:

- Native Title Representative Bodies (NTRBs)
- Native Title Service Providers (NTSPs)
- the National Native Title Tribunal (the Tribunal)
- the Federal Court of Australia (Federal Court)
- the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
- Attorney-General's Department.

Initial feedback from many of these organisations supports my view that lateral violence is occurring across all regions in Australia and at all stages of the native title process.⁴ Equally, I am encouraged by the innovative methods that some native title claimants and their representative organisations are developing to address lateral violence.

3 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Our Relationships in Native Title: starting the conversation* (Keynote address delivered at the Australian Institute of Aboriginal and Torres Strait Islander Studies Native Title Conference, Brisbane, 2 June 2011).

4 Responses about lateral violence and native title were received from eight NTRBs/NTSPs including Central Desert Native Title Services, Central Land Council, Native Title Services Victoria, NTSCORP Ltd, Queensland South Native Title Services, South West Aboriginal Land and Sea Council, Torres Strait Regional Authority and Yamatji Marlpa Aboriginal Corporation; and the Tribunal and FaHCSIA. I note that several organisations observed that prior to my keynote address at the AIATSIS Native Title Conference, they were not aware of the term 'lateral violence' but that the description of lateral violence was consistent with behaviours they could identify in their organisations and communities.

(a) What is lateral violence?

Lateral violence is created by experiences of powerlessness, which results in people within an oppressed group expressing their frustration and anger through engaging in conflict with each other.⁵ Text Box 2.1 sets out several descriptions of lateral violence and the ways in which we respond to a position of powerlessness and oppression.

Text Box 2.1:

Lateral violence is:

The 'expression of anomie and rage against those who are also victims of vertical violence and entrenched and unequal power relations'.⁶

A 'range of damaging behaviours expressed by those of a minority oppressed group towards others of that group rather than towards the system of oppression'.⁷

Oppressed group behaviour when an 'oppressed group is attacked and has no way of ... getting justice from the person who attacked them, or culture or institution who attacked them' feels powerless and takes this out on each other. So the 'violence ... or the redress goes sideways instead of back up the line and [the people in the group] start attacking each other'.⁸

As I discuss in the *Social Justice Report 2011*, the concept of lateral violence has its origins in the literature on colonialism from Africa⁹ and Latin America,¹⁰ as well as the literature around the oppression of African Americans,¹¹ Jewish people¹² and women.¹³ According to this literature, lateral violence is created by situations of power imbalance which then affects the identity of the people who are colonised. This occurs because colonisers establish power and control through positioning the people they colonised as inferior to themselves by devaluing their cultural identity and dismantling their previous ways of living.¹⁴

Theorists such as Paulo Friere¹⁵ and Frantz Fanon¹⁶ argue that colonised groups internalise the values and behaviours of their oppressors, leading to a negative view of themselves and their culture. This results in

5 See the *Social Justice Report 2011* for a discussion about lateral violence and an explanation about why lateral violence occurs within Aboriginal and Torres Strait Islander families, communities and organisations.

6 M Langton, 'The end of "big men" politics' (2008) 22 *Griffith Review* 11, p 3. At <http://griffithreview.com/edition-22-moneysexpower/the-end-of-big-men-politics> (viewed 21 September 2011).

7 S Gorrige, J Ross and C Forde, 'Will the Real Aborigine Please Stand Up': strategies for breaking the stereotypes and changing the conversation (2011), AIATSIS Research Discussion Paper 28, p 8. At <http://www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf> (viewed 27 September 2011).

8 G Phillips, *Healing Identity in Contemporary Australia: what is a real/traditional/grassroots Aborigine* (Australian Institute of Aboriginal and Torres Strait Islander Studies Seminar Series, Canberra, 18 May 2009). At <http://www.aiatsis.gov.au/research/seminarseries/2009-1.html> (viewed 6 October 2011).

9 F Fanon, *The Wretched of the Earth* (1963).

10 P Freire, *Pedagogy of the Oppressed* (1971).

11 S Carmichael and C Hamilton, *Black Power* (1967).

12 K Lewin, *Resolving Social Conflicts* (1948).

13 J Miller, *Toward a New Psychology for Women* (1976).

14 S J Roberts, 'Oppressed Group Behaviours: implications for nursing' (1983) 5(4) *Advances in Nursing Science* 21.

15 P Freire, *Pedagogy of the Oppressed* (1971).

16 F Fanon, *The Wretched of the Earth* (1963).

low self-esteem and often the adoption of violent behaviours. This anger and frustration about the injustices manifests itself in violence, not 'vertically' towards the colonisers responsible for the oppression but 'laterally' towards their own community.

The overwhelming position of power held by the colonisers, combined with internalised negative beliefs, fosters the sense that directing violence toward the colonisers is risky and so it is safer to attack those closest to us rather than the colonisers. As Richard Frankland explains:

[Lateral violence] comes from being colonised, invaded. It comes from being told you are worthless and treated as being worthless for a long period of time. Naturally you don't want to be at the bottom of the pecking order, so you turn on your own.¹⁷

Gregory Phillips describes lateral violence as trying to 'feel powerful in a powerless situation'.¹⁸ Acts of lateral violence establish new hierarchies of power within colonised groups that mimic those of the colonisers. That means that not only are we dealing with the harm that lateral violence causes individuals, we are also dealing with the destruction that it causes to the traditional structure and roles in our societies.

Our history of colonisation in Australia describes a similar story. Aboriginal and Torres Strait Islander peoples have been living together on our lands and with the environment for over 70 000 years. We have strong social structures, sophisticated systems of law, a rich culture and complex ways of managing our lands. In accordance with our traditional laws and customs, Aboriginal and Torres Strait Islander peoples had mechanisms to govern not only our interpersonal relationships, but trade and territorial agreements between different nations, clans and groups. Men's and women's business, Elders councils and ceremonies regulated all aspects of life and were used to resolve conflict.

When the British arrived on our lands, rather than respect our rights, laws and customs, the story of *terra nullius* was fabricated: Aboriginal and Torres Strait Islander peoples simply did not exist as fellow humans in the eyes of our colonisers. However, we did not give up our lands without a fight and there are many courageous peoples who mounted brave but ultimately unsuccessful battles for our lands. Similar to other colonised countries, Aboriginal and Torres Strait Islander peoples found there was no effective way for them to challenge the power and resources of the colonisers, and this created the foundation for lateral violence.

This history of colonisation and the resulting dispossession of our lands and waters has built an imbalance of power between us and non-Indigenous peoples.

For Aboriginal and Torres Strait Islander peoples, the continuing absence of self-determination means that colonialism is not simply an 'unjust past event' but rather an experience that continues in 'various guises'.¹⁹ Gaynor Macdonald reflects that:

Colonisation ... does not unfold in predictable ways: it is experienced differently in different times and places; it provides opportunities for some and suffering for others. Neither is it a universal story: it has had many different faces, rationales and unfoldings. It is a long, slow, often clumsy and ill-thought (if thought at all) set of intertwining and contradictory processes which engage the people involved – coloniser and colonised – over time in a variety of ways.²⁰

17 R Frankland in Creative Spirits, *Bullying and Lateral Violence*. At <http://www.creativespirits.info/aboriginalculture/people/bullying-and-lateral-violence.html> (viewed 6 October 2011).

18 G Phillips, *Healing Identity in Contemporary Australia: what is a real/traditional/grassroots Aborigine* (Australian Institute of Aboriginal and Torres Strait Islander Studies Seminar Series, Canberra, 18 May 2009). At <http://www.aiatsis.gov.au/research/seminarseries/2009-1.html> (viewed 6 October 2011).

19 G Macdonald, 'Colonizing Processes, the Reach of the State and Ontological Violence: historicizing Aboriginal Australian experience' (2010), *Anthropologica* 52, pp 49–66.

20 G Macdonald, 'Colonizing Processes, the Reach of the State and Ontological Violence: historicizing Aboriginal Australian experience' (2010), *Anthropologica* 52, p 50.

By understanding that colonisation is an on-going experience for Aboriginal and Torres Strait Islander peoples, we are able to recognise that non-Indigenous peoples continue to control the structures, processes and policies that provide access to wealth and power. This creates an environment where Aboriginal and Torres Strait Islander peoples are relatively powerless and lateral violence is able to thrive.²¹

Text Box 2.2:

Lateral violence: different words, different perspectives?

The term 'lateral violence' may be perceived as a form of physical violence. However, behaviours associated with lateral violence include gossiping, shaming of others, blaming, backstabbing, family feuding and attempting to socially isolate others.²²

Lateral violence may be described in a native title framework as 'intra- or inter-Indigenous disputes'. However, I believe that it is important for Aboriginal and Torres Strait Islander peoples to name this behaviour themselves and then to be supported to address the issues that generate lateral violence and to deal with the repercussions of lateral violence.

Lateral violence can occur in all communities. However, lateral violence is more acute within Aboriginal and Torres Strait Islander communities because it occurs as the result of our history of oppression and colonisation.

I acknowledge and agree with the input provided by several NTRBs/NTSPs and FaHCSIA that observed that disputes and conflict are central to all social systems. However, as I highlight in Text Box 2.2, lateral violence in our communities stems from our experiences of powerlessness that come from our oppression. In addition, the way lateral violence plays out in our families and communities creates a very different dimension to 'conflict' and 'disputes' because of the close community and kinship ties that exist in Aboriginal and Torres Strait Islander communities.

(b) Why is lateral violence associated with native title?

The relationship between lateral violence and native title has been broadly recognised.²³ I want to emphasise, however, that native title in and of itself does not necessarily cause lateral violence. Nor is native title the only forum within which lateral violence occurs for Aboriginal and Torres Strait Islander peoples. Rather, lateral violence is created by experiences of power and oppression, and can manifest in many different community and family situations. In this section, I explain how this experience of power and oppression plays out in native title.

21 R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 19.

22 See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011).

23 For example, see State Government of Victoria, Department of Planning and Community Development, *Indigenous Regional Forums 2010* (2010), p 9. At http://www.dpcd.vic.gov.au/__data/assets/pdf_file/0017/51254/Indigenous-Regional-Forums-2010-Report_FINAL_Double-Pages.pdf (viewed 6 October 2011). Also see the Report of the *Right People for Country* Project Committee (2011), p 6.

Lateral violence occurs in native title because the non-Indigenous process imposed by government reinforces their position of power and reignites questions about our identity. Concepts of power and identity are aggravated in native title because of the inherent contradiction between past government policies in Australia that removed our peoples from our country²⁴ and the current requirement under the Native Title Act for us to prove continuing connection to our lands and waters since the arrival of the British. For many of us, 'native title is absolutely a political (as well as cultural, economic and social) issue not just a legal one, and one that lies at the core of relations between [us] and the wider Australian society' (emphasis in original).²⁵

Native title can reinforce the imbalance of power between non-Indigenous peoples and Aboriginal and Torres Strait Islander peoples as well as positions of authority within our communities. For government and industry, the native title process can be used to affirm their control, access to and use of lands and resources. Within our communities, native title can be used to promote positions of authority as we deal with our history of powerlessness and oppression, and questions about our identity.

Richard Frankland, Muriel Bamblett, Peter Lewis and Robin Trotter describe the experience of native title in Victoria in the following words:

In the mid 1990s came some of the real fuel to the flame of internal conflict, the issue of Native Title. The uncertainty of the direction of the law itself created disharmony. At first everyone I spoke to in Victoria was excited: it wasn't land rights but it was a chance for some recognition of ownership. What began with hope soon began to become a tool which fractured our tribes and communities in a way not seen before. Siblings, cousins, Uncles, Aunties – families began to be driven apart from each other. In some cases they would not even talk to each other.²⁶

(i) Relationships of power within native title

The High Court decision on native title (the *Mabo* decision²⁷) recognised our connection to our lands and waters by creating a unique form of land tenure that attempts to intersect our traditional laws and customs and Australian common law and legislation.²⁸ Nonetheless, as Tony McAvoy and Valerie Cooms observe from their experience with native title in southern Queensland, the Native Title Act 'continues to force Indigenous people to fit their own concepts of land tenure into an imposed non-Indigenous conceptualisation of what their societies and traditional laws and customs should be.'²⁹

The resolution of native title involves multiple groups with various interests in land and water. David Ritter notes that this includes complicated 'questions of governance and law associated with Indigenous affairs,

24 The Protection Acts that governed the removal of Aboriginal and Torres Strait Islander peoples can be found at AIATSIS, *To Remove and Protect*, <http://www1.aiatsis.gov.au/exhibitions/removeprotect/index.html> (viewed 21 September 2011).

25 D Martin, T Bauman and Jodi Neale, *Challenges for Australian Native Title Anthropology: practice beyond the proof of connection* (2011), AIATSIS Research Discussion Paper 29, p 6. At <http://www.aiatsis.gov.au/research/documents/DP29NTRU2011.pdf> (viewed 27 September 2011).

26 R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 25.

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

28 See D Martin, 'Designing Institutions in the 'Recognition Space' of Native Title' in S Toussaint (ed), *Crossing Boundaries: cultural, legal, historical and practice issues in native title* (2004), p 68.

29 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 6. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

planning, infrastructure, land, water, mining, agriculture, fishing, heritage, judicial administration and so on'.³⁰ Furthermore, within our communities, the

multiple layers of relationships and connections to country are demanding realities of the native title process [in areas] where removals were so pervasive. They challenge anthropological interpretations, give rise to conflict, and raise many problems ... in dealing with what can be highly emotionally charged issues for [native title] claimants.³¹

Within this context of non-Indigenous land tenure and multi-layered interests in land, the Native Title Act places the onus on us to prove a continuing relationship with our country rather than requiring government (or other groups that assert interests in the claimed area) to disprove the native title claim. As I note in Chapter 1, concerns about this requirement have been recognised at the international level by the Committee on the Elimination of Racial Discrimination, which stated in September 2010:

Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by Indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5).³²

It is also my view that this approach to resolving native title is inconsistent with the Preamble to the Native Title Act, which states that the intent of the legislation is to

rectify the consequences of the past injustices ... to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

For many of us, the frustratingly complex and resource intensive experience to prove our native title has reinforced our feelings of being dispossessed of our lands and disempowered by non-Indigenous structures, processes and policies. Within this environment, we engage in lateral violence to try and reclaim authority in this cycle of oppression and denial of our rights in our lands.

Frankland, Bamblett, Lewis and Trotter in their Report, *This is 'Forever Business: A Framework for Maintaining and Restoring Cultural Safety in Aboriginal Victoria*, quote a Koorie worker as stating:

I think partly it's the way institutions, governments and others structure things, I mean look at the way Native Title for example is, has contributed to the conflict. It has encouraged people to go within themselves more and look for difference, as opposed to connection.³³

30 D Ritter, *Contesting Native Title: from controversy to consensus in the struggle over Indigenous land rights* (2009), p 74.

31 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 10. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

32 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/15-17 (2010), para 18. At: <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 30 August 2011).

33 R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business: A Framework for Maintaining and Restoring Cultural Safety in Aboriginal Victoria* (2010), p 79.

(ii) Using identity as a weapon of lateral violence in native title³⁴

Identity and in particular, notions of ‘authenticity’ and ‘legitimacy’ have become powerful weapons in lateral violence.

An AIATSIS Research Discussion paper by Scott Gorringer, Joe Ross and Cressida Fforde based on a workshop with Aboriginal and Torres Strait Islander participants elaborates on the link between lateral violence and identity, with one participant stating:

Lateral violence comes from identity problems. Identity is the sleeper. If you have a strong spirit all the rest of you is supported. When we don’t know who we are, something else jumps in to take that place.³⁵

Identity for Aboriginal and Torres Strait Islander people in the context of native title is multifaceted; it does not simply involve answering a question about our name and place and date of birth. Rather, native title requires us to confront our identity and family history by answering questions about who we are, where we and our ancestors are from, what country we can and/or can’t speak for, and what potential benefits we may access.

These questions about our identity may be further complicated in places where:

- we have been removed from our country by past government policies
- there are overlapping native title claims or disputes about boundaries
- there are several layers of land rights and/or cultural heritage legislation
- there are mining or other activities that affect land tenure and/or provide financial or other benefits to the native title claim group.³⁶

Native title challenges our notion of identity as Aboriginal and Torres Strait Islander peoples on two dimensions. First, native title questions our relationship to our lands by making us prove where we are from, despite the history of colonialism that has taken many of us from our country. And second, native title tests our relationships with each other by questioning who we are related to, although many of us have been removed from our families. Again, the responsibility and burden to provide this information is placed on us as Aboriginal and Torres Strait Islander peoples despite state governments holding our families’ historical records.

This requirement to justify and explain our identity threatens our connection to our country – the foundation of our social, economic, cultural and spiritual life. It also creates the opportunity to generate new elements of authority and legitimacy within our communities, as some of us participate in lateral violent behaviours such as gossiping about whether a person or family in our community is Aboriginal and/or Torres Strait Islander ‘enough’.

By pulling other people in our community down in this way, we assert our own position of authority within the native title system ‘because I’m more Aboriginal than you’. This is how we use identity as a weapon of lateral

34 S Gorringer, J Ross and C Forde, *‘Will the Real Aborigine Please Stand Up’: strategies for breaking the stereotypes and changing the conversation* (2011), AIATSIS Research Discussion Paper 28, p 8. At <http://www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf> (viewed 27 September 2011).

35 S Gorringer, J Ross and C Forde, *‘Will the Real Aborigine Please Stand Up’: strategies for breaking the stereotypes and changing the conversation* (2011), AIATSIS Research Discussion Paper 28, p 8. At <http://www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf> (viewed 27 September 2011).

36 L Kelly and L Behrendt, ‘Creating Conflict: case studies in the tension between native title claims and land rights claims’ (2007), *Journal of Indigenous Policy: Indigenous land: the war on terra* Issue 8, pp 73–93. Also see T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

violence;³⁷ we raise doubts about the identity and authenticity of other people to gain authority and legitimacy within our community.

As I mentioned earlier, there is an inherent conflict between the need to prove that our laws and customs remain relatively unchanged, and the need for our culture to have adapted to survive the experience of colonialism over the past two centuries.³⁸ This requirement for us to adapt to the experience of colonialism has reshaped our identity and this also is used as a weapon for lateral violence.

I discuss some of the ways in which the interaction between power, identity and lateral violence can play out in the native title process in the following section.

37 S Gorringe, J Ross and C Forde, *'Will the Real Aborigine Please Stand Up': strategies for breaking the stereotypes and changing the conversation* (2011), AIATSIS Research Discussion Paper 28, p 8. At <http://www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf> (viewed 27 September 2011).

38 Y C Paradies, 'Beyond Black and White: essentialism, hybridity and Indigeneity' (2006) *Journal of Sociology* 42 (355), pp 356, 361.

2.2 How does the native title process contribute to lateral violence?

At the outset of this discussion, I want to distinguish between native title, which recognises our rights and interests in our lands, and the native title process that is enacted in the Native Title Act. Native title itself provides immense benefits to Aboriginal and Torres Strait Islander peoples; it is the *process* that we need to follow to prove our native title that provides opportunities for lateral violence.

The process to recognise native title for Aboriginal and Torres Strait Islander peoples as set out in the Native Title Act is shown in Diagram 2.1. Although each of the stages in this process can generate lateral violence through provoking questions about power and identity, I focus only on the following stages of the native title process to highlight ways that lateral violence can occur:

- completing a native title claimant application to lodge in the Federal Court³⁹
- mediating a native title claim
- establishing a Prescribed Body Corporate (PBC).⁴⁰

I also consider how the process of negotiating Indigenous Land Use Agreements (ILUAs) and alternate land processes, such as state and territory land rights and cultural heritage legislation, can contribute to lateral violence within Aboriginal and Torres Strait Islander communities.

It is important to understand that while this Report is mainly looking at lateral violence within our families and communities, there are also many players who operate in the native title system in ways that can enable lateral violence. Government, industry and organisations set up to assist the native title process can – often unknowingly – perpetuate our experiences of power imbalance and identity conflict.

For example, McAvoy and Cooms describe the fixed policy position of the Queensland government in resolving native title in southern Queensland in 2005–2008 in the following way:

The immovable pillar in the whirlpool of law and policy which describes native title in southern Queensland has been the position of the State of Queensland. ... [T]he Queensland Government would not give priority to resourcing applications that are the subject of overlaps, thus giving it substantial control over the matters in which it would engage in substantive negotiation.⁴¹

As the representative organisations for Aboriginal and Torres Strait Islander peoples, NTRBs/NTSPs need to negotiate the interests of native title claim groups, government, industry and the Federal Court. This negotiation process can be complicated by the funding arrangements for NTRBs/NTSPs.⁴² NTRBs/NTSPs can also ‘be required to faithfully represent conflicting interests’ within our communities as they have the role to legally represent native title holders and also the conflicting role to be gatekeepers of aspiring claimants.⁴³

39 This may also be called a Form 1: native title determination application: claimant application and is available on the Federal Court of Australia website. At http://www.fedcourt.gov.au/fff/fff_NTRegulations_1.html (viewed 9 September 2011).

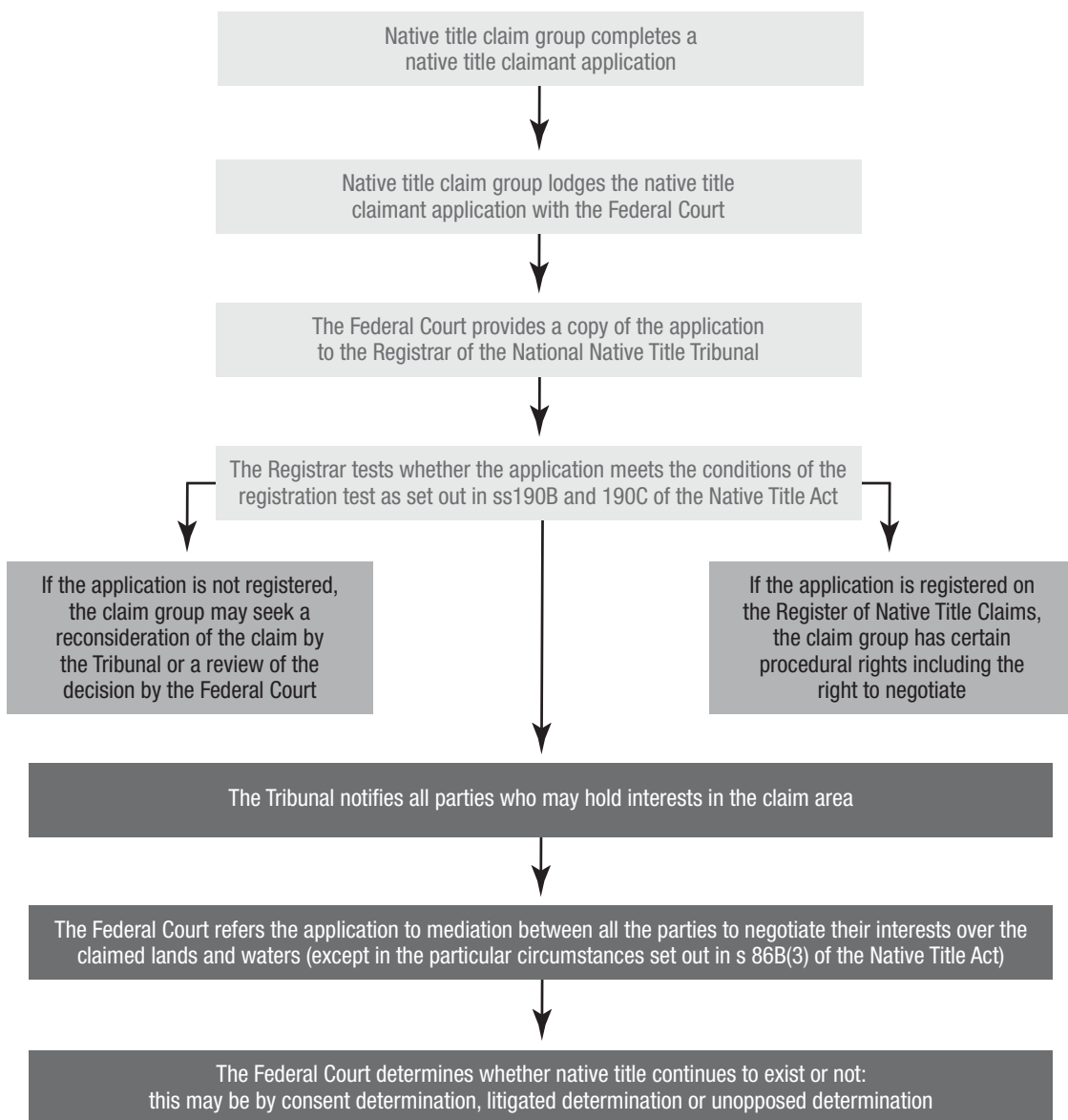
40 A Prescribed Body Corporate also may be referred to as a Registered Native Title Body Corporate (RNTBC), which is described in the *Native Title Act 1993* (Cth), s 253.

41 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 8. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

42 Also see discussion by T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, pp 3–4. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011), where they explain the differences between NTRBs and NTSPs, and how NTSPs are vulnerable to being manipulated by government because they can have their funding withdrawn at short notice.

43 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 2. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

Diagram 2.1:
The process of a native title claimant application⁴⁴



⁴⁴ Adapted from the brochure by the National Native Title Tribunal, 'What happens when there's a native title application?' (2010). At <http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Brochures.aspx> (viewed 20 September 2011).

Larissa Behrendt and Loretta Kelly, in their study of conflict created by native title, talk about the fundamental conflict that is at ‘the heart of the relationship between a NTRB and a claimant group. The NTRB is the *representative* of its client (the claimant group), yet it also *finances* its client’ (emphasis in original).⁴⁵ This conflict can lead to disputes between NTRBs and native title claim groups.

The requirement for native title claim groups to interact with a wide range of stakeholders with different interests (including government, industry, the Federal Court, the Tribunal and native title organisations who each have particular statutory functions, policy positions and funding arrangements) creates a complex web of relationships that make it feel like it’s ‘us against the world’. This large number of interests that need to be satisfied can further undermine our capacity to assert our authority in the native title process.

(a) Completing a native title claimant application

Prior to lodging a native title claimant application in the Federal Court, a claim group seeking native title must collate information to complete an application including:⁴⁶

- a description of the native title claim group
- the boundaries of the claimed lands and waters
- a list of claimed native title rights and interests, which are ‘readily identifiable’ and can be established *prima facie* by members of the claim group
- the factual basis upon which the native title claim group has a connection to the claim area that has continued since sovereignty
- the ability to demonstrate an on-going connection with the claim area by members of the claim group.

Members of the native title claim group also must authorise the applicant to make the native title determination application and ‘to deal with matters arising in relation to it’ on behalf of the group.⁴⁷ This involves the claim group agreeing on and applying a decision making process, either in accordance with their traditional laws and customs or by an agreed and adopted process.⁴⁸

The information in the application must be sufficient to meet the requirements of the registration test, which is explained in Text Box 2.3.

Text Box 2.3:

The registration test

Registration of native title claimant applications is an administrative decision-making function undertaken by the Registrar of the Tribunal. The decision to accept an application on the Register of Native Title Claims (RNTC) depends on whether the application satisfies all of the conditions set out in sections 190B and 190C of the Native Title Act. This process is referred to as the ‘registration test’.

45 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 33.

46 See the *Native Title Act 1993* (Cth), ss 190B and 190C, for the complete information required for a native title claimant application.

47 See the *Native Title Act 1993* (Cth), s 251B.

48 Alternatively, a NTRB or funded NTSP may certify that the applicant has been authorised and the application identifies all the other persons in the native title claim group in accordance with the *Native Title Act 1993* (Cth), s 203BE.

The registration of an application on the RNTC confers statutory benefits for the native title claim group including a right to negotiate about proposed future activity on the claim area.⁴⁹

If the native title claimant application does not meet the conditions of the registration test, the applicant may seek either a reconsideration of the claim by the Tribunal or a review of the decision by the Federal Court.⁵⁰

Aboriginal and Torres Strait Islander peoples view the registration test as a non-Indigenous process that tests the legitimacy of our native title claim, our culture and our identity. This can play out in our communities in the following ways:

- A native title claimant application that does not meet the conditions of the registration test creates an opportunity for non-Indigenous people and other community groups to question the legitimacy of the native title claim group.
- In areas of future act activity, a registered claim provides a legitimate position to negotiate potential benefits with industry/mining companies etc.

Either of these scenarios can build divisions within our communities that promote lateral violence.

I am aware that the level of information required for a native title claim group to meet the conditions of the registration test means that a claim group needs access to legal advice and anthropological/historical research.⁵¹

For Aboriginal and Torres Strait Islander peoples, the requirement to gather this information and to complete the application can be highly stressful. Yet, if we want to have our native title application registered, we must describe our relationships to each other and our connection to our lands in a way that meets the requirements of the registration test.

In order to provide this information in the appropriate legal format and navigate the unfamiliar system, we need other people such as lawyers, anthropologists and historians to help us. It is scarcely surprising, then, that the process of completing a native title claimant application can make us feel even more oppressed and dispossessed of our land and our identity.

Some of the issues that may contribute to lateral violence within our communities when we complete a native title claimant application are:

- agreeing on the membership of the native title claim group
- deciding who will be the applicant
- determining the boundaries of the claim area.⁵²

Addressing these issues produces positions of authority and inquiries about identity within our communities that can escalate latent conflict, as described in Text Box 2.4, into a cycle of lateral violence.

49 National Native Title Tribunal, *National Report Card – September 2010* (2010). At http://www.nntt.gov.au/Publications-And-Research/Publications/Pages/Corp_publications.aspx (viewed 14 September 2011).

50 See the *Native Title Act 1993* (Cth), ss 190E and 190F.

51 National Native Title Tribunal, *Native title claimant applications: a guide to understanding the requirements of the registration test* (2008). At <http://www.nntt.gov.au/Applications-And-Determinations/Pages/Information-Material.aspx> (viewed 23 August 2011).

52 Graeme Neate, the President of the Tribunal, also comments that Tribunal members and staff have observed disputes within and between groups of Aboriginal people in relation to the membership of native title claim groups, the areas covered by some claims and the progression of claims or other negotiations by the named applicants – see G Neate, President of the National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 2 August 2011.

Text Box 2.4:

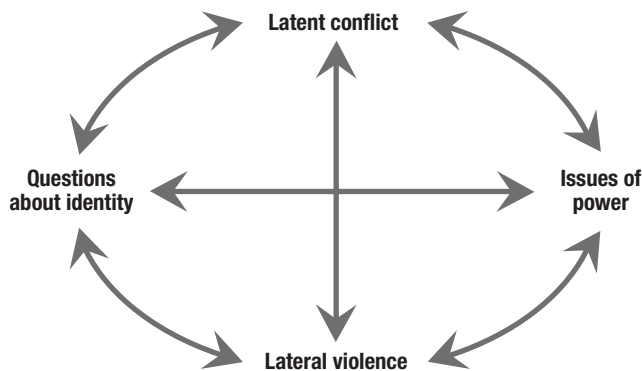
Latent conflict is:

The antecedents of conflict behaviour that can trigger fights when the right conditions occur.⁵³ Examples of latent conflict include intra- and inter-family disputes; economic disparity; and cultural issues, which can include historical and contemporary issues for Aboriginal and Torres Strait Islander peoples.⁵⁴

Native title provides a platform for latent conflict to develop into lateral violence because completing a native title claimant application requires families, communities and organisations to meet to decide fundamental questions about their identity and where they fit within the native title claim group. As I show in Diagram 2.2, these issues of power and questions about identity feed into the cycle of latent conflict and lateral violence.

Diagram 2.2:

The cycle of latent conflict and lateral violence



Native title requires individuals and families to meet to describe their connection to country, identify their ancestors and decide the applicant; these meetings provide a forum which can add 'fuel to the fire' in communities where feuds between individuals and families are already a source of conflict.⁵⁵ Each of these issues can create and contribute to positions of power within our communities and in this way, provide a catalyst for lateral violence.

53 South-Western Cengage Learning, *Conflict in Organizations* (no date). At <http://www.swlearning.com/management/champoux/powerpoint/ch11.ppt> (viewed 1 September 2011).

54 T Bauman and J Pope (eds), *Solid work you mob are doing: case studies in Indigenous dispute resolution and conflict management in Australia* (2009), p xix.

55 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 31.

(i) Who is in the native title claim group?

The question of who is and who is not included in a native title claim group can raise fundamental questions about our identity in relation to our family histories. This can be extremely confronting, hurtful and emotional; particularly in situations where we have been removed from our lands, taken from our families and/or are relying on stories told by our deceased parents and grandparents.⁵⁶ It can also generate positions of authority and legitimacy within our communities based on whether a person or family is accepted as part of the native title claim group.

The potential consequences that can flow to our communities because of the way a native title claim group is described are outlined in Text Box 2.5.

Text Box 2.5:

Membership of the native title claim group

A native title claim group can be described in a native title claimant application either by naming all the persons who are in the claim group or by describing the persons who are in the claim group.⁵⁷ A common way to describe a native title claim group is by reference to named apical ancestors⁵⁸ from whom members of the claim group are descended.⁵⁹

Describing a native title claim group as descendants of named ancestors can have the following consequences for our communities:

- The decision about who are the apical ancestors may be agreed by members of our communities. However, it is common for apical ancestors to be identified by research undertaken by anthropologists and historians; especially where there is dispute within our communities over family histories. This can take ownership of who belongs in our claim group away from us. As a result, many of us may feel further disempowered by the native title process as our notions of family are challenged.
- Describing our relationship to an apical ancestor may force us to choose only one side of our family, such as only our mother or grandmother or father or grandfather. If we seek to have our relationships to more than one ancestor recognised and be part of more than one native title claim group, we may be accused of 'claiming'. When we choose to identify as a member of only one claim group, we potentially forfeit our relationships to our other ancestors and our rights to their country. This situation can create divisions within our families when siblings choose to identify with different ancestors for the purposes of native title.

Our acceptance or denial into a native title claim group not only impacts on our identity but also can flow on to other areas of our lives. For example, if a person is included as a member of a native title claim group, they may be considered a legitimate person to speak for country, cultural heritage and native title. Conversely, in

56 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: Implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 9. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

57 See the *Native Title Act 1993* (Cth), s 190B(3).

58 An apical ancestor is a common ancestor from whom a claim group traces its descent.

59 National Native Title Tribunal, *Native title claimant applications: a guide to understanding the requirements of the registration test* (2008). At <http://www.nntt.gov.au/Applications-And-Determinations/Pages/Information-Material.aspx> (viewed 23 August 2011).

situations where an individual or family is denied membership to a native title claim group, other members of the community and non-Indigenous peoples may question whether they are legitimate Aboriginal and/or Torres Strait Islander peoples; their capacity to undertake cultural heritage work; their right to conduct ‘welcome to country’ ceremonies; and/or their ability to access training and employment opportunities designated for Aboriginal and Torres Strait Islander peoples.

Contending with these issues around our identity can be extremely divisive for our communities; we use tactics such as bullying, fighting, gossiping and intimidation to assert authority within our native title claim group and to ensure we have access to any benefits that flow from membership in the claim group.

Several NTRBs/NTSPs observed that questions about people’s family and status to speak as a traditional owner for their country was a common dispute that tended to escalate lateral violence.

For example, the South West Aboriginal Land and Sea Council wrote:

Native title has often been discussed in terms of breaking up families rather than bringing them together. There is a tendency among some members of the community who believe they must block out certain members or entire families who seek to assert connection to a claim area whether or not that connection can be proved. This tendency leads to a display of lateral violence in all its forms.

We have experienced examples of lateral violence that include both nonverbal innuendos through to physical altercations. These behaviours are exhibited in public forums when we hold meetings to explain various native title related processes. On occasion, we are spectators to lateral violence which is a debilitating experience both from our viewpoint and that of the claimants and especially so for the person or persons to whom it is directed.⁶⁰

(ii) Who is the applicant and how can they contribute to lateral violence?

The role of the applicant is described in Text Box 2.6. The person or people who are the applicant usually assume a leadership role within the native title claim group. As such, the applicant can build the cohesion of the claim group through including members and enabling them to participate in decision-making. Alternatively, the applicant can create the opposite outcome, either through engaging in lateral violence behaviours or by responding to lateral violence from the native title claim group.

Text Box 2.6: The applicant

The applicant in a native title claim can be either a single person or a number of people who are members of the native title claim group. The applicant must be authorised by the native title claim group to make the application and ‘deal with matters arising in relation to it’ on behalf of the claim group.⁶¹

60 M Aranda, Principal Legal Officer, South West Aboriginal Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2011.

61 See the *Native Title Act 1993* (Cth), ss 190C(4) and 251B.

McAvoy and Cooms outline three broad descriptions of people who are the applicant (these are objective generalisations and not a value-laden appraisal) and observe that the applicant is most productive when representatives from each group below are included:

1. Older people who have had limited formal education and little or no involvement in Aboriginal organisations but who are appointed as the applicant out of respect for their seniority and/or knowledge of law.
2. People who may have limited formal education but who have been exposed to a range of community politics that equips them to get the most out of the native title processes. This group can be subdivided into those who work with native title processes to access benefits, and those who try to stifle native title processes.
3. Younger people who have a good level of formal education and see that collaboration and negotiation is the most effective and efficient way to progress their native title claim. This group is often combative but also progressive and not obstructionist.⁶²

I believe that the applicant can play a key leadership role in creating a cohesive community and unified native title claim group. Tony McAvoy and Valerie Cooms observe the benefits of the applicant including people with diverse backgrounds and skills because their ability to ‘function consistently as an effective decision-making group’ is essential to effectively negotiate the native title process.⁶³ The applicant can also use their authority to make decisions that positively influence how our communities deal with native title. For example, I am aware of instances where the applicant made a considered decision to include particular families in a claim group to reduce the likelihood of their community becoming divided between ‘those within’ and ‘those outside’ the claim group.

Consistent, transparent and inclusive decision-making by the applicant can minimise the potential for lateral violence within the native title process. In contrast, if a person who is the applicant (and/or their family) is perceived to be unfairly benefiting from their role or excluding individuals/families from the native title process, then this can create divisions between the persons who are the applicant and/or the applicant and the native title claim group, and instigate lateral violence within the community.

Divisions between the persons who are the applicant can also play out in the process of registering an ILUA. The recent decision by Justice Reeves in the Federal Court, *QGC Pty Ltd v Bygrave (No 2)*⁶⁴ reinterprets the role of the applicant as a party to an ILUA (area agreement): see Text Box 2.7. While the intent of this decision may have been to clarify particular requirements for persons who are the applicant in relation to ILUAs (area agreements), it also has implications in terms of lateral violence in our communities. Disagreement about an ILUA between the persons who are the applicant may not prevent the registration of an ILUA (area agreement), but as I discuss later in the section on negotiating ILUAs, these divisions are likely to reflect a broader dispute within the native title claim group.

62 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 10. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

63 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008), p 10. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

64 *QGC v Bygrave (No 2)* (2010) 189 FCR 412.

Text Box 2.7:

QGC Pty Ltd v Bygrave (No 2)

In *QGC Pty Ltd v Bygrave (No 2)*, Justice Reeves considered the implications on the registration of an ILUA (area agreement) when one of the persons who comprise the applicant refuses to sign an agreement.

His Honour found that:

- The Registered Native Title Claimant (RNTC) must be a party to the ILUA.
- This could be achieved by naming one or more of those whose names and addresses appear on the Register of Native Title Claims as the applicant.
- Those so named do not need to assent to, or sign, or consent to becoming a party to, the agreement.⁶⁵

This means that there is no obligation for the applicant to act collectively as a mandatory party to an ILUA⁶⁶ and there is no requirement for any of the parties to sign an ILUA.⁶⁷

Prior to this decision, the Registrar of the Tribunal had interpreted s 24CD of the Native Title Act to mean that the RNTC is all the persons who comprise the applicant. The RNTC must be a party to an ILUA and so all persons who are the applicant need to sign an ILUA.

Justice Reeves argued that this approach would allow an individual person to frustrate or veto the making of an ILUA.⁶⁸ However, the Tribunal's view is that s 66B(2) of the Native Title Act enables the removal of a person as a member of the applicant/RNTC if they are acting outside of their authority in an ILUA context.⁶⁹

(iii) Defining the boundaries of the native title claim area

The Native Title Act requires a native title application to identify the lands and waters subject to the native title claim.⁷⁰ There are several complexities for Aboriginal and Torres Strait Islander peoples in describing the boundaries to our lands and waters.

The first is that native title requires us to describe our country in terms of non-Indigenous boundaries, a process that resembles us trying to fit a square peg into a round hole! Again, the onus is on us to adapt the way we define our traditional country into terminology that is acceptable to the legal native title construct. This can create fights in our communities as we are forced to put unambiguous contemporary boundaries around our lands and waters that do not (and cannot) represent the complex cultural ways that we can look after, inherit and occupy country. It can also start arguments about who is allowed to speak for particular places

65 National Native Title Tribunal, *Native Title Hot Spots* (2011) Issue 34, p 11. At <http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Pages/search.aspx> (viewed 6 October 2011).

66 *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412, 87.

67 *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412, 101.

68 *QGC Pty Ltd v Bygrave (No 2)* (2010) 189 FCR 412, 90.

69 National Native Title Tribunal, *Native Title Hot Spots* (2011) Issue 34, p 14. At <http://www.nntt.gov.au/News-and-Communications/Newsletters/Native-title-Hot-Spots-archive/Pages/search.aspx> (viewed 6 October 2011).

70 See the *Native Title Act 1993* (Cth), s 190B(2).

on country and these artificial boundaries can divide families. As many of us do not permanently live on our country,⁷¹ this conflict tends to play out between those who live on and care for country and those who do not.

Behrendt and Kelly, in their study of native title creating conflict, describe fighting over boundaries as follows:

The oral history of the claimants may state that a particular line marks the correct boundary between it and the neighbouring clan or nation. This may be inconsistent with the determination of the anthropologist using other sources. There may also be differing views within the one claimant group as to the boundary line.⁷²

The second difficulty in identifying the boundaries to our native title claim is the need to negotiate shared country, which can create conflict between neighbouring or overlapping native title claim groups. Kevin Smith, the CEO of Queensland South Native Title Services (QSNTS) observes that competing against each other to have our native title recognised is emotional and this is expressed through intra and inter-Indigenous disputes which can result in lateral violence.⁷³

This experience is heightened in areas such as southern Queensland where the history of colonisation and dispossession of land has been particularly harsh for Aboriginal peoples.⁷⁴ This has produced a native title landscape where, in mid-2004, 29 of the 30 native title claims in the region were wholly or partially subject to overlap with at least one other claim.⁷⁵ In Chapter 4, I discuss the process undertaken by QSNTS to implement a Legal Services Strategic Plan to reduce these overlaps in 2005–2008.

In summary, the process to complete a native title claimant application can contribute to lateral violence in our communities because we are required to adapt our identity, relationships and notions of land and culture into the non-Indigenous construct of native title. This aggravates our feelings of disempowerment and dispossession, and challenges to our identities and our connection to country become weapons of lateral violence that we can use against each other.

I note that lateral violence created by these issues may be addressed at this stage of the native title claim process or remain unresolved. The implications of not resolving these matters are discussed in the following section on mediating a native title claim.

(b) Mediating a native title claim

A native title application on the Register of Native Title Claims must be referred for mediation by the Federal Court.⁷⁶ The purpose of mediation under the Native Title Act is set out in Text Box 2.8.

71 The Australian Bureau of Statistics notes that, at June 2006, most Aboriginal and Torres Strait Islander people lived in non-remote areas with an estimated 32% of people living in major cities, 43% in regional areas, and 25% in remote areas. See Australian Bureau of Statistics, *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples* (2010). At <http://www.abs.gov.au/AUSSTATS/abs@.nsf/lookup/4704.0Chapter210Oct+2010> (viewed 15 September 2011).

72 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 29.

73 K Smith, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 1 August 2011.

74 K Smith, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 1 August 2011.

75 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 3. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

76 See the *Native Title Act 1993* (Cth), s 86B.

Text Box 2.8:

The purpose of mediation

The purpose of mediation is to assist parties to the claim to reach agreement on the existence of native title in relation to the claim area and to decide, for example:

- who holds or held the native title
- the nature and extent and manner of exercise of the native title rights and interests
- the nature and extent of any other interests.⁷⁷

Mediation can also provide a forum to discuss issues arising from latent conflict.

In this section, I consider two aspects of lateral violence within the mediation of a native title claim. The first is how does mediating a native title claim contribute to lateral violence within our families and communities? And the second aspect is how can lateral violence delay the resolution of native title claims?

(i) How does mediating a native title claim contribute to lateral violence?

Mediating our native title claim can contribute to lateral violence when our expectations about what can be achieved by native title are not realised. There are several aspects to this:

- the number of and varied interests in land that we need to negotiate
- the precedence of non-Indigenous interests over our interests
- both our expectations and the expectations of non-Indigenous/government parties about what can be achieved through the mediation of the native title claim
- mediation provides the opportunity to bring people together at meetings, which creates the space for latent conflict (both for ourselves and non-Indigenous groups/government/industry) to become lateral violence
- the complexity of negotiating within the legal native title framework and the timelines of the Federal Court.

Mediating a native title claim can be the forum where the 'valve' of the 'pressure cooker' is released in our communities as we work through these issues.

In the more settled areas of Australia, native title usually acknowledges only non-exclusive rights and interests in land. This means that mediating our native title claim involves negotiating with a substantial number of groups who also assert an interest in the claim area. These groups can include:

- state, federal and local governments
- Aboriginal and Torres Strait Islander respondents
- pastoralists
- mining companies
- telecommunications, electricity and water authorities
- fishing associations and beekeeping associations.

77 See the *Native Title Act 1993* (Cth), s 86A. This does not include a proceeding that involves a compensation application.

Clearly, the interests and activities undertaken on the claim area by these groups are diverse. For example, beekeepers are likely to have minimal impact on a native title claim area in comparison to open-cut mining activity that can devastate our land. These groups also have different levels of 'power' at the mediation table. For example, a claim area that is subject to exploration and mining licenses is highly valued by both the mining industry and governments, who may combine their interests in applying pressure on us during the mediation of a native title claim.

Despite these diverse activities and unequal interests in a claim area, often all of these external stakeholders have an equal opportunity to participate in mediating our native title claim.⁷⁸ It is easy in these situations for our interests to be suppressed by the many other groups whose interests take precedence over native title interests in the claim area. Again, we are consigned to a position of powerlessness in mediating our native title claim. To deal with our powerlessness, we enact lateral violence.

As I have argued throughout this Chapter, native title is a non-Indigenous structure that does not reflect our way of doing things. While we have a seat at the negotiation table, the process of mediating our native title claim simply reinforces that we are operating in a framework that makes us feel powerless. Our capacity to effectively participate in mediation is further exacerbated by the requirement for us to understand technical legal language and follow complicated rules and processes set out in the Native Title Act. Many of the people who assist us to manage our native title mediation are non-Indigenous, including a significant number of native title lawyers, anthropologists and mediators. As much of our authority is expressed through or facilitated by the lawyers, anthropologists and mediators, these processes can reinforce feelings of oppression and result in lateral violence within our families and communities.

Kevin Smith notes that particularly since the demise of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004, the absence of dedicated structures and programmes designed to address family, community, health and education issues means that these issues are now regularly raised in native title community meetings. Discussions around these underlying issues invariably compound the already complex and sensitive native title dialogue within our communities. Native title becomes both the space and focus for the outlet of frustrations concerning these broader issues.⁷⁹

Several other NTRBs/NTSPs also observed that native title mediation meetings can be taken over by unresolved community (and government) issues.⁸⁰ Initially, this can be because native title meetings provide the only forum for these issues to be discussed. As mediation progresses, however, these 'non-native title' issues can become part of the 'package' that is negotiated as part of the resolution of the native title claim. Addressing these issues can be an important part of rebuilding trust with other parties – including government – but can also cause anxiety in our communities when the mediation process drags on for a long time or when the broader community feels excluded from making decisions about issues that may also affect them.

Governments also have expectations about what native title can achieve for Aboriginal and Torres Strait Islander peoples. I agree with and commend the Attorney-General's aim that native title should provide

78 The Attorney-General's Department is undertaking a review of the Native Title Respondent Funding Scheme. The purpose of the review is to examine the efficiency and effectiveness of existing arrangements for financial assistance to native title respondents and to develop a revised interest test for the determination of exceptional circumstances for the provision of funding for legal professional fees to native title respondents. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialassistancebytheAttorney-Generalinnativetitlecases (viewed 1 September 2011).

79 K Smith, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 1 August 2011. Also see R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 44.

80 Also see D Ritter, *Contesting Native Title: from controversy to consensus in the struggle over Indigenous land rights* (2009), p 42.

'practical benefits' and be an 'avenue of economic development'.⁸¹ But this can lead to native title being used to resolve *all* socio-economic issues affecting our communities, particularly where the benefits are basic citizenship and human rights that we should be receiving without having to negotiate these rights. As I discuss in the following section on establishing PBCs, when expectations by governments and ourselves are not realised by our determination of native title, this creates yet another layer of frustration. For many of us, it is another reason to blame each other.

The case management of our native title claims within the Federal Court can also contribute to pressures put on us. As I report in Chapter 1, some native title representative bodies have welcomed the effective management and resolution of claims by the Federal Court since the *Native Title (Amendment) Act* in 2009, and others have remarked that the process to resolve claims has remained largely unchanged. However, Kevin Smith has raised concerns that the 'new Federal Court approach has placed another layer of complexity upon an already burdensome workload' in Queensland.⁸² This includes setting designated timeframes for the resolution of native title claims with an indicative timeframe of ten years to resolve all 120 existing claims in the Queensland system and five years for new claims.⁸³

While I commend the faster resolution of native title claims, I am concerned about the burden that is being placed on our communities and NTRBs/NTSPs, and the conflict that can result from this level of pressure. I am also troubled by the financial and emotional cost to the members of claim groups in terms of attending mediation meetings. For instance, prior to the Quandamooka native title consent determination there were more than 60 mediation conferences convened under the Native Title Act over a period of 18 months.⁸⁴ This was in addition to the parties meeting separately to resolve specific issues.⁸⁵

The level of commitment to mediating a native title claim is particularly onerous and challenging on claim group members who, in addition to attending meetings, also maintain full-time employment and have other family/community responsibilities. In most cases, claim group members are the only people not paid to participate in the mediation process and so need to take leave from their regular employment to mediate their native title claim. Clearly, this can be stressful and financially draining on our families and communities.

The difficulties of mediating our native title with different interest groups in an unfamiliar process inevitably contribute to positions of power and questions about identity that then fuels lateral violence in our communities.

I now discuss how lateral violence can delay us in resolving our native title.

-
- 81 R McClelland, *Negotiating Native Title Forum* (Speech delivered at the Negotiating Native Title Forum, Brisbane 29 February 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum (viewed 31 August 2011).
- 82 K Smith, *Native Title in 2011: A tale of two cities* (Keynote address delivered at the AIATSIS Native Title Conference, Brisbane, 1 June 2011), p 5. At <http://www.qsnts.com.au/index.cfm?contentID=30> (viewed 3 August 2011).
- 83 K Smith, *Native Title in 2011: A tale of two cities* (Keynote address delivered at the AIATSIS Native Title Conference, Brisbane, 1 June 2011), p 5. At <http://www.qsnts.com.au/index.cfm?contentID=30> (viewed 3 August 2011).
- 84 National Native Title Tribunal, 'Native title recognition for the Quandamooka People' (Media release, 4 July 2011). At <http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/NativetitolerecognitionfortheQuandamookaPeople.aspx> (viewed 22 August 2011).
- 85 National Native Title Tribunal, 'Native title recognition for the Quandamooka People' (Media release, 4 July 2011). At <http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/NativetitolerecognitionfortheQuandamookaPeople.aspx> (viewed 22 August 2011).

(ii) How does lateral violence delay the resolution of native title claims?

The 11 native title claims determined between 1 July 2010 and 30 June 2011 spent a minimum of four years and a maximum of 12 years in mediation.⁸⁶ I share the view of my predecessor, Tom Calma, who observed in the 2007 *Native Title Report*, that the ‘the design of the [native title] system, the way it operates, and the processes established under it’ delays the resolution of native title claims.⁸⁷ However, I also believe that lateral violence can contribute to delaying native title determinations.

Lateral violence can interrupt the mediation of our native title because our internal disputes get so bad that we cannot have meetings to constructively discuss the issues we need to mediate. Many people across the country have told me that they no longer participate in native title meetings because of the quarrels, arguments and fights that occur at these meetings. So, although we want to have our native title recognised, many of us feel that we cannot safely participate in the mediation of our claims and witness the destructive force of lateral violence within our communities.

Internal disputes about decision-making and communication can also be played out in a more formal way through mechanisms set out in the Native Title Act. For example, if a native title claim group believes that the applicant is not representing their views and interests, then they may seek to remove and change the applicant in accordance with the Native Title Act.⁸⁸ This process requires the claim group to set out the reasons to remove the current applicant, authorise the new applicant and seek an order from the Federal Court to change the applicant. To comply with the Native Title Act, the claim group requires legal assistance and the approval of the Federal Court – this provides a forum for us to enact lateral violence in an ‘official’ legal environment and defer the mediation of our native title claim.

(c) Establishing a Prescribed Body Corporate (PBC)

Following a positive determination of native title, a native title holding group must establish a PBC to manage their native title rights and interests.⁸⁹ A brief overview of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act) that governs PBCs is set out in Text Box 2.9.

Text Box 2.9:

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Corporations holding or managing native title under the Native Title Act and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations) must be incorporated under the CATSI Act.⁹⁰

The CATSI Act has particular requirements such as a majority of corporation members and directors need to be Indigenous and the corporation’s constitution must meet minimum standards of governance. Under the CATSI Act, the Office of the Registrar for Indigenous Corporations (ORIC)

86 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 August 2011.

87 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report*, (2007). At http://www.hreoc.gov.au/social_justice/nt_report/ntreport07/chapter1.html (viewed 29 August 2011).

88 See the *Native Title Act 1993* (Cth), s 66B.

89 I note that a Prescribed Body Corporate may be established at any stage of the native title process.

90 Office of the Registrar of Indigenous Corporations, *Comparative table of Commonwealth, state and territory incorporation legislation* (2008), p 3. At <http://www.oric.gov.au/Content.aspx?content=CATSI-Act/default.htm> (viewed 17 September 2011).

can provide assistance to corporations about issues such as the registration, rules of a corporation, dispute resolution, and undertaking research and policy proposals.⁹¹

Corporations registering under the CATSI Act may have the following features:

- the members can choose not to be liable for the debts of the corporation
- the rules of the corporation can take into account Aboriginal or Torres Strait Islander customs and traditions
- Aboriginal and Torres Strait Islander corporations can operate nationally
- it is free to register as an Aboriginal and Torres Strait Islander corporation
- sometimes the Registrar may exempt corporations from lodging annual reports
- profits of the corporation can be distributed to members if the rules allow this
- Aboriginal and Torres Strait Islander corporations can get assistance and support from ORIC.⁹²

As a PBC is the legal organisation through which the native title group talks to people who want to access the determined native title area, it needs to be able to make decisions about matters such as planning, administration and dispute management.

Recent research conducted by the Office of the Registrar of Indigenous Corporations (ORIC) found that internal disputes constitute the third most prevalent 'class' of failure within Indigenous corporations.⁹³ Text Box 2.10 is a snapshot of case studies drawn from the research that show how conflict can cause corporate failure.

Text Box 2.10:

Indigenous Corporate Failure Report

ORIC examined 93 cases of Indigenous corporate failure. The following case studies are examples of how internal conflict has contributed to the failure of the corporation.

Case study 10

A review of case study 10 revealed a totally crippled Indigenous corporation:

- Members of the Governing Committee can no longer meet in the same room.
- The manager has usurped the power of the Committee but is not capable of satisfactorily managing the corporation's affairs.

91 Office of the Registrar of Indigenous Corporations, *Comparative table of Commonwealth, state and territory incorporation legislation* (2008), p 3. At <http://www.oric.gov.au/Content.aspx?content=CATSI-Act/default.htm> (viewed 17 September 2011).

92 Office of the Registrar of Indigenous Corporations, *Comparative table of Commonwealth, state and territory incorporation legislation* (2008), p 4. At <http://www.oric.gov.au/Content.aspx?content=CATSI-Act/default.htm> (viewed 17 September 2011).

93 Office of the Registrar of Indigenous Corporations, *Analysing key characteristics in Indigenous corporate failure: Research paper* (2010), p 46. At http://www.oric.gov.au/html/publications/other/Analysing-key-characteristics-in-Indigenous-corporate%20failure_v-2-2.pdf (viewed 21 September 2011).

- A group of four members of the Committee who have a majority have been ostracised by the manager, who refuses to deal with them and has banned them from the office.
- Two Committee members have been supported by the manager and they have attempted to create a Committee by invalidly 'appointing' further members and subsequently passing resolutions noting that the four excluded members are no longer on the Committee.

Case study 18

A review of case study 18 showed an organisation that was in turmoil because of divisive elements within the community:

- There are two factions each claiming to represent the Governing Committee.
- There is little possibility of these two groups reconciling their differences and working together for the good of the organisation.
- The office of the organisation has been closed by one of the factions and the affairs of the organisation are effectively in limbo.

Case study 20

A review of case study 20 found a break down within the corporation that has led to paralysis:

- There are two groups claiming to be the legitimate Governing Committee.
- The dispute has become protracted involving solicitors and the police and there is little likelihood of the dispute being resolved at a local level.
- It appears that neither current Committee has a legitimate claim to manage the corporations affairs.
- It is considered that acknowledgement of one Committee over the other will open the gates to legal challenges by the other Committee, the outcome of which may only be resolved in a court of law.

Case study 22

A review of case study 22 found the corporation's failure is associated with disputes within the community :

- There has been a complete communication breakdown within the Aboriginal community that has resulted in a sense of alienation between certain members of the corporation and factions within the community.
- There have been allegations of threatening and intimidating behaviour.
- The chairperson currently has an apprehended violence order against a community member.
- The chairperson and administrator argue that the Committee acts in the broader interests of the Aboriginal community. A 'vocal' minority disagree suggesting it is rife with 'nepotism, cronyism and poor governance.'⁹⁴

94 Office of the Registrar of Indigenous Corporations, *Analysing key characteristics in Indigenous corporate failure: Research paper* (2010), pp 38, 48–49, 64. At http://www.oric.gov.au/html/publications/other/Analysing-key-characteristics-in-Indigenous-corporate%20failure_v-2-2.pdf (viewed 21 September 2011).

The governance structure of a PBC under the CATSI Act can affect how a native title holding group makes decisions. For example, if a native title holding group is made up of multiple families and estates but only one chairperson is authorised to sign off on decisions by the PBC, then this enables the chairperson to circumvent or veto decisions made by other families in the native title holding group. This issue is particularly relevant where decision-making protocols have not been designed to suit the needs of the group.

These types of decision-making structures can create positions of power and build divisions in our communities as some of us benefit (or are perceived to benefit) from decisions made by individuals in a position of authority. In contrast, governance structures such as the one developed by the Quandamooka Peoples, which is discussed as a case study later in this Chapter, provide a mechanism to include all families in a native title holding group in decision-making processes.

Governance structures that manage the complexities of native title rights and interests must straddle the laws of the CATSI Act and also encompass our way of doing business. The AIATSIS Research Discussion Paper by Jessica Weir, *Karajarri: a West Kimberley experience in managing native title*, notes that:

[c]onflict results because some Karajarri expect that native title results in a royalty stream to fund Karajarri individual and collective priorities ... there are complex issues of communal lands and group and individual rights that require innovation beyond the categories of public and private.⁹⁵

Too often, our efforts to meet the requirements of 'white man's law' and to achieve our own objectives lead to confusion and conflict in our communities.

As most determinations of native title provide limited benefits to our communities, PBCs usually have minimal capacity and inadequate resources to manage our native title interests. This has the following two implications for a PBC and native title holding group:

- It is difficult for a PBC with limited funding to fulfil the requirements of a corporation under the CATSI Act and respond to administrative obligations in accordance with the Native Title Act such as future act notices.
- It is challenging for a PBC with minimal resources to address expectations that their determination of native title will solve the long-term social and economic problems facing their community.

This pressure of community and statutory demands on PBCs that operate with limited capacity and resources produces an opportunity for lateral violence within our families, communities and organisations.

95 J Weir, *Karajarri: a West Kimberley experience in managing native title* (2011), AIATSIS Research Discussion Paper 30, p 17. At <http://www.aiatsis.gov.au/research/documents/DP30NTRU.pdf> (viewed 27 September 2011).

(d) Negotiating Indigenous Land Use Agreements (ILUAs)

The Native Title Act sets out the prerequisites of ILUAs.⁹⁶ ILUAs are usually about the effect of particular acts on our native title rights and interests, or the impact of future activities on our native title claim area.⁹⁷

Kevin Smith observed at the AIATSIS Native Title Conference in June 2011:

The resource boom in minerals, coal and coal seam gas has provided Aboriginal people in the QSNTS region unprecedented economic opportunities for present and future generations. It is the responsibility of applicants and claimants to protect rights and interests and seek compensation through s 31 Agreements and ILUAs. The tension is dividing the requisite amount of time and resources in the pursuit of these opportunities with prosecuting the claim in the Federal Court.⁹⁸

There are several aspects of negotiating ILUAs that can trigger lateral violence in our communities.

Negotiating an ILUA with a proponent that wants to carry out activities on a native title claim area forces the claim group to jointly decide a negotiation position. For example, this could include the claim group agreeing on whether or not to support the future act and what is a suitable level of compensation. Agreeing on a position may be relatively straightforward in situations where the activity is not inherently controversial and/or potentially beneficial to the community and is not expected to have a detrimental impact on their claimed native title rights and interests, such as an extension to school buildings or building a medical centre.

However, it is likely to be more difficult for the claim group to agree to a proposed open cut mine that is likely to devastate country. In these situations, the claim group may be split between those who see the potential royalties and employment and training opportunities as providing a future for their children and grandchildren, and those who consider that no amount of money and jobs can compensate the damage to their lands, waters and spiritual life. Understandably, a native title claim group that needs to resolve these fundamentally different and emotionally difficult positions is likely to find negotiating an ILUA escalates lateral violence in their community as they attempt to manage this complex and controversial process.

The challenges of these situations have been demonstrated in the extensive media coverage over the past year on the process of negotiating an ILUA between the Goolarabooloo Jabirr Jabirr Peoples and Woodside Petroleum and the Western Australian Government over the proposed gas hub at James Price Point, north of Broome in Western Australia; and the negotiation meetings between the Yindjibarndi People and Fortescue Mining Group over the Solomon Gas Hub in the Pilbara region.⁹⁹ Both of these situations have led to toxic relationships between Aboriginal peoples of these areas, governments and mining companies. This has also

96 See the *Native Title Act 1993* (Cth), s 24BA for the definition of an ILUA (body corporate agreement) and s 24CA for the definition of an ILUA (area agreement).

97 See the *Native Title Act 1993* (Cth), s 24BB for the matters that an ILUA (body corporate agreement) must be about and s 24CB for the matters that an ILUA (area agreement) must be about.

98 K Smith, *Native Title in 2011: A tale of two cities* (Keynote address delivered at the AIATSIS Native Title Conference, Brisbane, 1 June 2011), p 6. At <http://www.qsnts.com.au/index.cfm?contentID=30> (viewed 3 August 2011).

99 For example, see Australian Broadcasting Corporation, *Iron and Dust – Four Corners*, 18 July 2011. At <http://www.abc.net.au/4corners/stories/2011/07/18/3270263.htm> (viewed 29 September 2011); P Cleary, 'Pilbara split by resource riches' *The Australian* 14 May 2011. At <http://www.theaustralian.com.au/national-affairs/pilbara-split-by-resource-riches/story-fn59niix-1226055581095> (viewed 29 September 2011); P Taylor, 'Coconut slurs as Woodside gas deal in the Kimberley riles greens' *The Australian* 21 September 2011. At <http://www.theaustralian.com.au/national-affairs/coconut-slurs-as-woodside-gas-deal-in-the-kimberley-riles-greens/story-fn59niix-1226142192914> (viewed 21 September 2011).

caused extreme stress and conflict within both of these traditional owner groups and clearly demonstrates how the native title process can contribute to lateral violence.

Micheal Meegan, the Principal Legal Officer at Yamatji Marlpa Aboriginal Corporation, which is the NTRB for the Pilbara and Yamatji regions and has responsibility for a range of major and mid-level future act negotiations across these regions, observed that native title claimants were well aware of the compensation benchmarks and other terms negotiated between their neighbouring native title claims and mining companies, and claimants expected different mining companies to commit to benchmark compensation levels with the respective native title claim groups where mining activity was occurring across a region. The unwillingness of mining companies to meet these expectations of commensurable compensation terms, the readiness of some mining companies to seek future act arbitration from the Tribunal, and the state government's predisposition in the James Price Point case to compulsorily acquire the land to be developed all add to the pressure on native title claim groups and the likelihood of lateral violence occurring during and after the negotiation of ILUAs.¹⁰⁰

(e) Alternate legislation affecting land, territories and resources

Native title intersects with alternate legislation that governs our access to land and resources. Some of the legislation that determines our rights to land and cultural heritage protection in different states and territories is listed in Text Box 2.11.

Text Box 2.11:

Legislation affecting our rights to land, territories and resources

Commonwealth

- *Australian Heritage Commission Act 1975 (Cth)*
- *Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)*
- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth)*
- *Protection of Movable Cultural Heritage Act 1986 (Cth)*
- *Aboriginal Land Grant (Jervis Bay Territory) Act 1986 (Cth)*
- *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth)*
- *Native Title Act 1993 (Cth)*
- *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

Northern Territory

- *Northern Territory Aboriginal Sacred Sites Act 1989 (NT)*
- *Pastoral Land Act 1992 (NT)*

100 M Meegan, Personal Communication with Louise Bygrave, Senior Policy Officer, Australian Human Rights Commission, 28 July 2011.

Western Australia

- *Aboriginal Heritage Act 1972* (WA)
- *Aboriginal Affairs Planning Authority Act 1972* (WA)
- *Land Administration Act 1997* (WA)

New South Wales

- *National Parks and Wildlife Act 1974* (NSW)
- *Heritage Act 1977* (NSW)
- *Aboriginal Land Rights Act 1983* (NSW)

South Australia

- *Pitjantjatjara Land Rights Act 1981* (SA)
- *Maralinga Tjaruta Land Rights Act 1984* (SA)

Victoria

- *Aboriginal Lands Act 1970* (Vic)
- *Aboriginal Land (Aborigines' Advancement League (Watt Street) Northcote) Act 1982* (Vic)
- *Aboriginal Land (Northcote Land) Act 1989* (Vic)
- *Aboriginal Lands Act 1991* (Vic)
- *Aboriginal Land (Manatunga Land) Act 1992* (Vic)
- *Aboriginal Heritage Act 2006* (Vic)
- *Traditional Owner Settlement Act 2010* (Vic)

Tasmania

- *Aboriginal Lands Act 1995* (Tas)

Queensland

- *Community Services (Aborigines) Act 1984* (Qld)¹⁰¹
- *Community Services (Torres Strait) Act 1984* (Qld)¹⁰²
- *Aborigines and Torres Strait Islanders (Land Holding) Act 1985* (Qld)
- *Aboriginal Land Act 1991* (Qld)
- *Torres Strait Islander Land Act 1991* (Qld)
- *Nature Conservation Act 1992* (Qld)
- *Land Act 1994* (Qld)
- *Aboriginal Cultural Heritage Act 2003* (Qld)
- *Wild Rivers Act 2005* (Qld)
- *Cape York Peninsula Heritage Act 2007* (Qld)

The intent of this legislation has varying effects on our access to land and protection of cultural heritage across state and territory jurisdictions. However, the ways in which the Native Title Act interacts with other legislation in various jurisdictions can cause confusion and result in conflict within our communities. This is shown in Text Box 2.12, which sets out the study by Behrendt and Kelly about conflict created by native title in New South Wales.

101 This legislation created community level land trusts that own and administer former reserves or missions under a Deed of Grant in Trust (DOGIT).

102 This legislation created community level land trusts that own and administer former reserves or missions under a Deed of Grant in Trust (DOGIT).

Text Box 2.12:

Conflict in native title

Larissa Behrendt and Loretta Kelly undertook a study about conflict created by native title in New South Wales.¹⁰³ They observed ‘intra-cultural’ conflict occurring between Aboriginal peoples about the following issues:

- Traditional versus historical claims: conflict occurs ‘between traditional Aboriginal custodians and other Aboriginal occupants who may have interests in the same parcel of land’.¹⁰⁴
- Boundary disputes and overlapping claims: conflict ‘over boundaries can cause fighting, not only between family groups, but also within families’.¹⁰⁵
- Different aims and governance problems: conflict arises where ‘aims and objectives (in relation to the land claimed) differ amongst members of the claimant group’. Older people may be ‘more concerned about the preservation and restoration of environment, culture and language; whereas younger people are often more interested in developing land and obtaining jobs’.¹⁰⁶
- Family feuding: native title claims ‘add fuel to the fire’ in communities where feuds between one family and another family are already a source of conflict.¹⁰⁷

Behrendt and Kelly also note that native title can create:

- ‘Inter-cultural’ conflict that occurs between Aboriginal and non-Aboriginal people.
- ‘Organisational’ conflict that may ‘involve key individuals who are all Aboriginal, or there may be some key individuals to the conflict who are non-Aboriginal’.¹⁰⁸

In Queensland, responses from NTRBs/NTSPs highlighted two examples where the interaction of the Native Title Act and other legislation creates complexities for our communities. The first example is the intersection of native title and the Deed of Grant in Trust (DOGIT) system of land tenure¹⁰⁹, each of which is expected to benefit Aboriginal and Torres Strait Islander people, but represents distinct interests and has different purposes. The Torres Strait Regional Authority observed that:

Tensions between the native title system and the DOGIT often raise disputation on the issue of compensation. This is understandable as the Torres Strait Island Regional Council (TSIRC) is a local government body with a key focus on development, [and] this can at times be structurally adversarial to native title interests.¹¹⁰

103 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), pp 27–56.

104 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 28.

105 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 29.

106 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 30.

107 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 31.

108 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 27.

109 Deed of Grant in Trust (DOGIT) is a form of community freehold tenure held over former reserves or missions by community level land trusts.

110 J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2011.

The second example is the role of the applicant for a native title claim in Queensland also having responsibilities in accordance with the *Aboriginal Cultural Heritage Act 2003* (Qld). This bestows certain duties that give the applicant responsibilities with regard to cultural heritage and often results in paid employment for Aboriginal and Torres Strait Islander peoples.¹¹¹ As mentioned above, native title claimants are usually not paid to participate in these processes. This can create divisions between the applicant and the native title claim group if the applicant is perceived to be supporting their own family's interests rather than representing the interests of the whole claim group.¹¹²

In Victoria, the different histories and relationships to land for Aboriginal peoples are affected by the interaction of the Native Title Act and the *Aboriginal Heritage Act 2006*. The *Right People for Country Project* seeks to address uncertainty and conflict that can be produced by the intersection of native title and cultural heritage legislation by creating an agreement-making structure to deal with disputes between Aboriginal peoples over land ownership and cultural heritage.¹¹³ I discuss this further as a case study in the following section.

In summary, the complex and demanding process to recognise our native title rights creates opportunities for lateral violence within our families, communities and organisations. This is because the non-Indigenous policies and structures that govern the native title process require us to endure the significant burden of proving that our connection to our country exists – even though the experience of colonialism has taken many of us from our country and the meaning of land and resources has changed to accommodate non-Indigenous legal and commercial values. Nonetheless, many of us continue to demonstrate our strength and our optimism by participating in the native title process in the hope that our rights to our country will be recognised.

111 K Smith, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 1 August 2011.

112 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan* (2008), Native Title Research Monograph 2, p 3. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

113 Report of the *Right People for Country Project* Committee (2011).

2.3 Case studies: communities minimising lateral violence

It is my view that the native title system can result in positive outcomes for Aboriginal and Torres Strait Islander people, particularly if our traditional ownership is formally recognised and we are offered opportunities to negotiate agreements concerning the use and development of our lands.

The following two case studies illustrate how our communities are developing governance frameworks to minimise the impact of lateral violence in native title.

(a) Quandamooka Peoples native title consent determination

On 4 July 2011, the Quandamooka Peoples native title rights and interests were recognised over their lands and waters on and surrounding North Stradbroke Island, and some islands in Moreton Bay. More than 16 years after the Quandamooka People lodged their native title claim, this occasion marked the first native title determination in southern Queensland: see Text Box 2.13. The final determination of native title will take effect upon the registration of two ILUAs negotiated by the Quandamooka Peoples with the Queensland State Government and the Redlands Shire Council.¹¹⁴

I congratulate the Quandamooka Peoples and the many organisations and individuals who were involved with the consent determination of the native title claim.

The positive consent determination of the Quandamooka Peoples' native title claim belies the long and at times, divisive native title process that has been experienced by the native title claim group.

For the Quandamooka Peoples, the 70 year history of sand-mining on North Stradbroke Island has created bitter relationships within the community between those families who financially have benefited from employment by the mining companies and those families that have believed that sand-mining should stop because of its devastating impact on their Island.¹¹⁵ While sand-mining was occurring prior to native title, native title meetings provided another forum for old fights about mining to take on a renewed energy.¹¹⁶

Since the first native title claimant application was lodged by the Quandamooka Peoples in 1995, the process of resolving their native title required the claim group to decide who are the people in the native title claim group, who are the person or people that are the applicant, and negotiate with multiple parties about their native title rights and interests over North Stradbroke Island and some of the surrounding islands and waters of Morton Bay. The intense pressure on the community from these processes resulted in the Quandamooka peoples declining a native title settlement offer from the Queensland Government almost ten years ago.

The turning point for the Quandamooka Peoples claim was in 2005 when QSNTS, the representative body for the claim area, organised a meeting between Quandamooka Elders, the Federal Court and QSNTS. The participants at the meeting talked about the history of the native title determination application and obtained the Elders' agreement to progress the resolution of the claim.¹¹⁷

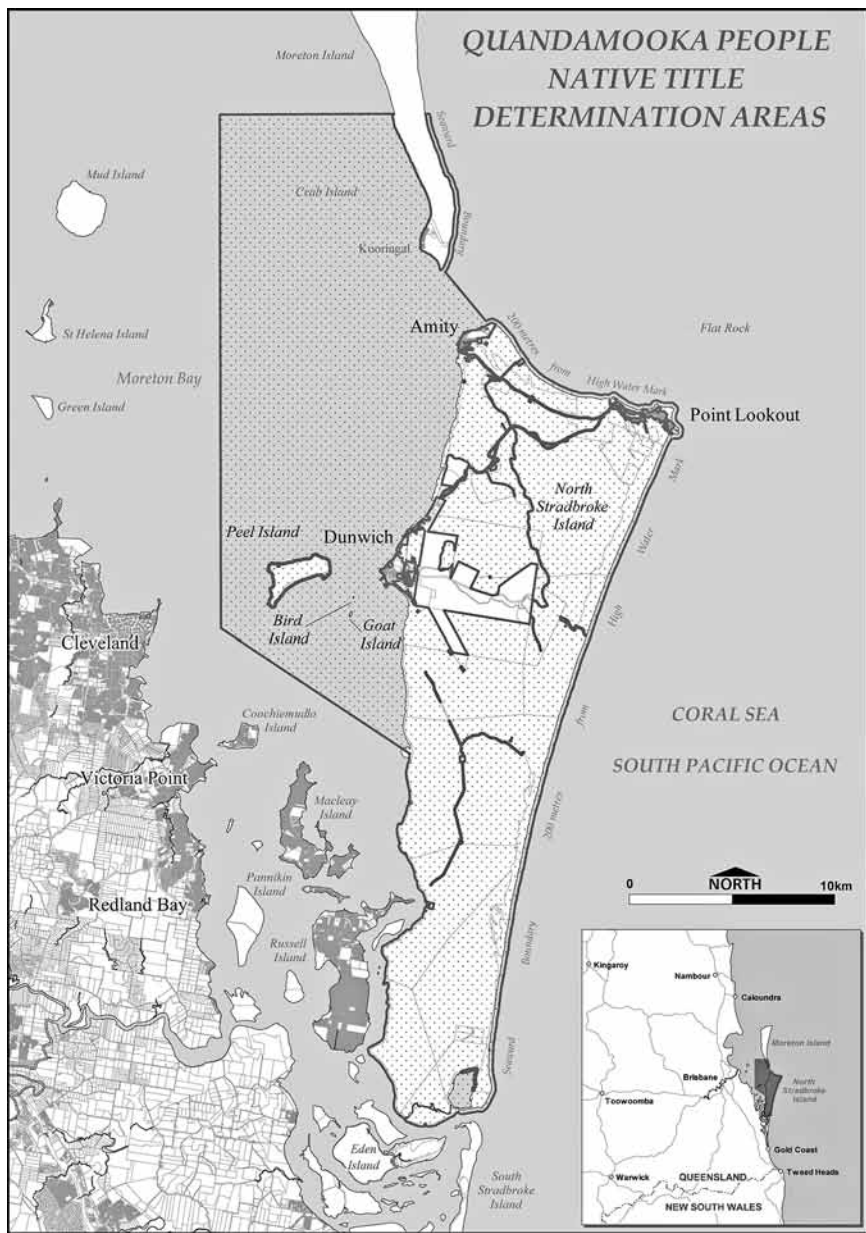
114 National Native Title Tribunal, *Quandamooka People's native title determinations, North Stradbroke Island* (2011). At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Multimedia%20and%20determination%20brochures/Determination%20brochure%20-%20-%20Quandamooka%20People's%204%20July%202011.pdf> (viewed 29 September 2011).

115 National Indigenous Times, 'Mining Divides Stradbroke', 23 June 2011, p 15.

116 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Our Relationships in Native Title: starting the conversation* (Keynote address delivered at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) Native Title Conference, Brisbane, 2 June 2011), p 7.

117 V Cooms, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 8 August 2011.

Map 2.1:
Quandamooka Peoples determination area¹¹⁸



118 Map produced by the National Native Title Tribunal.

Text Box 2.13:

Timeline: Quandamooka Peoples consent determination

3 January 1995:	Quandamooka Peoples lodged their first native title claim over the majority of North Stradbroke Island and the southern part of Moreton Island, Bird Island, Goat Island, Peel Island and surrounding offshore areas.
8 September 1995:	Quandamooka People #1 application was placed on the Register of Native Title Claims.
14 August 1997:	Quandamooka Land Council and Redland Shire Council signed a Process Agreement that established a framework for future negotiations.
10 September 1999:	Quandamooka Peoples filed their second claim with the Federal Court over the southern part of North Stradbroke Island and some areas in the north of the Island.
4 June 2000:	Quandamooka People #2 claim was registered with the National Native Title Tribunal.
26 October 2010:	Quandamooka People and the State of Queensland signed an Agreement in Principle for a Quandamooka-State ILUA.
February 2010 – July 2011:	Mediation by the National Native Title Tribunal.
4 July 2011:	Federal Court of Australia made two consent native title determinations at Dunwich, North Stradbroke Island. ¹¹⁹

It is my understanding that the native title consent determination for the Quandamooka Peoples coincides with agreement that all sand-mining will cease on North Stradbroke Island by 2025 and 80 per cent of the Island will become national park by 2026.¹²⁰ However, the agreement to close sand-mining does not immediately halt the conflict within the community as some families deal with fear about the loss of employment and concern about whether other employment opportunities in tourism and joint management of national parks will transpire.¹²¹

So, what governance structure did the Quandamooka Peoples establish to deal with these issues that cause fights within their community?

Post-2005, the Quandamooka Peoples developed a clear and transparent decision-making process to enable them to deal with issues to negotiate their native title claim. As shown in Diagram 2.3, this governance structure incorporates one representative from each of the twelve families who are descendants of the twelve apical ancestors named in the native title claim group.¹²²

119 National Native Title Tribunal, *Quandamooka People's native title determinations, North Stradbroke Island* (2011). At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Multimedia%20and%20determination%20brochures/Determination%20brochure%20%20-%20Quandamooka%20People's%204%20July%202011.pdf> (viewed 29 September 2011).

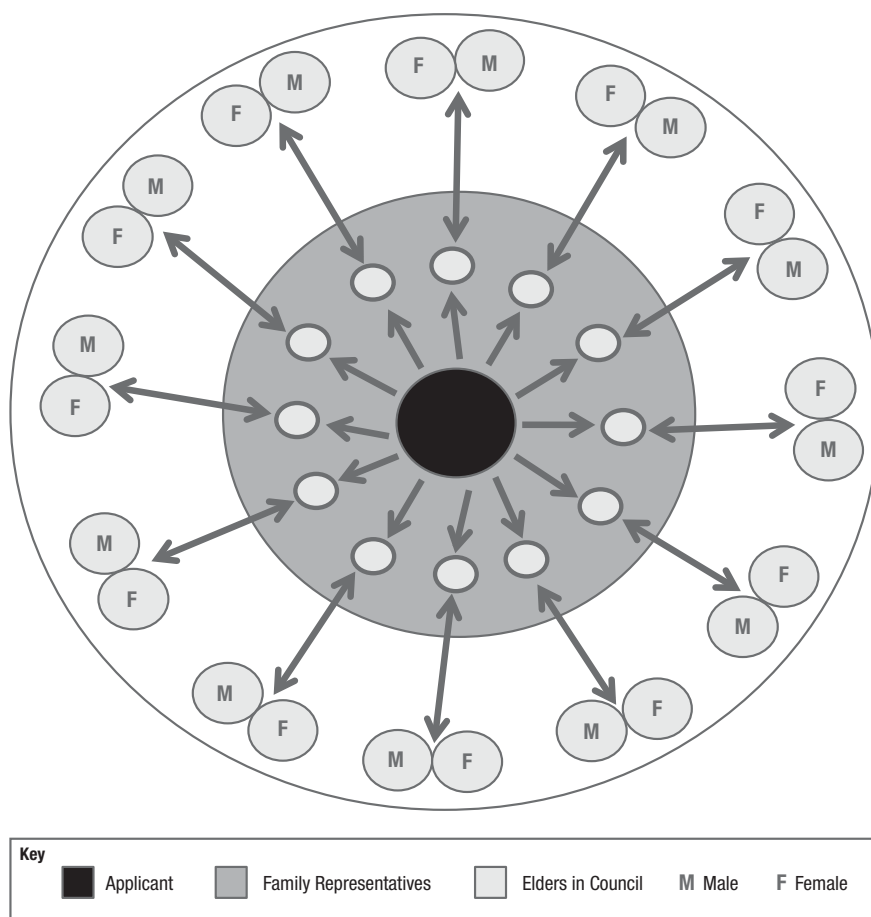
120 V Darling, Minister for Environment, 'North Stradbroke Island Reference Group – community planning for the future' (Ministerial Media Statements, 25 August 2011). At <http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=76228> (viewed 2 September 2011).

121 V Cooms, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 8 August 2011.

122 V Cooms, Personal Communication with Louise Bygrave, Senior Policy Officer Social Justice Team, 8 August 2011.

This group of twelve family representatives advised the single named applicant during the native title negotiations. Decisions by the applicant required the mandate of the family representatives, who agreed on issues by consensus. Any issues that were disputed and could not be resolved by the group of family representatives were taken to the Council of Elders. The Council of Elders comprises twelve female Elders and twelve male Elders who represent each of the family groups and apical ancestors. Elders must be acknowledged as such by their peers before they are accepted on to the Council of Elders.¹²³

Diagram 2.3:
Governance structure for Quandamooka Peoples



The Quandamooka Peoples have ensured that this inclusive structure of decision-making continues in Yoolooburrabee Aboriginal Corporation, the PBC set up to manage their native title rights.¹²⁴

123 V Cooms, Personal Communication with Louise Bygrave, Senior Policy Officer, Social Justice Team, 8 August 2011.

124 V Cooms, Personal Communication with Louise Bygrave, Senior Policy Officer, Social Justice Team, 8 August 2011.

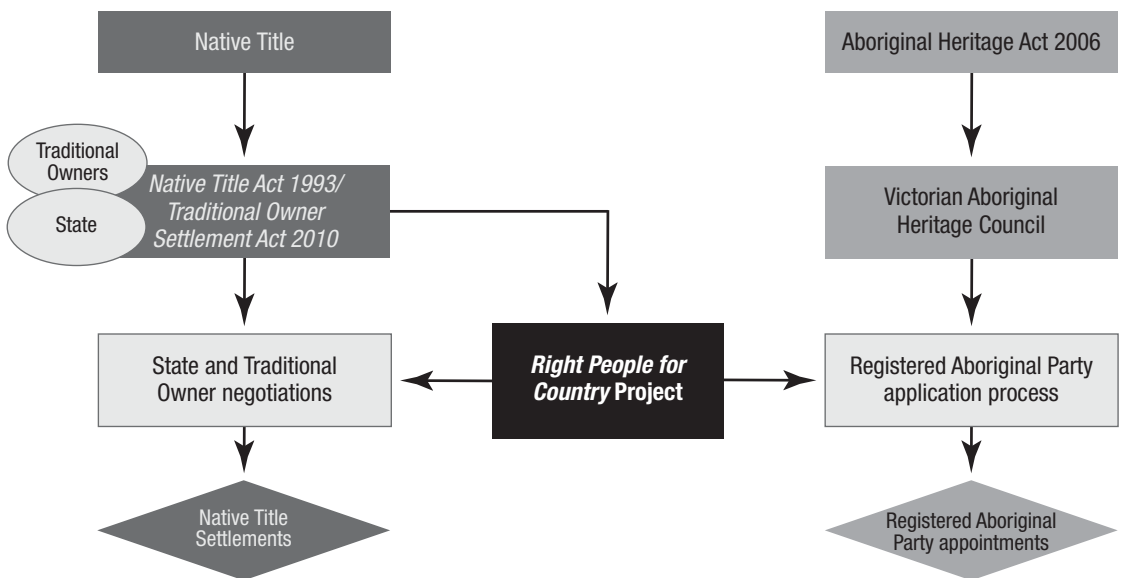
(b) *Right People for Country* Project: Victoria

The *Right People for Country* Project in Victoria creates a new approach to resolving disputes between Aboriginal peoples over land ownership and cultural heritage.

Diagram 2.4 demonstrates how the separate systems and processes used to determine native title and cultural heritage rights can be aligned through the *Right People for Country* Project.

Diagram 2.4:

Native title and cultural heritage management¹²⁵



The Project seeks to develop an agreement-making process led by Aboriginal peoples that deals with disputes about group membership and extent of country. In Chapter 4, I outline the core principles for this Indigenous agreement-making process and the way it has incorporated the rights set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

In March 2011, the *Right People for Country* Project Committee completed their Report, which sought to develop a new approach to support the resolution of disputes between Aboriginal peoples in Victoria. The Project Committee comprises the Victorian Government, the Victorian Aboriginal Heritage Council, the Victorian Traditional Owner Land Justice Group and Native Title Services Victoria.

I commend the Project Committee for their partnership in developing the *Right People for Country* Project and their commitment to addressing land issues.

The Executive Summary of the Project Committee's Report that was completed in March 2011 is set out in Text Box 2.14.

125 Report of the *Right People for Country* Project Committee (2011), p 13.

Text Box 2.14:

Report of the *Right People for Country* Project Committee

Background

The High Court decision in the *Mabo* case in 1992 and the Native Title Act brought about a fundamental shift in law and government policy, giving way to the growing recognition of the rights and interests of Aboriginal people to their country. Implementation of the *Aboriginal Heritage Act 2006* (Victoria) has continued this broad shift, with Traditional Owner groups being appointed as Registered Aboriginal Parties with cultural heritage management responsibilities for defined areas.

One of the critical threshold issues affecting the rate of settlement of native title claims and the appointment of Registered Aboriginal Parties is the question of native title or Traditional Owner group composition and the extent of their country.

In 2009, *The Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework* recommended the *Right People for Country* project be established to develop and implement a new approach to support resolution of Indigenous disputes. This *Right People for Country* report is a response to the Steering Committee's recommendation. It has been developed by a project committee comprising representatives of Victorian Traditional Owners and Victorian Government agencies.

The *Right People for Country* project represents a new approach to Indigenous disputes in Victoria. The project is an Indigenous-led agreement making approach that shifts away from governments and courts making decisions for Traditional Owners on questions of group membership and extent of country. It is a significant step towards enabling Traditional Owners to make decisions for and among themselves. This approach is based on national and international best practice and is informed by consultations with Victorian Traditional Owners.

Rationale for a new approach

Victoria has a history of dispossession, dispersal and removal of Victoria's first peoples from their country. This has set the scene for disputation around questions of identity and extent of country. Where the impacts of settlement have been most profound, the resolution of group composition and extent of country issues may be contested among Aboriginal people themselves. The process of publicly identifying and defining Victoria's native title or Traditional Owner groups has sometimes created new disputes or added fuel to existing ones within the Indigenous community.

The uncertainty created by these disputes leads to social and economic costs for government, land users and Traditional Owners. These include increased legal and administrative costs in processing native title claims and Registered Aboriginal Party applications, delays to land dealings caused by uncertainty about who are the 'right people for country', delays in native title and cultural heritage outcomes for Traditional Owners, and ongoing conflict and division in Indigenous communities.

Current approaches to determining traditional ownership have had limited success in resolving Traditional Owner disputes. The native title system has imposed court-managed mediation processes, framed by a litigious approach and driven by the imperatives of processing the broader claim. In Victoria such native title mediation has been lengthy and expensive. Processes – and sometimes outcomes – have been imposed and have received limited acceptance by the communities involved. The Victorian Aboriginal Heritage Council has had no legislative mandate and no dedicated resources to support Traditional Owner groups to work through disputes.

For native title and cultural heritage outcomes to be robust, positive and durable, Traditional Owner communities need to be able to work through issues of group membership and extent of country on their own terms. A lack of capacity and supporting resources and processes is stopping Traditional Owner groups from reaching agreements and resolving disputes among themselves. Government has a role in facilitating the development of a new approach to support Traditional Owner groups to reach internal agreements that can then form the basis for engagement with government.

Benefits of agreement making

The agreements that are developed through the *Right People for Country* project will provide government and land users with greater certainty about who to deal with for defined areas of country. They will assist government to settle native title claims and the Victorian Aboriginal Heritage Council to appoint Registered Aboriginal Parties. Agreement making will seek to identify a single inclusive Traditional Owner entity for a defined area for land and cultural heritage management purposes.

The *Right People for Country* project will lead to significant benefits for the Victorian Government, land users and Indigenous people:

- greater certainty for government and land users about who to deal with for a defined area of country
- better native title and cultural heritage outcomes
- reduced costs for government, land users and Traditional Owners
- strengthened capacity of Traditional Owner groups to manage relationships and negotiate agreements
- greater alignment of native title and cultural heritage management processes and priorities
- reduced conflict and division in Indigenous communities.

Roadmap for implementation

The vision of the *Right People for Country* project is that Traditional Owner groups reach durable agreements about group composition and/or extent of country that lead to better native title and cultural heritage management outcomes.

The report identifies success factors for Indigenous agreement making and identifies 32 resulting core principles. These core principles provide a roadmap for how the project should be implemented and underpin the four project objectives:

- To develop a best practice agreement making approach to support Traditional Owner groups to reach durable agreements about group composition and/or extent of country issues
- To strengthen the organisational capacity of Traditional Owner groups to manage disputes and negotiate agreements
- To build a workforce of Indigenous and non-Indigenous facilitators skilled in Indigenous agreement making
- To coordinate systems and build collaboration of stakeholders to support Indigenous agreement making.

Traditional Owners will be supported by skilled facilitators to prepare for and then negotiate durable agreements. Traditional Owners will have opportunities to strengthen their capacity to better manage

relationships and negotiate agreements. Greater coordination and collaboration of stakeholders will support the agreement making process.

Agreements will address the minimum requirements of the Victorian Government and the Victorian Aboriginal Heritage Council to ensure that they assist in the resolution of native title and appointment of Registered Aboriginal Parties. Minimum requirements include that Traditional Owner groups have inclusive group membership and that agreements are supported by available research.

Agreement making is an additional option available to Traditional Owner groups to resolve Indigenous disputes about group composition and extent of country. Where groups do not wish to or are not ready to engage or where agreement is not reached, existing native title and cultural heritage management processes remain.¹²⁶

Both the governance structure established by Quandamooka Peoples to progress their native title claim in Queensland and the framework developed by the *Right People for Country* Project to manage native title and cultural heritage in Victoria demonstrate how we can create frameworks to maximise the outcomes that can be achieved through the native title system and minimise the impact of lateral violence in our communities in the native title process.

126 Report of the *Right People for Country* Project Committee (2011), pp 6–8.

2.4 Conclusion

Native title can be a catalyst for lateral violence because the native title process reinforces our oppression and dispossession of our lands, and raises questions about our identity – issues that are already sensitive for us given our harsh history of colonialism.

Lateral violence resulting from our engagement in native title is having a devastating impact on our families and communities and we need to work out ways to address this. I believe that there are some changes that we, as Aboriginal and Torres Strait Islander peoples, need to make in rebuilding our relationships with each other. Government and industry also can work with our communities differently. I talk about this further in Chapters 3 and 4, where I use the Declaration as a guide to explore strategies to address lateral violence in our families, communities and organisations.

Chapter 3: Giving effect to the Declaration

3.1 Introduction **118**

3.2 Lateral violence – a human rights issue **120**

3.3 The Declaration on the Rights of Indigenous Peoples **123**

3.4 Conclusion **145**



3.1 Introduction

Indigenous peoples from all over the world have suffered the long-standing effects of colonisation. Consequently, we continue to struggle with the challenges that I have raised in this Report; particularly those that concern our identity, culture and access to and protection of our lands, territories and resources.

The Special Rapporteur on the rights of indigenous peoples, Professor James Anaya comments on the ongoing effects of colonisation stating that:

Indigenous peoples ... find themselves subject to political orders that are not of their making and to which they did not consent. They have been deprived of vast landholdings and access to life-sustaining resources, and have suffered historical forces that have actively suppressed their political and cultural institutions. As a result, indigenous peoples have been crippled economically and socially, their cohesiveness as communities has been damaged or threatened, and the integrity of their cultures has been undermined ... Historical phenomena grounded in racially-discriminatory attitudes are not just blemishes of the past but rather translate into current inequities.¹

The High Commissioner for Human Rights, Ms Navanethem Pillay, also voices her concerns in this regard. The following comments are particularly relevant to the situation in Australia:

Even in wealthy countries, some indigenous peoples continue to live in squalor, destitution and hopelessness. Often they continue to suffer the consequences of colonization and century-long dispossession.

To confront and put an end to such exclusion and inequality, indigenous peoples must be included in decision-making. It is imperative that positive measures and policies be put into place to foster their participation.²

Aboriginal and Torres Strait Islander peoples have consistently demonstrated a strong determination to be recognised in our own right and to have our human rights respected and realised. However, the internalisation of the oppression imposed on us has had a profound impact on every aspect of our lives. This impact is exhibited through lateral violence.

Fortunately, we have available to us a powerful tool that can assist to address lateral violence by transforming behaviours from those that cripple to those that empower our communities. This is the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

This Chapter will examine ways that the Declaration can guide the development of healthier relationships, not only with governments, industry and the wider Australian community but also within our Aboriginal and Torres Strait Islander families, communities and organisations.

I believe the Declaration provides a solid foundation of human rights upon which to build legislative, policy and program frameworks such as native title.

1 J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era', in C Charters and R Stavenhagen (Eds), *Making the Declaration Work* (2009) 184, p 191.

2 N Pillay, United Nations High Commissioner for Human Rights, *Opening Remarks*, Statement provided to the fourth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 11 July 2011, p 2. At <http://www.docip.org/Online-Documentation.32.0.html> (viewed 16 September 2011).

This Chapter will therefore consider how the Declaration can be used to guide the development of these frameworks to ensure that they comply with international human rights standards and principles, and as a result, empower Aboriginal and Torres Strait Islander peoples to reach their full potential. The Declaration guides us in developing the right tools to manage and respond to lateral violence.

In my view, the Declaration is not only a guide; it is also the assessment tool against which communities and governments can measure the successful application of human rights standards as they apply to the rights of Aboriginal and Torres Strait Islander peoples. If used in this way, it allows us to review, evaluate and modify the native title system to give it the best chance to reach its full potential into the future.

3.2 Lateral violence – a human rights issue

Lateral violence is a human rights issue. As detailed in the *Social Justice Report 2011*, lateral violence is a product of a complex mix of historical, cultural and social dynamics that results in a spectrum of behaviours such as gossiping, jealousy, bullying, shaming, social exclusion, family feuding and organisational conflict, which can and often do, escalate into physical violence.

However, as outlined in the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* and the *Convention on the Rights of the Child* everyone has the right to be respected and safe.³ I believe that lateral violence violates this most fundamental human right.

The discussion in Chapter 2 demonstrates how lateral violence behaviours can be provoked and stimulated by structures like the native title system. As I outline in Text Box 3.1, these behaviours negatively affect a number of human rights.

Text Box 3.1:

Human rights affected by lateral violence

Lateral violence can affect a number of human rights including:

- **the right to be free from mental, emotional and physical violence.**⁴
- **the right to the highest attainable standard of physical and mental health**⁵ – lateral violence can have negative impacts on physical and mental health causing physical injuries, stress-related illness, depression and other health issues.

3 *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 5. At <http://www.un.org/en/documents/udhr/> (viewed 23 September 2011); *International Covenant on Civil and Political Rights*, 1966, articles 7, 9. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); *Convention on the Rights of the Child*, 1989, articles 2, 19. At <http://www2.ohchr.org/english/law/crc.htm> (viewed 23 September 2011).

4 For example see *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 7, 22(2). At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 23 September 2011); *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 5. At <http://www.un.org/en/documents/udhr/> (viewed 23 September 2011); *International Covenant on Civil and Political Rights*, 1966, article 7. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); *Convention on the Rights of the Child*, 1989, article 19. At <http://www2.ohchr.org/english/law/crc.htm> (viewed 23 September 2011); Committee on the Elimination of Discrimination Against Women, *General Recommendation 12: Violence against women*, UN Doc A/44/38 at 76 (1990). At <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom12> (viewed 23 September 2011); Committee on the Rights of the Child, *General Comment 13: The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (2011). At http://www2.ohchr.org/english/bodies/crc/docs/CRC.C.GC.13_en.doc (viewed 23 September 2011).

5 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), article 24. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 23 September 2011), *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 25. At <http://www.un.org/en/documents/udhr/> (viewed 23 September 2011), *International Covenant on Economic, Social and Cultural Rights*, 1966, article 12. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 23 September 2011); *Convention on the Rights of the Child*, 1989, article 24. At <http://www2.ohchr.org/english/law/crc.htm> (viewed 23 September 2011).

- **the right of self-determination and to participate in decisions that affect us⁶** – lateral violence can create caustic environments where people withdraw from opportunities to actively participate in decision-making that affects them and their rights.⁷ Lateral violence can also exclude people from participating in decision-making processes. Furthermore, the presence of coercion (be it force, bullying or pressure) is inconsistent with the principle of free, prior and informed consent.⁸
- **the right to culture and to participate in cultural life⁹** – lateral violence attacks and undermines an individual's identity and authenticity as an Aboriginal or Torres Strait Islander. As a consequence lateral violence threatens an individual's safety in their cultural identity.
- **the right to social, cultural and economic development¹⁰** – lateral violence can result in Aboriginal and Torres Strait Islander peoples being denied access to opportunities, programs and projects that can facilitate social, cultural and economic development.
- **the freedom of expression and to hold opinions without interference¹¹** – the impacts of lateral violence may prevent individuals from freely expressing their opinions.
- **the right to life, freedom from torture and security of the person¹²** – lateral violence can have serious negative impacts on Aboriginal and Torres Strait Islander peoples and may result in depression, self-harm and suicide.¹³ It also deprives people of a sense of safety both in themselves and their community.

-
- 6 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 5, 13(2), 18, 19, 20(1), 23, 27, 30(2), 32, 36, 38. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 20 September 2011); *International Covenant on Civil and Political Rights*, 1966, article 25. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); Human Rights Committee, *General Comment 25: The Right to Participate in Public Affairs, Voting and the Right of Equal Access to Public Service (art 25)*, UN Doc CCPR/C/21/Rev.1/Add.7 (1996), para 5. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/d0b7f023e8d6d9898025651e004bc0eb?Opendocument) (viewed 23 September 2011).
- 7 Chapter 2 of this Report examines how it is not uncommon for Aboriginal and Torres Strait Islander people to withdraw from participating in their native title claim to avoid the conflict, grief and trauma it causes.
- 8 Working Group on Indigenous Populations, *Standard-setting: Legal commentary on the concept of free, prior and informed consent. Expanded working paper submitted by Mrs. Antoanella-Lulia Motoc and the Tebtebba Foundation offering guidelines to govern the practice of Implementation of the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources*, UN Doc E/CN.4/Sub.2/AC.4/2005/WP.1 (2005), para 56.
- 9 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 11–13. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 23 September 2011); *International Covenant on Civil and Political Rights*, 1966, article 27. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); *International Covenant on Economic, Social and Cultural Rights*, 1966, article 15. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 23 September 2011).
- 10 *International Covenant on Economic, Social and Cultural Rights*, 1966, article 1. At: <http://www2.ohchr.org/english/law/cescr.htm> (viewed 23 September 2011); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), articles 3, 4, 20, 23, 31(1). At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 9 December 2010).
- 11 *International Covenant on Civil and Political Rights*, 1966, article 19. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), article 19. At <http://www.un.org/en/documents/udhr/> (viewed 23 September 2011).
- 12 *International Covenant on Civil and Political Rights*, 1966, articles 6, 7, 9. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 23 September 2011); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 1984, articles 1, 2. At <http://www2.ohchr.org/english/law/cat.htm> (viewed 20 September 2011).
- 13 See C Tatz, *Aboriginal Suicide is Different: Aboriginal youth suicide in New South Wales, the Australian Capital Territory and New Zealand: towards a model of explanation and alleviation*, Criminology Research Grants (1999). At <http://www.criminologyresearchcouncil.gov.au/reports/tatz/> (viewed 23 September 2011).

Text Box 3.1 demonstrates that lateral violence is clearly a human rights issue.

I believe that a human rights based response must be applied to address the power imbalance that triggers and nurtures lateral violence in Aboriginal and Torres Strait Islander communities because a human rights based approach:

- Provides governments and communities with a set of minimum and objective standards based on dignity and equality to inform and guide the development of policy, legislation, and social and governance structures.¹⁴
- Ensures Aboriginal and Torres Strait Islander peoples are key actors in addressing lateral violence and provides guidance on the roles of governments and communities to address these issues.¹⁵
- Requires that in the exercise of human rights all people must have their rights respected.
- Affirms that in the exercise of any right, we have a responsibility to behave in a way that ensures that everyone else can similarly enjoy all human rights.

14 See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *The practical power of human rights* (Speech delivered at Queensland University of Technology Faculty of Law Public Lecture Series, Brisbane, 19 May 2010. At http://www.humanrights.gov.au/about/media/speeches/social_justice/2010/20100519_practical_power.html (viewed 1 September 2011).

15 United Nations Development Group, *The Human Rights Based Approach to Development Cooperation Towards a Common Understanding among UN Agencies* (2003). At <http://www.undg.org/index.cfm?P=221> (viewed 8 September 2011).

3.3 The Declaration on the Rights of Indigenous Peoples

The Declaration is the most comprehensive tool we have available to advance the rights of Aboriginal and Torres Strait Islander peoples and to address the contemporary effects of oppression and colonisation.¹⁶

In essence, the Declaration 'contextualises human rights with attention to the patterns of indigenous group identity and association that constitute them as peoples'. As James Anaya argues:

It is precisely because the human rights of indigenous groups have been denied, with disregard for their character as peoples, that there is a need for the Declaration ... the Declaration exists because indigenous peoples have been denied equality, self-determination, and related human rights. It does not create ... new substantive human rights that others do not enjoy. Rather, it recognizes for them rights that they should have enjoyed all along ... contextualises those rights in light of their particular characteristics and circumstances, and promotes measures to remedy the rights' historical and systemic violation.

The Declaration ... will go a long way ... toward rolling back inequities and oppression.¹⁷

Not only was the Declaration informed by and drafted with Indigenous peoples, it catalogues all human rights contained in international treaties and mechanisms that are particularly relevant to Indigenous peoples being able access their lands, territories and resources.

As I discuss in Chapter 2, it is the need to secure and protect these rights through non-Indigenous processes and structures such as the native title system, that creates the potential for an environment where relationships are tested and lateral violence thrives.

In addition to outlining our human rights, the Declaration provides guidance in clarifying, establishing and strengthening relationships. The Declaration also guides our responsibilities in our relationships. I believe that any response to a violation of a human right must be found within the particular human right being violated.

A holistic and integrated approach is required; one that uses the key principles that underpin the Declaration. These key principles are:

- self-determination
- participation in decision-making and free, prior and informed consent
- non-discrimination and equality
- respect for and protection of culture.

I believe that these principles provide a useful lens to look at any human rights challenge confronting Aboriginal and Torres Strait Islanders peoples. I demonstrate what such an approach could look like in Chapter 4 when I look at developing human rights based responses to lateral violence.

These key principles reinforce each and every one of the rights contained within the Declaration. It is my view that lateral violence occurs when these fundamental human rights and principles are not met.

I will discuss below how each of these principles relate to our discussion on the manifestation of lateral violence in the native title environment.

16 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular para 6. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 23 September 2011).

17 S J Anaya, *International Human Rights and Indigenous Peoples* (2009), p 63.

I strongly believe that if we draw on these principles to guide all of our efforts, both internally and externally, to secure the rights of Aboriginal and Torres Strait Islander peoples, the potential for lateral violence will be significantly reduced.

(a) Self-Determination

Exercising self-determination for Aboriginal and Torres Strait Islander peoples is challenging in Australia because of our history of colonisation and the imposition of laws that are not designed or developed to accommodate our vastly different systems of social organisation.

(i) What does self-determination look like?

Self-determination can mean different things to different groups of people and so there is no pre-determined outcome of what self-determination looks like. However, the principle and right of self-determination has a number of characteristics, which can be used to guide the development of structures and processes that promote self-determination: see Text Box 3.2.

Text Box 3.2:

The principle of self-determination¹⁸

The characteristics of self-determination include that it:

- is a human right that is afforded to individuals as well as groups and it applies universally and equally to all segments of humanity
- cannot be viewed in isolation from other human rights but rather must be reconciled with and understood as part of the broader universe of values and prescriptions that constitute the modern human rights regime
- is a regulatory vehicle that broadly establishes rights for the benefit of all peoples, including Indigenous peoples
- is grounded in the precepts of freedom and equality, and opposes both prospectively and retroactively, patterns of empire and conquest
- affirms that human beings, individually and as groups, are equally entitled to be in control of their own destinies and to live within governing institutional orders that are devised accordingly
- affirms that peoples are entitled to participate equally in the development of the governing institutional order, including the constitution, under which they live and, further, to have that governing order be one in which they may live and develop freely on a continuous basis
- includes the dual aspects of autonomous governance and participatory engagement
- is an instrument of reconciliation and conciliation, particularly for peoples who have suffered oppression at the hands of others
- promotes the building of a social and political order based on relations of mutual understanding and respect.

18 S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhagen (Eds), *Making the Declaration Work* (2009) 184, pp 186–196.

The power of the Declaration to address lateral violence is in its affirmation that Indigenous peoples have the right of self-determination, its recognition that we have been denied this right, and the parameters it identifies for processes that will remedy that denial.¹⁹

In consideration of the characteristics outlined above, self-determination as it applies to Indigenous peoples is the right of a group of peoples to meet the human needs²⁰ of that group, including the means to preserve that group's identity and culture.²¹

Exercising the right of self-determination means we have the 'freedom to live well and live according to our values and beliefs'.²² Self-determining people are 'actors in their own lives instead of being acted upon others'. In other words, 'they make things happen in their lives. They are goal oriented and apply problem-solving and decision-making skills to guide their actions'.²³

I note that the Australian Government acknowledges it has a role in fulfilling the right of self-determination as it applies to Aboriginal and Torres Strait Islander peoples. In the Government's statement adopting the Declaration in 2009, Minister Macklin confirmed that:

[t]hrough the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully...We support Indigenous peoples' aspirations to develop a level of economic independence so they can manage their own affairs and maintain their strong culture and identity ... We also respect the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with lands and waters ... [and] [w]here possible, the Australian Government encourages land use and ownership issues to be resolved through mediation and negotiation rather than litigation.²⁴

(ii) Self-determination and native title, rights to lands, territories and resources

The *Native Title Report 2007* identified two reasons why the recognition of native title by Australian law is vital for Aboriginal and Torres Strait Islander peoples to be able to freely exercise self-determination:

- Firstly, the recognition of Aboriginal and Torres Strait Islander peoples, our societies and our laws and customs that takes place when the Federal Court makes a determination that native title exists and who holds it, affirms our cultural identity and our connections and cultural responsibilities to our lands, territories and resources.
- Secondly, the actual rights and interests recognised can facilitate opportunities to achieving economic, social and cultural outcomes for Aboriginal and Torres Strait Islander peoples.²⁵

19 S J Anaya, 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhagen (Eds), *Making the Declaration Work* (2009) 184, p 196.

20 For a discussion on human needs theory, see Chapter 2 of the *Social Justice Report 2011*.

21 UNESCO, 'Conclusions and recommendations of the conference' in van Walt van Praag (ed) *The implementation of the right to self-determination as a contribution to conflict prevention*, 1999, p 19.

22 E Daes, 'Striving for self-determination for Indigenous peoples' in Y Kly and D Kly (eds), *In pursuit of the right to self-determination* (2000), p 58.

23 M Wehmeyer, *Self-determination and the education of students with disabilities*, Educational Resources Information Center Clearinghouse on Disabilities and Gifted Education Digest No E632 (2002). At <http://www.hoagiesgifted.org/eric/e632.html> (viewed 8 September 2011).

24 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples*, 3 April 2009, at http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 28 September 2011).

25 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 4. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/chapter0.html (viewed 19 September 2011).

As Justice Merkel in the *Rubibi* case pointed out, the resolution of native title claims is:

a means to an end, rather than an end in itself. Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for indigenous communities ... native title can also be seen as a means of indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia. Obtaining a final determination of native title, where that is achievable, can be a stepping-stone to securing those outcomes but cannot, of itself, secure them.²⁶

Engaging in the native title process as traditional owners is only one element of self-determination. Merely engaging in the native title process will not result in the full exercise of self-determination because the system does not adequately facilitate our effective engagement or our access to and enjoyment of the benefits arising from it.

Achieving self-determination is difficult because of the dichotomy of a government that has a focus on the pursuit of individual wealth creation and Aboriginal and Torres Strait Islander peoples who may pursue self-determination as individuals or groups within a cultural context that focuses more broadly on social, cultural and environmental as well as economic benefits.

Further, Aboriginal and Torres Strait Islander communities have cultural rights and responsibilities to our families and our lands, territories and resources that are different to non-Indigenous Australians. Balancing these differences can create conflict in our communities and this can result in lateral violence.

As demonstrated in Chapter 2, our efforts to try and fit into non-Indigenous legal systems create a situation where native title holders are often forced to compromise their traditional decision-making processes and values to fit these imposed governance structures. The intra-Indigenous conflict that arises as a result of these circumstances often leads to mistrust and suspicion between Aboriginal and Torres Strait Islander peoples which can fracture the social cohesion of the group involved and impede self-determination.

(iii) Government and our right of self-determination

Prior to announcing their support for the Declaration in 2009, the Australian Government consistently failed to support the concept of self-determination. Rather than ensuring the capacity of Aboriginal and Torres Strait Islander peoples to actively participate in decision-making and take control of our own futures, successive governments have attempted to address the disadvantage we face through mainstream policy platforms or legislation that affirms government control over our lives.

In the second preambular paragraph of the Declaration, the General Assembly of the United Nations affirms:

... 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.²⁷

While this might seem innocuous at first glance, it actually imposes obligations on governments to design and implement systems that cope with difference. This means it is not up to the individuals and communities who are different to navigate their way through the western legal system. The system should be designed to accommodate difference.

26 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, [166] as cited in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/chapter0.html (viewed 19 September 2011).

27 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular para 2. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

The need for the native title system to accommodate different cultural values, decision-making processes and governance structures has consistently been raised with the Australian Government by both Aboriginal and Torres Strait Islander peoples themselves and the non-government organisation (NGO) sector. To date, however, native title reform has not addressed these particular limitations within the system. This leaves communities trying to define themselves in ways that are understandable and acceptable to non-Indigenous requirements; but undermine and distort our identities,²⁸ our right to determine and develop our own priorities and strategies for the development or use of our lands, territories and resources,²⁹ and our right of self-determination.³⁰

Further, Aboriginal and Torres Strait Islander peoples must be able to access and use the tools provided by the native title system to promote the right of self-determination. For example, two of the key mechanisms provided by native title that can enable us to exercise self-determination are the negotiation of Indigenous Land Use Agreements (ILUAs) or native title settlement agreements; and the establishment of Prescribed Bodies Corporate (PBCs) that are set up to manage determined native title rights and interests and the distribution of any benefits secured.

As these mechanisms are designed in accordance with non-Indigenous legal systems and corporate structures, there is often a direct conflict with the 'governing institutional order' of Aboriginal and Torres Strait Islander peoples. Mechanisms and processes intended to empower and benefit us must actually do so by enabling our active and appropriate participation in decision-making and developing our capacity to access and manage any accrued benefits.

On the one hand, structures that are based on imposed control and regulation do not provide for appropriate governance arrangements and do not empower communities to make decisions or determine our own futures in accordance with our human rights. On the other hand, a community that is insecure in its cultural identity, with unchecked family-feuds that uses decision-making processes like native title as a platform for these feuds, is not self-determining.

A self-determining community not only exerts control but it also self-regulates. It decides how disputes are resolved, how decisions are made, what protocols for behaviour are acceptable, and it ensures the well-being and active participation of the entire community.

(iv) Guidance provided by the Declaration

The Declaration clearly outlines the rights that promote self-determination and how governments can incorporate the principle in their laws and policies: see Text Box 3.3.

28 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), article 33. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

29 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), article 32. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

30 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), article 3. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

Text Box 3.3:

Promoting self-determination in a native title context using the Declaration

While the principle of self-determination underpins all rights outlined in the Declaration, a number of provisions directly promote the right of self-determination. The Declaration also directly informs governments about how they should implement this right.

Self-determination as it applies to the native title system and other land and resource related processes is articulated in the Declaration as follows.

Aboriginal and Torres Strait Islander peoples have the right to:

- freely determine our political status and freely pursue our economic, social and cultural development (art 3)
- belong to an Indigenous community or nation and determine our own identities, structures and membership of our organisations in accordance with our customs and traditions and procedures; and determine the responsibilities of individuals to our communities (arts 9, 33 and 35)
- autonomy or self-government in matters relating to our internal and local affairs, as well as ways and means for financing our autonomous functions (art 4)
- determine and develop priorities and strategies for exercising our right to development; develop, determine and administer economic and social programmes affecting us through our own organisations; promote, develop and maintain our organisational structures and our distinctive customs, spirituality, traditions, procedures, practices, and juridical systems or customs in accordance with international human rights (arts 23 and 34)
- own, use, develop and control our lands, territories and resources we traditionally owned, occupied, used or otherwise acquired; and determine and develop priorities and strategies for the development or use of our lands or territories and other resources (arts 26 and 32)
- enjoy fully all rights established under applicable international and domestic labour law (art 17).

Government's role is to facilitate our right of self-determination by establishing systems that:

- prevent forced removal and assimilation, prejudice and discrimination, and destruction of culture; and promote tolerance, understanding and good relations among Aboriginal and Torres Strait Islander peoples and all other segments of society (arts 8–10 and 15)
- ensure that we can understand and be understood in political, legal and administrative proceedings, through the provision of interpreters and other appropriate means (art 13)
- ensure that consultation and cooperation with Aboriginal and Torres Strait Islander peoples is in good faith, and that our free, prior, and informed consent is obtained through our own representative organisations before adopting and implementing legislative or administrative measures that may affect us; or for the approval of any project affecting our lands, territories or resources, particularly in connection with the development, utilization or exploitation of mineral, water and other resources (arts 19 and 32)
- ensure the continuing improvement of our economic and social conditions, with particular attention paid to the rights and special needs of Aboriginal and Torres Strait Islander elders, women, youth, children and persons with disabilities (art 21)

- give legal recognition and protection to lands, territories and resources owned, used or otherwise acquired by Aboriginal and Torres Strait Islander peoples, respecting the customs, traditions and land tenure systems of the Aboriginal and Torres Strait Islander peoples concerned (art 26)
- in consultation and cooperation with Aboriginal and Torres Strait Islander peoples, ensure that appropriate measures, including legislative measures and the provision of financial and technical assistance, are provided to achieve the ends of the Declaration (arts 38 and 39).

(b) Participation in decision-making and free, prior and informed consent

Like self-determination, free, prior and informed consent reinforces all of the rights contained within the Declaration. In fact, free, prior and informed consent has been identified as a ‘requirement, prerequisite and manifestation of the exercise of our right to self-determination’.³¹

In Australia today, Aboriginal and Torres Strait Islander peoples do not have genuine decision-making authority and power over their lives and futures. That power and authority continues to rest in the hands of governments.³²

As I discuss in Chapter 2, the native title system is currently supported by an unequal power dynamic that promotes the external decision-making processes of governments and breaks down internal decision-making and conflict management processes of Aboriginal and Torres Strait Islander peoples.

The denial of our right to participate in decision-making and the deterioration of our community norms and protocols increases the potential for conflict resulting in lateral violence. In order to avoid this outcome, our participation in decision-making must be underpinned by the principle of free, prior and informed consent.

The successful operation of the native title system is dependent on the effective and appropriate engagement and participation of Aboriginal and Torres Strait Islander peoples in decision-making. However, as I argue in Chapter 2, the ‘complexities and inter-relatedness of Indigenous societies means that issues are multi-levelled, multi-directional and multi-layered’,³³ and processes for decision-making must be able to accommodate a wide range of issues and players.

The consequences of decisions often ripple across the community and beyond, along extensive Indigenous social and cultural networks. Outcomes invariably affect Indigenous people who may not be directly involved in making the decisions and issues under consideration are often influenced by, and not be seen as separate from, other issues in the community.³⁴

31 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, para 34. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

32 D Smith, J Hunt, *Do They Get It? Indigenous Governance: The Research Evidence and Possibilities for a Policy Dialogue with Australian Governments* (Presentation delivered at the Inaugural National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 18 November 2010). At http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith_Hunt.pdf (viewed 17 September 2011).

33 T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: research findings, recommendations and implementation* (2006), Report No. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 13. At <http://www.aiatsis.gov.au/ntru/docs/researchthemes/negmedfac/lfamp/lfampReport.pdf> (viewed 9 September 2011).

34 T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: research findings, recommendations and implementation* (2006), Report No. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, p 13. At <http://www.aiatsis.gov.au/ntru/docs/researchthemes/negmedfac/lfamp/lfampReport.pdf> (viewed 9 September 2011).

The principle of free, prior and informed consent should underpin the development of all frameworks of engagement with Aboriginal and Torres Strait Islander peoples and therefore is fundamental to ensuring our effective participation in decision-making on issues that affect us. Securing these key principles early in the process also ensures that the introduction of frameworks and processes do not further exacerbate existing conflicts or create new ones.

(i) What are the key features of free, prior and informed consent?

In the *Native Title Report 2010*,³⁵ I outlined the elements of a common understanding of free, prior and informed consent, and features of a meaningful and effective consultation process. These are summarised again below: see Text Box 3.4.

Text Box 3.4:

Free, prior and informed consent;³⁶ and meaningful and effective engagement, participation and consultation³⁷

What does free, prior and informed consent mean?

When making policies, laws or undertaking activities that affect our peoples, governments and others should negotiate with us with the aim of obtaining our consent.

For government, this is much stronger than an obligation to just provide information or ‘consult’. Governments and companies should not impose their position onto our peoples without first taking our rights into consideration. The following outlines free, prior and informed consent:

Free means no force, bullying or time pressure.

Prior means that we have been consulted before the activity begins.

Informed means we are given all of the available information and informed when that information changes or when there is new information. If our peoples don’t understand this information then we have not been informed. An interpreter or other person might need to be provided to assist. It is the duty of those seeking consent to ensure those giving consent are fully informed.

Consent requires that the people seeking consent allow Aboriginal and Torres Strait Islander communities to say yes or no to decisions affecting them according to the decision-making process of their choice.³⁸ To do this means we must be consulted and participate in an honest and open process of negotiation that ensures:

- all parties are equal, neither having more power or strength

35 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), apps 3, 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 15 September 2011).

36 Extract from United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), paras 46–49. At <http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html> (viewed 19 November 2010).

37 For a detailed discussion of these elements, see M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 October 2011).

38 C Hill, S Lillywhite and M Simon, *Guide to Free, Prior and Informed Consent*, Oxfam Australia (2010), p 9. At <http://www.oxfam.org.au/resources/filestore/originals/OAUs-GuideToFreePriorInformedConsent-0610.pdf> (viewed 11 October 2011).

- our group decision-making processes are allowed to operate
- our right to choose how we want to live is respected.

Importantly, the onus is on the organisation (government, corporate or our own representative bodies) who is seeking consent or a decision to be made to ensure that the decision that is made is free and informed.³⁹

Internal and external aspects of decision-making

The principle of free, prior and informed consent should be applied to both internal and external aspects of decision-making and underpin the formulation of governance arrangements.

Participation in decision-making has two distinct elements: internal and external.⁴⁰

*Internal participation in decision-making*⁴¹ – the processes undertaken by our Aboriginal and Torres Strait Islander peoples, organisations and/or communities to make decisions. This includes being able to determine who within the community makes decisions and what protocols need to be followed to guide this decision-making. These processes also tend to include dispute resolution mechanisms.

*External participation in decision-making*⁴² – requires governments and other third parties to facilitate the active involvement of Indigenous peoples in decisions that impact on their rights. This requires governments and other players to recognise, include and treat Indigenous peoples as substantive players and major stakeholders in the development, design, implementation, monitoring and evaluation of all policy and legislation that impacts them.

The Expert Mechanism on the Rights of Indigenous Peoples asserts that:

[t]he Declaration distinguishes between internal and external decision-making processes. Thus, indigenous peoples have the right to autonomy or self-government over their internal and local affairs (art. 4), as well as the right to participate fully, if they so choose, in the political, economic, social and cultural life of the State (art. 5), and to participate in all decisions affecting them or their rights (art. 18 and 19).⁴³

Effective engagement with Indigenous peoples is essential to ensure that external decision-making supports internal decision-making processes of Indigenous peoples.

39 See Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), p 25. At http://www.humanrights.gov.au/declaration_indigenous/declaration_full.html (viewed 23 September 2011); Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN Doc E/C.19/2005/3 (2005), paras 46–48.

40 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, para 31. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

41 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, part III. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

42 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, part IV. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

43 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, para 3. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

Meaningful and Effective Engagement, Consultation and Participation

Based on international standards and the experiences of Aboriginal and Torres Strait Islander peoples and their representatives,⁴⁴ meaningful and effective engagement and participation should be promoted in consultation processes by including the following features as a minimum:

- consultation processes should be products of consensus
- consultations should be in the nature of negotiations
- consultations need to begin early and should, where necessary, be ongoing
- Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- adequate timeframes should be built into consultation processes
- consultation processes should be coordinated across government departments
- consultation processes need to reach the affected communities
- consultation processes need to respect Aboriginal and Torres Strait Islander representative and decision-making structures
- governments must provide all relevant information and do so in an accessible way.

The features set out above can be used to facilitate participation, guiding the development of appropriate engagement processes on a case-by-case basis. However, they should not be used to advocate a 'one-size-fits-all' model of consultation.

In speaking to people in government, I often detect anxiety about what free, prior and informed consent means, particularly whether it means a veto right. But the right to free, prior and informed consent is, as Kenneth Deer puts it:

... not automatically a veto, since our human rights exist relative to the rights of others. Nor is there any reference to a veto in the *Declaration*. Free, prior, and informed consent is a means of participating on an equal footing in decisions that affect us.⁴⁵

The informed component of free, prior and informed consent places obligations on the organisation seeking consent to ensure that the people giving consent are fully informed. That is, we must be told the good, the bad and the ugly of any decision that we may be asked to make. This means that affected Aboriginal and Torres Strait Islander communities are to be informed of all the relevant information. If information is provided to a community in an *ad hoc* manner, weapons of lateral violence like rumours and innuendo can fill the void.

44 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter3.html#Heading35 (viewed 15 September 2011).

45 K Deer, 'Reflections on the Development, Adoption, and Implementation of the *UN Declaration on the Rights of Indigenous Peoples*' in J Hartley, P Joffe, J Preston (eds), *Realising the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope and Action* (2010) 18, p 27.

(ii) Internal and external decision-making processes

Effective participation in decision-making is essential to remedy the inequality that exists within the native title system. The absence of appropriate internal and external decision-making processes in native title not only delays the determination of outcomes, it provides opportunities for latent conflict (such as intra/inter-family disputes, economic disparity, and historical and contemporary cultural issues that centre on identity) to surface and further complicate and delay reaching the best possible outcome.

The potential for lateral violence can be significantly reduced by:

- developing appropriate engagement protocols with traditional owner groups to improve our own internal decision-making processes
- reforming mechanisms to facilitate our effective participation in external decision making.

Engagement protocols that provide guidelines for internal and external engagement should be grounded in the principle of free, prior and informed consent.

Effective internal decision-making processes are respectful, inclusive, build group cohesion, have democratic legitimacy and include mechanisms for resolving disputes. Dispute resolution is discussed further in Chapter 4.

External consultation and engagement processes by third parties, including governments, NGOs and industry should be developed in cooperation with Aboriginal and Torres Strait Islander peoples. They should be flexible enough to accommodate the internal decision-making processes of the Aboriginal and Torres Strait Islander communities they are working with and incorporate dispute resolution or conflict management processes.

They should build community cohesion, strengthen relationships and decision-making capacity, and should not become a platform for disputes and family feuds to be played out.

Robust internal and external decision-making processes can also facilitate mutual understanding about the priorities for each of the parties at the table and also what motivates them: their needs, wants, fears and concerns.

Importantly, these processes should, as much as possible, counteract behaviours that foster lateral violence such as coercion and exclusion.

Without understanding these crucial elements, outcomes will be based on power and authority rather than achieving a win-win outcome.

(iii) Effective participation in decision-making is central to securing and exercising native title and rights to lands, territories and resources

Native title outcomes should reflect the aspirations of traditional owners. However, while the native title system provides for the recognition of the rights of Aboriginal and Torres Strait Islander peoples to our lands and territories, the Native Title Act does not afford native title claimants the right to participate in accordance with free, prior and informed consent. In fact, as discussed in Chapter 2, it significantly limits the opportunities for traditional owners to participate in decisions about activities (whether they be our aspirations to own, use or develop our lands; or the aspirations of others) on our lands.

In the original Native Title Act, the right to negotiate was included in recognition of the ‘special attachment of Aboriginal and Torres Strait Islander people to their land’.⁴⁶

The *Native Title Amendment Act 1998* (Cth) changed the right to negotiate provisions. It authorised states and territories to introduce legislation that allowed for exceptions to the right, in effect significantly diminishing the right to negotiate. The amendments also changed the right to negotiate in the Native Title Act itself, replacing it with the lesser rights to only make comment or be notified.

As I examine in Chapter 2, the native title system in its current form ensures that negotiations occur on an unequal playing field. However, it not only reflects the power imbalance that exists between Aboriginal and Torres Strait Islander peoples, the State and influential extractive industries; it also sets up an unequal power dynamic and socio-economic inequities for Aboriginal and Torres Strait Islander peoples generally – creating the ‘haves’ and the ‘have not’s’.

This is not only an issue within native title groups but extends to the broader community. For example, ‘in native title processes, “native title holders” are often seen to constitute the appropriate agreement-making group to the exclusion of “historical” people with whom they may have close family ties, or have lived for many years.’⁴⁷ This creates the ideal situation for lateral violence to play out.

Effective participation in decisions about our native title rights and interests is critical to our overall well-being, both as individuals and as groups of peoples. This is particularly important because of the unique cultural obligations and relationships we have to our lands, territories and resources. The greater the impact and damage that a decision or project will have on our people’s lives, cultural integrity and country, the greater the need to reach an outcome to which we can all agree.⁴⁸

As such, the principle of free, prior and informed consent should be achieved before any of the following actions are taken:

- projects or decisions that affect our country including mining, development and the use or destruction of sacred sites
- the use of biological materials, traditional medicines and knowledge, including artwork, dance and song
- making agreements or treaties between government and our peoples
- the creation of laws or policies that affect our peoples
- actions that could lead to the forced removal of Aboriginal and Torres Strait Islander peoples from country.⁴⁹

The Goldfields Land and Sea Council have developed a mining policy; *Our Land is Our Future*, which guides the Council’s decision-making on mining-related activity. The policy adopts human rights standards including

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

47 T Bauman and R Williams, *The Business of Process Research Issues in Managing Indigenous Decision-Making and Disputes in Land*, Research Discussion Paper No 13, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, p 12. At <http://www.aiatsis.gov.au/research/docs/dp/DP13.pdf> (viewed 3 October 2011).

48 Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), p 25. At http://www.humanrights.gov.au/declaration_indigenous/declaration_full_4.html (viewed 15 September 2011).

49 Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), p 25. At http://www.humanrights.gov.au/declaration_indigenous/declaration_full_4.html (viewed 15 September 2011).

those contained in the Declaration. Importantly, it asserts that the free, prior and informed consent of the traditional owners is to be secured before mining activities are approved.

The policy also includes:

- overarching and operational principles for mining-related decisions
- procedures for mining-related decisions
- a statement outlining the relationship of the mining policy to Aboriginal rights
- principles that promote environmental, economic, social and cultural sustainability
- a review mechanism.⁵⁰

(iv) Government obligations to facilitate our participation

I acknowledge the efforts of the Australian Government to seek the views of Aboriginal and Torres Strait Islander peoples and their representatives on reforming the native title system. However, I reiterate my concerns that many of these processes do not effectively facilitate our full participation or seek to obtain our free, prior and informed consent; and where they do, our views are often not reflected.

The United Nations Permanent Forum on Indigenous Issues voiced its concerns at the apprehension displayed by States in implementing free, prior and informed consent:

Such consent is vital for the full realization of the rights of indigenous peoples and must be interpreted and understood in accordance with contemporary international human rights law, and recognized as a legally binding treaty obligation where States have concluded treaties, agreements and other constructive arrangements with indigenous peoples. In this regard, the Permanent Forum emphatically rejects any attempt to undermine the right of indigenous peoples to free, prior and informed consent. Furthermore, the Forum affirms that the right of indigenous peoples to such consent can never be replaced by or undermined through the notion of “consultation”.⁵¹

Unfortunately, the Australian Government is yet to demonstrate an understanding of or a solid commitment to effective engagement that is consistent with free, prior and informed consent with Aboriginal and Torres Strait Islander peoples.

Governments are under a duty to consult ‘whenever a State decision may affect Indigenous peoples in ways not felt by others in society’, even if our rights have not been recognised in domestic law.⁵² This duty requires governments to consult effectively with us before adopting or implementing measures that may affect our rights. However, the objective of consultations must be more than governments telling us what they want to do for or to us. The intent of consultations ‘should be to obtain the consent or agreement of the Indigenous peoples concerned’.⁵³

50 Goldfields Land and Sea Council, *Mining Policy: Our Land is Our Future* (2008). At <http://www.glc.com.au/> (viewed 15 September 2011).

51 Economic and Social Council, *Permanent Forum on Indigenous Issues Report on the tenth session (16–27 May 2011)*, UN Doc E/2011/43-E/C.19/2011/14 (2011), para 36. At http://www.un.org/esa/socdev/unpfii/en/session_tenth.html (viewed 11 October 2011).

52 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 29 September 2011).

53 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 65. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 29 September 2011).

To do this effectively, the current requirement to consult must be extended to reflect in a practical sense a requirement to effectively negotiate. This not only applies to the agreement-making opportunities that form part of the native title system, it also applies to reforming the policy and legislative framework. Policy making processes that are based on consultation alone do not satisfy the principles of equality, equity and effective participation required under international law.

While the Australian Government conducts consultations on a range of issues through various mechanisms such as Senate Committees, reviews and evaluations of policies and programs, more often than not the contributions made by Aboriginal and Torres Strait Islander stakeholders are not reflected in the final outcome. These impacts were addressed in the *Native Title Report 2010*.⁵⁴

Lateral violence can be exacerbated by governments through a lack of recognition and engagement with Aboriginal and Torres Strait Islander peoples and by relying on processes that do not reflect their input and as a result, pit groups against each other. For instance, where an Aboriginal person was sent to represent their group in a community consultation, if their views or aspirations are not reflected in the outcome, this person may be seen to have not represented or misrepresented their views to the government. Alternatively, they can be blamed for outcomes decided by government that restrict or deny the human rights of the communities represented.

As I discuss in Chapter 1, the Australian Government has made some attempts to improve engagement with Aboriginal and Torres Strait Islander peoples through their Engagement Framework. However, in order for these efforts to create holistic systemic change they must be adopted as standard practice instead of being applied in an *ad hoc* or voluntary manner. Further, they must inform whole of government responses to Aboriginal and Torres Strait Islander policy development and implementation.

A critical step required to achieve a significant improvement in the lives of Indigenous peoples is for governments to recognise, endorse and treat Aboriginal and Torres Strait Islander peoples as substantive players and major stakeholders in the development, design, implementation, monitoring and evaluation of all policy and legislation that impacts on us.

The Australian Human Rights Commission publication, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples*, highlights that adhering to the principle of free, prior and informed consent:

... creates a process where governments or companies and our peoples can talk to each other on an equal footing and come to a solution or agreement that all parties can accept.⁵⁵

External decision-making processes that are guided by free, prior and informed consent increase the capacity for governments to engage with Aboriginal and Torres Strait Islander communities and reduce the possibility of having dealings hijacked by internal disputes.

(v) Guidance provided by the Declaration

A number of rights contained within the Declaration require that free, prior and informed consent is obtained. The Declaration also clearly affirms our right to participate in decision-making: see Text Box 3.5.

54 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 15 September 2011).

55 Australian Human Rights Commission, *The Community Guide to the UN Declaration on the Rights of Indigenous Peoples* (2010), p 25. At http://www.humanrights.gov.au/declaration_indigenous/declaration_full.html (viewed 23 September 2011).

Text Box 3.5:

The requirement to obtain free, prior and informed consent and the right to participate in decision-making

The Declaration requires that governments and external stakeholders obtain the free, prior and informed consent of Indigenous peoples, particularly in relation to:

- the forcible removal of Indigenous peoples from our lands or territories – no relocation shall take place without our free, prior and informed consent (art 10)
- the right to practice and revitalise our cultural traditional and customs – cultural, intellectual, religious and spiritual property should not be taken without our free, prior and informed consent or in violation of our laws, traditions and customs (art 11)
- adopting and implementing legislative or administrative measures that affect Indigenous peoples – before adopting measures, States shall consult and cooperate in good faith through our own representative organisations in order to obtain our free, prior and informed consent (art 19)
- traditionally owned or otherwise occupied or used lands, territories and resources, that have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent – Indigenous peoples have the right to redress including restitution or just, fair and equitable compensation (art 28)
- military activities and the storage or disposal of hazardous materials on our lands or territories – States shall take effective measures to ensure that these activities do not occur without the free, prior and informed consent of the Indigenous peoples whose lands are concerned (arts 29 and 30)
- the development, utilization or exploitation of mineral, water or other resources – States shall consult and cooperate in good faith with the Indigenous peoples concerned through our own representative organisations in order to obtain our free, prior and informed consent prior to the approval of any project affecting our lands or territories and other resources (art 32).

The right to participate in decision-making is affirmed as follows:

- Indigenous peoples have the right to participate in decision-making in matters which would affect our rights, through our own representatives and in accordance with our own procedures; as well as to maintain and develop our own Indigenous decision-making organisations (art 18)
- as a group, Indigenous communities can determine the responsibilities of individuals within that community and what those responsibilities are to their communities (art 35)
- Indigenous peoples have the right to a fair process to resolve disputes and to provide effective remedies for violations of our rights. This process should consider Indigenous customs and legal systems and international human rights law (art 40).

(c) Non-discrimination and equality

As highlighted in the *Social Justice Report 2011*, discrimination and inequality perpetuates lateral violence in three ways:

- Racial discrimination reinforces negative stereotypes about Aboriginal and Torres Strait Islander peoples. Over time these stereotypes can become internalised and generate lateral violence.
- Lateral violence thrives in environments where human needs (including our acceptance, access and security needs) are not met.
- Equality requires an acknowledgement of cultural difference and recognition that historical discrimination has continuing negative impacts.

(i) Discrimination, inequality and identity

Inequality is generated by the existence and promotion of unequal power dynamics. Discrimination arises where the powerful assert their authority against the powerless. While Aboriginal and Torres Strait Islander peoples can face all categories of discrimination (including sex, age, disability and race-based discrimination), race based discrimination exacerbates the effects of all others.

Text Box 3.6

Race discrimination in Australia

In Australia, protections against discrimination on a number of grounds including race, colour, descent, or national or ethnic origin, are provided through the *Racial Discrimination Act 1973* (Cth) (RDA). In 1995, the RDA was amended to include racial vilification.

The RDA, administered by the Australian Human Rights Commission, gives effect to Australia's obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD), which the Australian Government ratified in September 1975.

Racism – defined as the hatred or intolerance of another race or other races – results in much more than humiliation, embarrassment and hurt feelings. Racism has serious health, social and economic consequences for individuals, communities and societies. It's been associated with depression, anxiety, high blood pressure, heart disease, smoking, alcohol and substance abuse as well as poor employment and educational outcomes.⁵⁶ Racism has the potential to do plenty of damage regardless of who perpetrates it.

Current evidence also suggests that race based discrimination and exclusion also impacts on families, family life and local communities with multiple and serious social and economic costs.⁵⁷

56 A Larson, M Gilles, PJ Howard, J Coffin, 'It's enough to make you sick: the impact of racism on the health of Aboriginal Australians' (2007) 31(4) *Australian and New Zealand Journal of Public Health* 322, pp 322–329.

57 VicHealth, *More than tolerance: Embracing diversity for health: Discrimination affecting migrant and refugee communities in Victoria, its health consequences, community attitudes and solutions – A summary report* (2007) Victorian Health Promotion Foundation. At <http://www.vichealth.vic.gov.au/~media/ResourceCentre/PublicationsandResources/Mental%20health/MoreThanTolerance/DCASv2%204%20%20FINAL%20060907.ashx> (viewed 19 October 2011).

As highlighted above, race discrimination reinforces negative stereotypes about Aboriginal and Torres Strait Islander peoples. Unfortunately, these stereotypes can also negatively influence the effective operation of the native title system.

This was particularly relevant in the early days of native title, where we heard claims by Members of the Federal Parliament that native title directly threatened the backyards and homes of ordinary Australians.⁵⁸ This sentiment was repeated again in 2006, in relation to the Noongar peoples whose traditional lands cover metropolitan Perth in Western Australia. The Australian Government was widely reported in the media saying that there would be no guarantee that Perth's beaches, parks and riverbanks will be excluded from a successful native title claim.⁵⁹

While these claims are unfounded, these fears continue to permeate the native title landscape and affect our engagement within the system and the way external stakeholders see us and engage with us in the native title process. The fact that the interests of non-Indigenous stakeholders always take precedence over the inherent rights of Aboriginal and Torres Strait Islander peoples demonstrates this ongoing inequality within the native title system. We enter into the native title system knowing that when an impasse is reached, Government still retains the power to compulsorily acquire land in the 'national interest'.

I will briefly outline the types of race discrimination below, as I believe that in order to confront and address discrimination, we must be aware of it and its damaging effects.

(ii) So how does race discrimination relate to lateral violence?

Racism is a form of oppression that relies on and reinforces negative stereotypes. As we have seen recently in the media, racism can be very direct. Direct racism⁶⁰ is extremely confronting and demoralising for Aboriginal and Torres Strait Islander peoples and goes to the heart of our identity, and our sense of belonging as Australians. It can be as simple as being called an 'Abbo' or a 'Boong', and as extreme as having non-Indigenous people question your Aboriginality publicly. Race discrimination attacks and denies our cultural heritage and it denies our histories of oppression and colonisation.

Some forms of racism are less identifiable. For example, institutionalised or systemic racism is an indirect and largely invisible process. It is the application of beliefs, values, presumptions, structures and processes by the institutions of society (be they economic, political, social or cultural) that indirectly treats the values of a particular racial group as inferior. It can involve a failure to acknowledge historical discrimination against a particular group which results in that group in the present day occupying an inferior or unequal position in society.

Systemic racism has been perpetuated by legislative and policy frameworks that seek to define what constitutes being Aboriginal or Torres Strait Islander.⁶¹ These legislative frameworks have supported the colonisation process in Australia and continue to affect our own constructs of identity, family, community and systems of organisations. Because of the issues that I have discussed both above and in the *Social Justice Report 2011*, the native title system and other policy and legislative frameworks concerning our lands, territories and resources may also be used to support these circumstances.

58 Commonwealth, *Parliamentary Debates*, Senate, 27 November 1997, pp 9635–9753 (Senator Forshaw, Senator Faulkner, Senator Herron, Senator Evans). At <http://www.aph.gov.au/hansard/senate/dailys/ds271197.pdf> (viewed 7 October 2011).

59 See for example AAP, "No guarantees" in WA native title claim', *Sydney Morning Herald*, 31 October 2006. At <http://www.smh.com.au/news/National/No-guarantees-in-WA-native-title-claim/2006/10/31/1162278143622.html> (viewed 7 October 2011).

60 See *Racial Discrimination Act 1975* (Cth), s 9(1).

61 For example see the Protection Acts, AIATSIS, *To Remove and Protect*, www1.aiatsis.gov.au/exhibitions/removeprotect/index.html (viewed 19 September 2011).

I discuss in Chapter 4 how reforms to the native title system assist in overcoming the barriers racism presents. It is my strong view that in order to reset and strengthen relationships between Aboriginal and Torres Strait Islander peoples and governments, work needs to be done to eradicate racism and break down the negative stereotypes and preconceptions that we have of each other.

(iii) Governments obligations to eradicate racism

The role for governments is to remove existing structural and systemic impediments to healthy relationships within our communities and reinforce protections against race discrimination. In the native title context, this will not only improve relationships between traditional owners and governments, it will also facilitate positive relationships between traditional owners and external parties to native title negotiations.

More generally, we should start with committing to a zero tolerance of racial discrimination across all legislation and policies. This will alleviate some of the tension that is created by the systemic requirement to conform to inappropriate legislative and policy arrangements, and systems of governance, in turn alleviating the experience and effect of lateral violence in our communities.

The Australian Government appeared before the Committee on the Elimination of Racial Discrimination (CERD) in August 2010. As a signatory to the CERD, Australia has a legal obligation to ensure that it protects its citizens from race discrimination. The CERD has provided nation-states with considerable guidance to establishing measures in this regard. In particular, the CERD has provided clear guidance to the Australian Government on applying this Convention to the rights of Aboriginal and Torres Strait Islander peoples including:

- *General Comment XXIII*,⁶² which acknowledges that the preservation of Indigenous culture and identity has been jeopardised as a result of colonisation, ongoing discrimination and the denial of human rights and fundamental freedoms. In paragraph 4 of the general comment, the Committee specifically calls on governments to:
 - (a) recognize and respect indigenous distinct culture, history, language and way of life as an enrichment of the State's cultural identity and to promote its preservation
 - (b) ensure that members of indigenous peoples are free and equal in dignity and rights and free from any discrimination, in particular that based on indigenous origin or identity
 - (c) provide indigenous peoples with conditions allowing for a sustainable economic and social development compatible with their cultural characteristics
 - (d) ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent
 - (e) ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages
- *The Committee's Concluding Observations on Australia*⁶³ where the Committee reiterated 'in full its concern about the Native Title Act 1993 and its amendments', particularly regarding the 'persisting

62 Committee on the Elimination of Racial Discrimination, *General Recommendation 23: Rights of indigenous peoples*, UN Doc A/52/18 (Annex V) (1997). At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocume nt](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocume nt) (viewed 11 October 2011).

63 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/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/ cerds77.htm> (viewed 30 August 2011).

high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land'. The CERD recommended that the Australian Government 'enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources'.

(iv) Guidance provided by the Declaration

As set out in Text Box 3.7, the Declaration contains a number of rights that support non-discrimination and equality.

Text Box 3.7: Promoting non-discrimination and equality

The Declaration states that Indigenous peoples and individuals:

- are free and equal to all other peoples and individuals and have the right to be free from any other kind of discrimination, in the exercise of their rights, in particular that based on their Indigenous origin or identity (art 2)
- 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 (art 9).

Governments have a responsibility to:

- provide effective mechanisms for the prevention of and redress for any form of propaganda designed for promote or incite racial or ethnic discrimination directed against them (art 8)
- take effective measures, in consultation and co-operation 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 (art 15)
- 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 (art 22).

(d) The respect for and the protection of culture

Aboriginal and Torres Strait Islander peoples belong to the oldest continuing culture⁶⁴ in the world. When respected and nurtured, culture is a source of strength, resilience, happiness, identity and confidence. This is

64 Culture can be 'thought of as a complex and diverse system of shared and interrelated knowledge, practices and signifiers of a society, providing structure and significance to groups within that society...Shared knowledge includes collectively held norms, values, attitudes, beliefs, and the like, while cultural practices are evidenced in the language, law, and kin relationship practices of a society...Cultural maintenance, transmission, and transformation are the result of ongoing interaction of people engaged in shared activities in concrete situations. Put simply, culture is socially constructed and maintained'. See M J Halloran, *Cultural maintenance and trauma in Indigenous Australia*, (Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Perth, Western Australia, 2–4 July 2004), p 2. At http://www.latrobe.edu.au/psy/aw/Halloran-Murdoch_law_journal.pdf (viewed 25 September 2011).

particularly so for those who have been removed from their lands and territories, where access to their culture and lands provides a critical link to their cultural heritage.⁶⁵

As such, access to our lands, territories and resources is essential to our cultural identity, cultural integrity and cultural self-determination. The International Law Association argues that while political self-determination is significant, 'cultural' self-determination may be the most important element of gaining control of our destinies:

What most indigenous peoples pursue is especially "cultural" self-determination, which has been defined as "the right to recapture their identity, to reinvigorate their ways of life, to reconnect with the Earth, to regain their traditional lands, to protect their heritage, to revitalize their languages and manifest their culture – all of these rights are as important to indigenous people as the right to make final decisions in their internal political, judicial, and economic settings". Self-determination and the right to self-government for indigenous peoples presuppose that the "survival of their culture, their cosmovision, and their respect for the Earth, including all living and non-living things" is granted.⁶⁶

This position is also reflected by Aboriginal and Torres Strait Islander peoples in Australia. However, our culture and our cultural identities have endured significant pressure as a result of colonisation. As Mick Dodson observes:

Along side the colonial discourses we have always had our own Aboriginal discourses in which we have continued to create our own representations, and to recreate identities which escaped the policing of the authorised versions. They are Aboriginalities which arise from our experience of ourselves and our communities. They draw creatively from the past, including the experience of colonisation and false representation. But they are embedded in our entire history, a history which goes back a long time before colonisation was even an issue.

Those Aboriginalities have been, and continue to be a private source of spiritual sustenance in the face of others' attempts to control us.⁶⁷

Michael Halloran argues that 'effects that continuously and severely suppress or undermine a culture would be expected to produce ongoing cultural trauma, which is likely to result in anxiety-based maladaptive behaviours amongst its members'.⁶⁸ For example, imposed or adopted cultural influences and experiences have resulted in questions of authenticity, both from within and from outside our families and communities.

It is my view that where our communities are struggling to maintain and protect their culture, these maladaptive behaviours result in lateral violence.

The native title system and other land rights and cultural heritage processes directly question our culture and our cultural identities. Further, they require a justification that is consistent with parameters defined by government and other stakeholders.

This has been a source of considerable conflict and lateral violence for many people and this will continue until appropriate structures are established with Aboriginal and Torres Strait Islander peoples that promote, maintain and protect our culture.

65 The Secretariat of the National Aboriginal and Islander Child Care, *National Aboriginal and Islander Children's Day*, www.snaicc.asn.au/news-events/dsp-default.cfm?loadref=62 (viewed 25 September 2011).

66 International Law Association, *The Hague Conference (2010) Rights of Indigenous Peoples*, Interim Report, p 11. Internal references removed.

67 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *The End in the Beginning: Re(de)fining Aboriginality* (Speech delivered at Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1994). At http://www.humanrights.gov.au/about/media/speeches/social_justice/end_in_the_beginning.html (viewed 8 September 2011).

68 M J Halloran, *Cultural maintenance and trauma in Indigenous Australia*, (Paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Perth, Western Australia, 2–4 July 2004), pp 4–5. At http://www.latrobe.edu.au/psy/aw/Halloran-Murdoch_law_journal.pdf (viewed 25 September 2011).

(i) Ensuring our right to our culture

In order to address this significant deficiency, the recognition of Aboriginal and Torres Strait Islander cultures and cultural differences must be a key consideration in policy development and implementation in Australia. Culture is a strength upon which policy responses should be built and as such must not be confined to the margins or be an afterthought in the development of policy and programs. Prioritising culture results in empowerment and requires the recognition of our cultural differences.

The Declaration provides a strong basis from which Aboriginal and Torres Strait Islander peoples can affirm their rights and define their aspirations in their relations with governments and other stakeholders around development with culture and identity.

Article 3 is central to the Declaration as it refers to the right to self-determination. Article 32 is also a key provision that captures the essence of culture with development and identity.

...

In pursuing their well-being and sustainability, indigenous peoples should reconstitute, restore, and revitalize their cultures, priorities and perspectives. This change is in line with their rights enshrined in the Declaration and other international human rights standards.⁶⁹

A human rights framework also promotes the concept of cultural safety and security. A culturally safe and secure environment is one where our people feel safe and draw strength in their identity, culture and community. Lateral violence on the other hand, undermines and attacks identity, culture and community. In Chapter 4, I advocate the need to create an environment that ensures:

- cultural safety within Aboriginal and Torres Strait Islander communities and organisations
- cultural security by external parties such as governments, industry and NGOs who engage with Aboriginal and Torres Strait Islander communities and organisations.

I also discuss in Chapter 4 the importance of ensuring that structures that intend to promote our development are reinforced by culturally relevant frameworks that promote cultural safety and security, and culturally appropriate conflict management mechanisms.

(ii) Guidance provided by the Declaration

The principles discussed so far; self-determination, free, prior and informed consent, and non-discrimination, provide the reinforcing foundations necessary to ensure the promotion, maintenance and protection of our cultures and identities.

The Declaration recognises and affirms that our inherent rights, in particular our rights to our lands, territories and resources, are derived from our cultures, spiritual traditions, histories and philosophies and must be promoted and respected. It also recognises that our cultures, Indigenous knowledge and traditional practices contribute to the sustainable and equitable development and proper management of the environment.

The Declaration asserts that having control over developments that affect our lands, territories and resources will enable Indigenous peoples to maintain and strengthen our institutions, cultures and traditions, and to

69 United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, Fact Sheet Background. At <http://www.un.org/esa/socdev/unpfii/documents/Development%20with%20Culture%20and%20Identity.pdf> (25 September 2011).

promote our development in accordance with our aspirations and needs.⁷⁰ Empowering our communities in such a way will counter the impacts of lateral violence on our development.

Text Box 3.8 outlines the rights in the Declaration that seek to protect our culture.

Text Box 3.8:

Respect for and the protection of culture

The Declaration states that Indigenous peoples and individuals:

- have the right not to be subjected to forced assimilation or destruction of our culture (art 8)
- have the right to practise and revitalize our cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of our cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature (art 11)
- have the right to the dignity and diversity of our cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information (art 15)
- have the right to maintain, control, protect and develop our cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of our 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. We also have the right to maintain, control, protect and develop our intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions (art 31).

Governments have a responsibility to:

- provide effective mechanisms for the prevention of, and redress for 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; including forced assimilation or integration (art 8)
- 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 (art 11)
- 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 (art 14).

⁷⁰ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular para 10. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

3.4 Conclusion

The Declaration contains the ‘minimum [international] standards for the survival, dignity and well-being of the indigenous peoples of the world’.⁷¹ It reaffirms that Aboriginal and Torres Strait Islander peoples are entitled to all human rights recognised in international law without discrimination. But it also acknowledges that, without recognising the unique and collective rights of Indigenous peoples and ensuring the protection of our cultures, we can never be truly free and equal.

The Declaration is the international instrument that provides the most authoritative guidance to governments about how their binding human rights obligations apply to Indigenous peoples. It catalogues existing human rights standards in one document and interprets them giving full consideration to Indigenous peoples’ unique historical, cultural and social circumstances.

In the context of addressing lateral violence, the Declaration can assist us to develop stronger and deeper relationships within our communities, and guide relationships between Indigenous peoples and the broader community but more particularly between governments and Indigenous peoples.

Table 3.1 demonstrates that actions based on this guidance would seek to remedy the historical and contemporary drivers of lateral violence.

Table 3.1: The Declaration guiding responses to lateral violence

Historical and contemporary drivers of lateral violence	Declaration
<ul style="list-style-type: none"> • Colonisation, oppression and control of Aboriginal and Torres Strait Islander peoples. • Feelings of powerlessness. • Meeting human needs. 	<ul style="list-style-type: none"> • Empowering Aboriginal and Torres Strait Islander communities to take control of their communities and aspirations.
<ul style="list-style-type: none"> • Loss of land, traditional roles, structures and knowledge. • Addressing trauma. 	<ul style="list-style-type: none"> • Promoting and developing community decision-making and dispute resolution protocols.
<ul style="list-style-type: none"> • Internalisation of negative stereotypes. • Meeting human needs. 	<ul style="list-style-type: none"> • Addressing discrimination and negative stereotypes by promoting equality that recognises difference.
<ul style="list-style-type: none"> • Loss of land, traditional roles, structures and knowledge. • Identity conflict. • Internalisation of negative stereotypes. 	<ul style="list-style-type: none"> • Building culture as a form of resilience and strength that promotes healthy cultural norms and recognises differences and diversity.

The Declaration provides clear direction that enables us to transform negative behaviours that manifest in lateral violence and create dysfunction in our families and communities into effective and appropriate frameworks that support our individual and collective self-determination.

71 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), article 43. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 16 September 2011).

As it relates to native title, the Declaration assists us to develop responses to lateral violence that:

- empower us to take control of our community and community aspirations
- promote and develop our community decision-making and dispute resolution protocols
- address discrimination and negative stereotypes by promoting equality that recognises difference
- build culture as a form of resilience and strength that promotes healthy cultural norms and recognises differences and diversity.

I encourage Aboriginal and Torres Strait Islander peoples to use the Declaration to assert your rights to self-determination, to participation, to be free from discrimination and to protect and maintain your culture. I also encourage you to ensure that these fundamental principles underpin your own internal governance structures and ways of doing business; particularly in negotiating your inherent rights to your lands, territories and resources, and establishing native title or land rights organisations to manage those rights and interests secured through a determination, and the distribution of benefits secured through agreements. Affirming these principles as normative standards within your families and communities will help to confront issues that could result in lateral violence and effectively address them when they arise.

Finally, I encourage all governments to assist Aboriginal and Torres Strait Islander communities deal with lateral violence by ensuring that all legislation, policy and programs developed for communities are developed and implemented in accordance with the Declaration.

Chapter 4:

Options for addressing lateral violence in native title

4.1 Introduction **150**

4.2 Naming lateral violence **152**

4.3 Legislative and policy review and reform **153**

4.4 Culturally relevant frameworks **160**

4.5 Conclusion **188**



4.1 Introduction

This Chapter considers options for addressing lateral violence in environments that concern our lands, territories and resources. Although this is the beginning of the conversation, the Chapter aims to give Aboriginal and Torres Strait Islander peoples and communities some ideas about how to address lateral violence through the establishment of strong structural foundations and principles. It also seeks to assist governments to help us confront this problem by reinforcing these structures through legislation and policy.

At the outset of this Chapter, I want to reiterate that the Native Title Act itself does not create lateral violence. Lateral violence occurs across all of the issues we face on a daily basis, whether it is health, education and/or housing; and it also exists in our political dealings and in our daily interactions with each other. The *Social Justice Report 2011* provides a more detailed discussion on the broader experience of lateral violence and the mechanisms that our communities have developed to address it.

However, I believe that native title is an important place to start this conversation. Of all the areas that aim to address our disadvantage, the native title system goes to the heart of providing redress for the impact of our dispossession from our lands, territories and resources, and the destruction of our cultures and our identities.

In my view, the way *all* stakeholders engage within the native title system can encourage behaviours that result in lateral violence. As such, it is critical that the Native Title Act and the operation of the native title system are reinforced by human rights principles and 'strengths based' frameworks that aim to realise the full potential for our Aboriginal and Torres Strait Islander peoples and our communities.

If we are able to reform the native title system in ways that help us to address lateral violence, we are well on the way to transforming these issues into positive outcomes.

While I argue that Aboriginal and Torres Strait Islander peoples need to take direct responsibility for confronting lateral violence when it threatens to consume our communities, this does not absolve governments or other stakeholders of their responsibility to ensure that the potential for lateral violence is minimised.

It is my view that we *all* have a role to play to ensure that we have an environment that empowers rather than disempowers Aboriginal and Torres Strait Islander peoples.

I believe that governments and stakeholders, particularly the mining industry, who work with our communities in the native title environment cannot address lateral violence for us; but they can minimise their contribution to creating environments for lateral violence to flourish, and can facilitate and empower communities to address and overcome the challenges that promote lateral violence. The role of governments and others working with us is to foster the principles of the Declaration; and in particular, our choice, participation and control of our communities.

Aboriginal and Torres Strait Islander peoples need to be empowered to become the agents of our own change. The Department of Finance's *Strategic Review of Indigenous Expenditure* informatively argued:

[E]vidence points to the benefits flowing from a genuine partnership with Indigenous communities, adopting a 'strengths based' approach, and building on the inherent leadership and wisdom within communities to create a new spirit for change and the embracing of essential reforms to personal behaviour.¹

Aboriginal and Torres Strait Islander peoples and communities need to lead this process and insist that structures developed to advance our situation are built on solid foundations that cannot be weakened or destroyed by lateral violence.

¹ Department of Finance and Deregulation, *Strategic Review of Indigenous Expenditure* (2010), p 248. At http://www.finance.gov.au/foi/disclosure-log/2011/docs/foi_10-27_strategic_review_indigenous_expenditure.pdf (viewed 23 September 2011).

In applying a human rights-based approach, there are a number of options for addressing lateral violence in relation to our lands, territories and resources. I note that these approaches can also be applied more broadly across other areas of social policy as demonstrated in the *Social Justice Report 2011*. These include:

- naming lateral violence
- legislative and policy review and reform
- culturally relevant frameworks.

I discuss each of these options for addressing lateral violence in this Chapter.

This Chapter also considers options for governments to provide support to Aboriginal and Torres Strait Islander peoples to address lateral violence played out in native title processes. These suggestions are applicable to other stakeholders working with Aboriginal and Torres Strait Islander peoples in the native title environment, particularly the mining sector.

Specifically, it demonstrates how the Declaration can be applied as a human rights framework to guide the creation and maintenance of a culturally safe and secure environment where Aboriginal and Torres Strait Islander communities can reach their full potential.

Some communities and their native title representative organisations are starting to put in place structures that help to protect them from the effects of lateral violence in the native title environment. This Chapter will case study this positive work that is occurring in Aboriginal and Torres Strait Islander communities to address lateral violence.

4.2 Naming lateral violence

While lateral violence is a new concept to many people, the behaviours that constitute lateral violence have been devastating our families, communities and organisations for many years.

Naming it is the first step towards exerting control over lateral violence. It is also a way of exercising agency and responsibility for our communities. Naming lateral violence becomes an action of prevention. In the native title environment, confronting lateral violence is the only way to ensure that it has minimal impact on our peoples.

Addressing lateral violence means confronting those in our communities and those who work with our peoples who perpetrate lateral violence. I discuss later in this Chapter the concepts of cultural safety and cultural security that can support our communities to confront lateral violence; and the role our communities, governments and external stakeholders can play in creating such an environment.

While this will be a challenge, particularly in our communities that have suffered extensive devastation as a result of colonisation, facing up to tough issues is not new for Aboriginal and Torres Strait Islander communities. There are many instances of communities confronting problems like family violence or alcohol abuse with great courage. The benefits may take time to become apparent. However, over time this new way of doing things will become a community standard and value.

In taking this step, our people must be supported by governments and external native title stakeholders to ensure the system does not facilitate lateral violence. External stakeholders should engage in good faith and not use the native title system to fracture and divide communities in order to progress their development priorities.

Raising awareness of lateral violence

Naming lateral violence is essentially a process of education. It is about giving our communities:

- the language to name lateral violence behaviour
- the space to discuss its impact
- the tools to start developing solutions.

It is ironic that while native title involves processes of mediation and negotiation, lateral violence is still a significant barrier to achieving native title outcomes. Stakeholders participating in native title processes must be conscious that the native title system provides the perfect platform for lateral violence to surface because it brings people to the table – possibly for the first time – who are living on a daily basis with the impacts of colonisation. The native title process requires that native title claimants justify their involvement in the process and this can result in the exclusion of some people to participate.

The native title system must foresee when lateral violence is likely to occur and be equipped to identify it and address it. This means that engaging in native title processes requires solid preparation and robust frameworks to accommodate the potential for disagreement and conflict, and to enable people to work through this conflict. I discuss further below what these frameworks might look like.

It must be acknowledged that this process will need to address the historical as well as the contemporary issues that arise as a result of pursuing our native title rights to our lands, territories and resources. This will require the space and time to deal with these issues and the development of appropriate tools to facilitate solutions in the native title process and to manage future issues that may lead to lateral violence.

4.3 Legislative and policy review and reform

Legislative reform and policy review will assist Aboriginal and Torres Strait Islander communities to address lateral violence by creating structures that promote healthy relationships within our communities and with external stakeholders. These structures should include a strengths based approach that is informed by human rights standards and applied to both governments and communities.

The Attorney General's Department has progressed a number of native title reforms to move towards a more flexible approach that encourages negotiated outcomes and discourages litigation and adversarial approaches. However, it is my view that we cannot simply reform the native title system in isolation to the broader legislative and policy framework and hope that this will fix the native title system. In order for the native title system to be as effective as possible, the legislative and policy framework within which it exists must also support its operation.

This means that native title reform must incorporate our human rights obligations as set out in the Declaration and the Australian Constitution. The native title system sits within the framework of the Declaration and Constitution and alongside a wide range of other policy and legislative platforms that need to operate simultaneously to ensure the best possible outcomes for our peoples.

On 27 January 2011, Australia appeared before the Human Rights Council Universal Periodic Review (UPR).² The Human Rights Council recommended that Australia revise its Constitution, legislation, public policies and programs to enable the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.³

We currently have three opportunities to progress legislative and policy reform that would respond to this recommendation and significantly improve the operation of the native title system. These are to:

- ensure that the unique and inherent rights of Aboriginal and Torres Strait Islander peoples are protected under the National Human Rights Framework
- reform the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples and prohibit discrimination on the basis of race
- maintain efforts aimed to create a just and equitable native title system.

The National Human Rights Framework provides the overarching structure, while constitutional reform provides a foundation for the effective operation of the native title system. Reforming the native title system will increase its potential to deliver positive outcomes and ensure that it operates to advance the aspirations of Aboriginal and Torres Strait Islander peoples across Australia.

Legislative and policy frameworks that promote an environment where Aboriginal and Torres Strait Islander peoples empower themselves are essential to our active participation in the life of the Australian nation. They provide the structural supports necessary for Aboriginal and Torres Strait Islander peoples to realise the full potential of our inherent rights as the first peoples of Australia. These structural supports also contribute to creating a safe and secure environment that does not stimulate conflict or foster behaviours that result in lateral violence.

2 The Universal Periodic Review is a unique process, established by the Human Rights Council to review the human rights records of every country. See United Nations Office of the High Commissioner for Human Rights, *Universal Periodic Review*, <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRMain.aspx> (viewed 20 September 2011).

3 Human Rights Council, *Report of the Working Group on the Universal Periodic Review Australia*, UN Doc A/HRC/17/10 (2011), rec 106. At <http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx> (viewed 8 September 2011).

(a) The National Human Rights Framework

In Chapter 3, I argue that the Declaration is a key tool to advance the human rights of Aboriginal and Torres Strait Islander peoples and to address lateral violence.

The Australian Government is currently putting in place the structures necessary to build a strong human rights culture. In April 2010, the Federal Attorney-General launched *Australia's Human Rights Framework*. This Framework forms part of the *National Human Rights Action Plan* and affirms the Government's commitment to promoting awareness and understanding of human rights in Australia.⁴

The development of *Australia's Human Rights Framework* also provides the Australian Government with the perfect opportunity to work with Aboriginal and Torres Strait Islander peoples to review and where necessary, reform all relevant legislation and policies to ensure their compliance with human rights standards and the Declaration.

(b) Constitutional Reform

Aboriginal and Torres Strait Islander peoples are not recognised in the Australian Constitution as our nation's first peoples. As such the Constitution offers no recognition or protection of our rights to our lands, territories or resources.

While the National Apology to the Stolen Generations⁵ provided a formal apology to Aboriginal and Torres Strait Islander peoples for detrimental laws and policies that resulted in the forced removal of children from their families, communities and country; reforming the Constitution will formalise this acknowledgement and provide a key cornerstone to address the historical 'truth' of our nation. In itself, this acknowledgement is so powerful as to curb lateral violence in our communities because it reinforces our cultural identities both as Aboriginal and Torres Strait Islander peoples and as Australians.

I congratulate the Australian Government and all other political parties who have embarked on this journey of constitutional reform to recognise Aboriginal and Torres Strait Islander peoples as the first peoples of our nation. I believe that these reforms to the Australian Constitution will go some way to stem the ongoing impacts of colonisation and lateral violence by:

- affirming our place as the first peoples of Australia and recognising the untruth of *terra nullius* in our founding document
- addressing a history of exclusion of Aboriginal and Torres Strait Islander peoples
- improving the sense of self-worth and social and emotional well-being of Aboriginal and Torres Strait Islander peoples as individuals, as communities and as part of the national identity⁶
- changing the context in which debates about the challenges faced by Aboriginal and Torres Strait Islander communities take place
- improving relationships between Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

4 Attorney-General's Department, *Australia's Human Rights Framework*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Human_rights_and_anti-discriminationAustralia's_Human_Rights_Framework (viewed 3 October 2011).

5 K Rudd, *Apology to Australia's Indigenous Peoples* (Speech delivered to the House of Representatives, Canberra, 13 February 2008). At <http://australia.gov.au/about-australia/our-country/our-people/apology-to-australias-indigenous-peoples> (viewed 24 September 2011).

6 See The Royal Australian and New Zealand College of Psychiatrists, 'Constitution changes would improve Indigenous mental health' (Media Release, 12 October 2010). At <http://www.ranzcp.org/media/constitution-changes-would-improve-indigenous-mental-health.html> (viewed 24 November 2010).

This process also provides us with an opportunity to address the provisions of the Constitution that permit discrimination on the basis of race. The right to live free from discrimination is a fundamental human right that most Australians take for granted.

The Constitution currently offers no protection of our right to be free from discrimination on the basis of our race. Aboriginal and Torres Strait Islander peoples are particularly vulnerable to this lack of protection. For example, the *Racial Discrimination Act 1975* (Cth) (RDA) has been compromised on three occasions: each time it has involved Aboriginal and Torres Strait Islander issues, and on one occasion it has involved the Native Title Act.⁷

In order to address this inadequacy, constitutional reform is necessary to improve the protection of Aboriginal and Torres Strait Islander peoples' rights against discrimination.

Aboriginal and Torres Strait Islander peoples must be able to rely on the Constitution to ensure that legislation cannot be passed and policies cannot be implemented that are detrimental to our human rights including our right to be free from discrimination. Further, as Australian citizens, we must be able to rely on the Constitution to ensure that legislative and policy reform does not diminish our rights.

(c) Native Title Reform

The Native Title Act provides the legislative framework for the operation of the native title system.

The *Mabo*⁸ decision and the subsequent Native Title Act corrected the untruth of *terra nullius*. Former Prime Minister of Australia, Paul Keating, recently reflected on his role in the development of the Native Title Act and the original intent of the native title legislation:

[T]he Native Title Act went a substantial way in settling the fundamental grievance of indigenous Australia; the brutal dispossession of their lands and the smashing of their ways of life at the hands of an alien imperial power ... I saw the opportunity of the native title route as a modality in dealing with and settling unresolved questions of indigenous land justice in this country ... One of its main objects is to 'provide for the recognition and protection of native title'; that is, those rights and interests finding their origin in indigenous law and custom; not finding those rights and interests arising solely or peculiarly from the Act itself.⁹

Unfortunately, the Native Title Act has since been transformed to a significantly diminished recognition of native title and no longer reflects this original intent.

Following the *Mabo* decision that a form of native title exists under the common law, the Australian Government committed to three key policy responses:

- To pass the Native Title Act to offer the protection of statute law to native title and set out processes for future dealings in native title land.
- To introduce legislation to establish a National Aboriginal and Torres Strait Islander Land Fund and an Indigenous Land Corporation to acquire and manage land for dispossessed Aboriginal and Torres Strait Islander peoples.

7 *Native Title Amendment Act 1998* (Cth); *Kartinyeri v Commonwealth* (1998) 195 CLR 337; Northern Territory Emergency Response (*Northern Territory National Emergency Response Act 2007* (Cth)).

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

9 P Keating, 'Time to revisit native title laws', *The Australian*, 01 June 2011. At <http://www.theaustralian.com.au/national-affairs/opinion/native-title-laws-retain-some-inequality/story-e6frgd0x-1226066685042> (viewed 24 September 2011).

- To establish a package of social justice measures for Aboriginal and Torres Strait Islander peoples, in acknowledgement of continuing disadvantage and dispossession.¹⁰

While the first two responses have been delivered to varying degrees, the social justice measures are yet to be developed.

With regard to the first two policy responses, I have longstanding concerns that amendments made to the Act since its commencement have significantly limited the benefits that could be achieved by native title holders, and that the objectives of the Indigenous Land Corporation have not been met and require review. I also believe that both of these policy responses have contributed to lateral violence in communities, with native title claimants constantly required to negotiate their rights within frameworks that are designed to prioritise the interests of governments and industry.

Many Aboriginal and Torres Strait Islander peoples also feel that the native title system has not delivered the intended outcomes for our lands, territories and resources. In particular, many people have the view that native title delivers limited meaningful recognition of the rights, interests, obligations and responsibilities they hold in their country under the traditions and customs of their own society.¹¹

As governments begin to understand that our relationship to our lands and resources is interconnected to our overall physical, spiritual and cultural well-being, the need to return to the original intent of the Native Title Act should become more apparent. Native title stakeholders have consistently raised the requirement to create a just and equitable native title system. I have also advocated the need for a holistic review of the operation of the native title system to ensure that it complies with international human rights standards.¹²

In the following section I discuss how the system can be reformed to strengthen the effective participation of Aboriginal and Torres Strait Islander peoples. I also argue that reinforcing the native title system with social justice measures will ensure that Aboriginal and Torres Strait Islander policy is developed in a holistic way to close the gap and contribute to overcoming disadvantage across all social indicators.

(i) Reforming the native title system

The recognition of native title can empower traditional owners.¹³ Former Federal Court Justice Murray Wilcox has commented that:

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 ... 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 people are seeking.¹⁴

10 Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1995). Reproduced in [1996] *Australian Indigenous Law Reporter* 27. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 22 August 2011).

11 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), p 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/chapter0.html (viewed 19 September 2011).

12 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), chs 1, 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter1.html#Heading53 (viewed 20 September 2011).

13 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), p 79. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 6 October 2011).

14 M Wilcox QC, *Mabo Oration 2009 – Comments on the 2009 Oration* (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 October 2011).

However, as I discuss in Chapter 2, establishing our claims to native title involves extensive requirements for proving our identity and connection to country. In the shadow of the dispossession referred to by Justice Wilcox, it is often these questions of ‘who we are’ that can exacerbate lateral violence in our communities.

Many people and organisations have commented on the extensive requirements for us to prove our native title. For example, as I note in Chapter 2, the Committee on the Elimination of Racial Discrimination expressed regret that as a result of ‘the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, ... many are unable to obtain recognition of their relationship to land (art. 5)’.¹⁵

The native title reforms that I and previous Social Justice Commissioners have recommended go some way to addressing these issues.

I note that the Australian Government has identified native title reform as a priority and has taken some steps to address a range of issues particularly focused on economic development.¹⁶ To date, however, substantial reform that addresses the broad inadequacies of the system that concern our culture and identity eludes us. These reform initiatives include:

- improving the recognition of traditional ownership
- the current burden of proving native title
- the operation of the law regarding extinguishment
- options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).

As these options for reform have been detailed extensively in the previous Native Title Reports, it is unnecessary to repeat these details in this Report.¹⁷ Some of these reform options are also canvassed in Senator Siewert’s Native Title Amendment (Reform) Bill 2011, which I discuss in Chapter 1 and Appendix 2.

I am of the view that these native title reforms would have a positive effect on addressing lateral violence in our communities. The reforms that may be of particular benefit include reversing the onus of proof, providing more flexible approaches to connection evidence and exploring options for negotiating alternative settlements.

In Chapter 1, I call for a review of the Native Title Act to bring it in line with international human rights standards. This should incorporate our collective goal to achieve a ‘fair, independent, impartial, open and transparent process’ that acknowledges our traditional laws and customs to our lands, territories and resources,¹⁸ and eases the burden that comes with the requirements to prove our identity and connection to country.

15 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/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 6 October 2011).

16 R McClelland, *Negotiating Native Title Forum* (Speech delivered at the Negotiating Native Title Forum, Brisbane, 29 February 2008), para 10. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FirstQuarter_29February2008-NegotiatingNativeTitleForum (viewed 31 August 2011).

17 See Native Title Reports submitted to the Australian Parliament, at http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 21 September 2011). In particular see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 6 October 2011).

18 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 27. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 6 October 2011).

(ii) Reinforcing the Native Title System – the Social Justice Package

The Social Justice Package was the third element of the Australian Government's response to the *Mabo* decision.

The Social Justice Package was promised by Prime Minister Keating in his second reading speech on the Native Title Bill. In 1994, the then Minister for Aboriginal and Torres Strait Islander Affairs, Robert Tickner, told the 12th Session of the United Nations Working Group on Indigenous Populations:

The social justice package presents Australia with what is likely to be the last chance this decade to put a policy framework in place to effectively address the human rights of Aboriginal and Torres Strait Islander people as a necessary commitment to the reconciliation process leading to the centenary of Federation in 2001.¹⁹

The Australian Government sought the views of Aboriginal and Torres Strait Islander peoples on what the Social Justice Package might look like. In particular, the Government expressed a 'desire for constructive and realistic proposals to increase the participation of indigenous peoples in Australia's economic life, to safeguard and develop indigenous cultures, to help develop a positive community consensus and to contribute to lasting reconciliation'.²⁰

Text Box 4.1:

The Social Justice Package²¹

The Aboriginal and Torres Strait Islander Commission reported to the Australian Government in 1995 that a social justice package should include:

- major institutional and structural change, including constitutional reform and recognition, regional self-government and regional agreements, and the negotiation of a Treaty [or national agreement] or comparable document
- overcoming inequities and inefficiencies in service delivery, including the achievement of genuine access and equity in Commonwealth mainstream programs and revised Commonwealth-State funding arrangements
- protection of rights through such means as recognition of customary laws, protection of intellectual and cultural property, and recognition of Indigenous rights
- practical measures to enhance opportunities for economic development and to achieve other desirable objectives such as improved public awareness of Indigenous cultures and Indigenous issues.

19 Quoted in *Indigenous Legal Issues, Commentary and Materials*, ed. Heather McRae et. al, LBC Information Services, North Ryde, 1977, p 299. As cited in J Gardiner-Garden, *From Dispossession to Reconciliation* (1999) Research Paper 27, Parliament of Australia. At <http://www.aph.gov.au/library/pubs/rp/1998-99/99rp27.htm#responseMabo> (viewed 3 October 2011).

20 Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1995) in Eds, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures – Digest' (1996) 1(1) *Australian Indigenous Law Reporter* 76. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 22 August 2011).

21 Aboriginal and Torres Strait Islander Commission, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures' (1995) in Eds, 'Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures – Digest' (1996) 1(1) *Australian Indigenous Law Reporter* 76. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 22 August 2011).

These proposals fall into five major themes:

- the rights of Aboriginal and Torres Strait Islander peoples as citizens
- recognition of their special status and rights as Indigenous Australians and the achievement of greater self-determination for Aboriginal and Torres Strait Islander peoples
- ensuring that Indigenous Australians are able to exercise their rights and share equitably in the provision of Government programs and services
- the protection of the cultural integrity and heritage of Indigenous Australians
- measures to increase Aboriginal and Torres Strait Islander participation in Australia's economic life.

Despite ongoing calls from the Aboriginal and Torres Strait Islander community, the Social Justice Package is still to be delivered.

The Social Justice Package is essential to completing the promise of the *Mabo* decision as it provides the structural supports necessary for the effective operation of the Native Title Act and the Land Fund. However, the Social Justice Package is also essential to addressing the effects of colonisation that have resulted in the permanent dispossession of lands and the denial of access to, and protection and maintenance of culture and heritage as a result of removal policies.²²

As I discuss in Chapter 3, within Aboriginal and Torres Strait Islander communities we have been divided into the 'have's and the have not's'. This is not only relevant to the resources that come from our lands and territories but also relates to our cultures and our knowledge's, with some of us perceived to be 'more Aboriginal' than others based on the amount of cultural information we have about ourselves and our families. This disparity within our communities is a source of conflict that results in lateral violence.

I believe that a Social Justice Package that protects our human rights is essential to the full exercise and enjoyment of our rights to our lands, territories and resources. A Social Justice Package must aim to strengthen all areas of policy affecting Aboriginal and Torres Strait Islander peoples, including the Closing the Gap policy platform and the Council of Australian Government's targets. It must also ensure that the work of service delivery agencies is appropriately co-ordinated and does not create additional pressure on Aboriginal and Torres Strait Islander communities. And it must enable Aboriginal and Torres Strait Islander communities to build capacity and effectively access and manage the benefits and opportunities available to them.

Holistic efforts such as these empower communities. I view empowerment as the key to addressing lateral violence.

The Government's focus on creating a strong human rights culture in Australia through the National Human Rights Framework provides a great opportunity for the Australian Government to deliver on the promise of the Social Justice Package.

22 The Protection Acts that governed the removal of Aboriginal and Torres Strait Islander peoples can be found at AIATSIS, *To Remove and Protect*, <http://www1.aiatsis.gov.au/exhibitions/removeprotect/index.html> (viewed 21 September 2011).

4.4 Culturally relevant frameworks

Ensuring that the native title system is just, transparent and accountable at all levels (from government through to the community) is essential to reducing the potential for lateral violence.

In order for native title to be successful, it must also be culturally relevant. If it is not, the native title system will continue to operate in ways that exclude and divide Aboriginal and Torres Strait Islander peoples and communities. We will continue to be disempowered and struggle amongst ourselves to define our own destinies. This is counter-productive on all fronts.

It has been demonstrated on numerous occasions that a one-size-fits-all policy approach does not deliver desired outcomes and inhibits the accommodation of differences that exist within Aboriginal and Torres Strait Islander communities.

Whether commencing a native title claim process, negotiating an ILUA or establishing a PBC, we need appropriate frameworks for participation, decision-making and conflict management in order to prevent behaviours that result in lateral violence. These preventative measures need to be negotiated with our communities as early in the process as possible:

... at the outset of any native title agreement-making process, there is a need for the negotiation of an agreed decision-making and dispute management framework amongst the Indigenous parties as a prerequisite to the successful implementation and sustainability of agreements.²³

These measures assist those involved to set up guidelines for engagement, identify historical and contemporary issues and possible points of contention, and establish protocols for managing conflict that can lead to lateral violence behaviours.

A number of NTRBs/NTSPs noted in their responses to me that they enact a Code of Conduct to encourage respect to all persons and provide clear guidelines for behaviour at native title meetings. The Code of Conduct used by the Yamatji Marlpa Barna Baba Maaaja Aboriginal Corporation (YMBBMAC) is at Text Box 4.2.

Further, McAvoy and Cooms verify that corporate entities that reflect 'the interests of the native title group and its claims to nationhood can facilitate lasting change':

Such a corporation can manage its own cultural heritage matters, manage trusts into which compensation payments are made, hold shares, and be the party which represents the Traditional Owner interests in regional intra-Indigenous and external agreements. Additionally, it can hold land, engage in commercial contracts, participate in training schemes and, where required, be the registered native title body corporate under the NTA...

Whatever the future holds for the individual native title applications in the region, the future of these Indigenous nations is inexorably bound to the ability of each nation to manage its own affairs.²⁴

23 Visiting Research Fellow, Toni Bauman has published a Native title Research Unit Issues paper which sets out some of the process issues, practical implications and techniques arising out of IFAMP's case study. See T Bauman, 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute Management Frameworks' (2006) Vol. 3, Issues Paper No. 6. *Land, Rights, Laws: Issues of Native Title*, p 1. At <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip06v3n6.pdf> (viewed 12 October 2011).

24 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph No. 2 (2008), p 19. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

Text Box 4.2:

Code of conduct for native title claim groups working with Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation (YMBBMAC)

This Code of Conduct recognises that:

- Claim Group members and YMBBMAC staff have a right to safety, dignity and respect at all times. This is true even though the native title process may involve strong emotions and difficult decisions.
- YMBBMAC lawyers have professional obligations which they must carry out. These obligations arise as a result of legislation, Professional Conduct Rules and various Codes of Conduct.
- The best outcomes are achieved when people:
 - work together respectfully,
 - show a unified front when negotiating with other parties, and
 - accept the Claim Group's informed decisions, once they have been lawfully made under the group's decision making process.

The Claim Group and each of its members agree to the following obligations when interacting with YMBBMAC staff (including lawyers, anthropologists, heritage officers and administrative staff):

A. No threats to YMBBMAC staff or Claim Group members

- Threats, violence, racial slurs, abusive language and intimidating behaviour are not acceptable and will not be tolerated by YMBBMAC staff.
- Claim Group members will not threaten or intimidate other Claim Group members or YMBBMAC staff for any reason, such as to influence decisions, heritage surveys or meeting outcomes.

B. Claim Group or YMBBMAC staff can exclude members, vary or end meetings

- Claim Groups or YMBBMAC staff may exclude members from meetings, decide to end a meeting, or vary the way meetings are held (eg, holding 'split' meetings or secret ballots):
 - if a member of the Claim Group is using threats, violence, abusive language, intimidation or other unacceptable behaviour; or
 - if a member of the Claim Group is behaving in an unreasonable way that is stopping a meeting's progress.
- YMBBMAC staff may decide to end a meeting if they feel that lawyers advising the Claim Group or Working Group are being prevented from carrying out their professional responsibilities.

C. Being on time (Punctuality)

- Claim Group members will make all reasonable efforts to arrive on time at community meetings, Working Group meetings and other appointments.

- Meetings will start within 15 minutes of the planned starting time, provided that any required quorum has been reached, even if some members of the group have not arrived.

D. Minimum number of people at a meeting (Quorum)

- Some claim groups, in considering what their agreed decision making process will be, may decide that a minimum number of Claim Group members must be present at a meeting before the business of a meeting can happen (this number is known as a “quorum”).
- Other claim groups may decide that a quorum is not needed or is culturally inappropriate.
- If a Quorum is required for Working Group meetings, the Claim Group will determine this at a Claim Group meeting (community meeting).
- Any quorum should make sure there are enough people present to speak with authority for all parts of country, and the Claim Group as a whole.

E. Acting on someone else’s behalf (Proxies)

- Some claim groups may allow a member to select another person (a “proxy”) to attend meetings, cast votes or make decisions if the member is not there.
- Other claim groups may decide that proxies are not needed or are culturally inappropriate.
- A proxy can only act in the place of the member they represent. If a proxy is chosen, but the member attends the meeting anyway, only one of them can vote.
- A member can only appoint a proxy **in writing**, so that YMBBMAC staff are sure that the proxy has the authority to participate in making decisions.

F. Members’ Conflict of Interest

- If a member of a Working Group or Claim Group has a conflict of interest, the member will tell the meeting about it (declare it). (An example of a conflict of interest is if a member works for a mining company, and the meeting is discussing an issue to do with that mining company.)
- The meeting will then decide if that member should:
 - be excluded by being asked to leave the room,
 - be allowed to stay as an observer only,
 - be allowed to participate in the discussion but not vote, or
 - be allowed to participate in the discussion and vote.

G. Confidentiality of information

- Information that is not already in the public domain (including discussions, presentations and documents used in meetings, heritage surveys and connection work) is to be treated as confidential between Claim Group members and YMBBMAC staff, unless disclosure is permitted by law (including the *Privacy Act 1988* (Cth) as amended from time to time).
- Claim Group members must not breach that confidentiality, such as by sharing that confidential information with others (for example, talking about it to a mining company that they work for).

Below, I discuss five key elements necessary for creating frameworks that are strengths based and can assist us to address the damaging effects of lateral violence:

- development with culture and identity
- cultural safety and security
- cultural competence
- culturally appropriate conflict management/dispute resolution
- creating strong and sustainable governance.

(a) Development with culture and identity

Development with culture and identity requires that we accommodate the diversity of experience and need within Aboriginal and Torres Strait Islander communities. It also requires that all legislation, policies and programs reflect the local needs and aspirations of affected communities:

Holistic concepts of development have to consider the reality and struggle that indigenous peoples experience in order to live in a market-driven society. Development policies, institutions and systems established by States must allow for diversity and plurality and the coexistence of indigenous governance, economic, social, education, cultural, spiritual and knowledge systems and natural resources with systems adopted by the State. This is part of indigenous peoples' right to self-determination.²⁵

The inclusion of culture and identity into development frameworks is essential to addressing lateral violence. It affirms the need to ensure that all processes designed to promote our development are framed and reinforced by cultural integrity and cultural self-determination; and seeks to build on collective rights, security and greater control and self-governance of our lands, territories and resources.

The Native Title Act was established to reaffirm and accommodate the cultural relationships Aboriginal and Torres Strait Islander peoples have with their lands, territories and resources. However, a critical point of conflict for traditional owners is the need to balance the cultural, social, economic and environmental elements of development that arise from the native title system. This conflict is facilitated by governments and industry that focus heavily on economic outcomes and ignore the other elements essential for our well-being including our social, cultural, political and spiritual systems.

The United Nations Permanent Forum on Indigenous Issues recently conducted a study on Indigenous people's development with culture and identity. The Report on the study highlighted that:

The dominant models of development have compromised indigenous peoples in every aspect of their daily lives, including through the imposition of large infrastructure projects on their lands without their consent. This has generated poverty and severe inequality, massive environmental devastation and human rights violations. The serious rupture to the fabric of social life in indigenous communities as manifested in family breakdowns, alcoholism, and suicide among young people has been fuelled further by this model. In addition, it ignores indigenous peoples' own governance, economic, social, education, cultural, spiritual and knowledge systems and the natural resources that have sustained them through the generations.²⁶

25 United Nations Permanent Forum on Indigenous Issues, *Indigenous Peoples: Development with Culture and Identity Articles 3 and 32 of the UN Declaration on the Rights of Indigenous Peoples*, Fact Sheet Background. At <http://www.un.org/esa/socdev/unpfi/documents/Development%20with%20Culture%20and%20Identity.pdf> (25 September 2011).

26 Economic and Social Council, *Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples*, Report of the international expert group meeting, UN Doc E/C.19/2010/14 (2010), para 10. At <http://www.un.org/esa/socdev/unpfi/documents/E.C.19.2010.14%20EN.pdf> (viewed 14 October 2011).

The Permanent Forum argued that development models based purely on economic advancement fail 'to promote the cultural, political, social, ecological and economic integrity of indigenous peoples and their communities'.²⁷

As I highlight in Chapter 3, a key mechanism provided by the native title system is the ability to negotiate ILUAs or native title settlement agreements. Agreement making gives native title holders a seat at the table and opens opportunities to negotiate a range of development outcomes that meet our local needs and aspirations. These mechanisms must be flexible enough to incorporate our social, cultural, spiritual, environmental and economic development requirements.

The *Right People for Country* project has developed a set of core principles that are required for Indigenous agreement making in Victoria. Text Box 4.3 sets out and provides a brief explanation of these core principles.

Text Box 4.3:

Report of the *Right People for Country* Project Committee: Indigenous agreement making²⁸

The *Right People for Country* Project identifies the following core principles that are required for Indigenous agreement making in Victoria:

Indigenous-led participatory approach

The process for agreement making in the *Right People for Country* Project is 'Indigenous-led', which is consistent with the principles of self-determination and empowering community decision-making that are set out in the Declaration.²⁹ This approach enables Traditional Owners to make their own decisions about group composition and extent of country.

Education and engagement

The *Right People for Country* Project identifies the need to build understanding and trust around the policies and processes of both Indigenous communities and governments. This includes relevant and timely education programs and communication strategies, including:

- information on legal issues
- policy context
- project parameters
- agreement making processes, such as roles and responsibilities of groups and potential outcomes.

27 Economic and Social Council, *Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples*, Report of the international expert group meeting, UN Doc E/C.19/2010/14 (2010), para 11. At <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.14%20EN.pdf> (viewed 14 October 2011).

28 Report of the *Right People for Country* Project Committee (2011), pp 19–27.

29 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 12 July 2011).

Involvement of Indigenous people in the management and delivery of native title services increase Indigenous engagement with the service. This involvement embeds Indigenous knowledge, expertise and perspectives within the service and reduces the perception of the service as an imposed process.³⁰ Local advocates can promote Indigenous agreement making processes and disseminate information.

Resources to support traditional owner participation and preparation

Support is required for Traditional Owners to participate in agreement making. Indigenous agreement making is part of the broader process of settlement negotiations and may not be the only process a group is involved in. Currently, different resources are available according to what process the Traditional Owners are involved in. Alignment of processes and coordination of stakeholders will create more efficient use of resources.

Preparation is essential to build relationships and understanding of issues.

Facilitator agreed to by the parties

In Indigenous agreement making, Traditional Owner groups must agree to the facilitators and may select a facilitator known to and respected by the parties. Traditional owners should also be supported to explore perceived bias or conflict of interest.

Traditional Owners design process

Traditional Owner groups express frustration that non-Indigenous information and systems are imposed. Participation of Traditional Owners in the design of agreement making processes must be settled prior to consideration of issues in a dispute.

While existing decision making structures are important and should be incorporated into all stages of agreement making, Traditional Owner groups should be supported to develop agreement making processes that embed respect for cultural authority and practice. This acknowledgment of Indigenous knowledge systems may include traditional law and customs such as kinship protocols, respect for Elders, Traditional Owners and use of ceremony. It may involve meeting on alternating parties' country or visiting country the day before a meeting to undertake ceremony together.

Matching of process and support options

Mediation is only one process option in agreement making; parties may require capacity building in negotiation skills, conflict management and community facilitation. The *Right People for Country* Project aims to use a range of process and support options that are consistent with Indigenous-led participatory approach and tailored to group needs.

Use of research

The *Right People for Country* Project, in partnership with relevant stakeholders, will develop guidelines for the use of research in Indigenous agreement making. This will focus on research as a tool to support but not to determine agreement making and promotes Traditional Owners' understanding and access to research.

Confidentiality and transparency

Confidentiality in mediation with Traditional Owner groups is complex, therefore confidentiality protocols should be negotiated between Traditional Owner groups upfront. The *Right People for Country* project will explore a range of mechanisms to provide legal protection to Traditional Owner groups in agreement making, such as contractual agreements, confidentiality undertakings and statutory legal protections.

Building relationships

Restoring and building relationships is critical to implementation of outcomes. The meaning and importance of people's primary connection to country and affiliated/multiple clans needs to be considered in relationship building. It is beneficial to negotiate agreements that determine how groups will conduct their relationship with each other in the future.

Free, prior and informed consent

The Declaration requires states to obtain free, prior and informed consent before adopting and implementing legislative measures that affect Indigenous people. Implementing free, prior and informed consent will require reassessment of timeframes to ensure sufficient time for Indigenous consultation and decision making. Comprehensive information about decision making processes and substantive issues must be provided to the parties.

My predecessor, Tom Calma highlighted the Argyle Participation Agreement (Argyle Agreement) in his *Native Title Report 2006*. This agreement making process was underpinned by similar principles to those outlined above.

I believe the Argyle Agreement confirms that when culturally relevant frameworks that respect culture and identity are developed in conjunction with native title claimants, positive outcomes that discourage conflict and encourage mutual understanding of each other's priorities can be achieved.

This case study is particularly relevant because the families involved were struggling with lateral violence within their communities as a result of historical negotiations with the mining company.³¹ However, they came together and worked through these issues to achieve what is regarded as a positive agreement. While I have not gone back to review the progress of the Argyle Agreement, it continues to be promoted as a best practice model.

31 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/pdf/ntr_ch05.pdf (viewed 16 September 2011).

Text Box 4.4:

The Argyle Participation Agreement³² – Part 1

The Argyle Diamond Mine Participation Agreement (the Argyle Agreement) is a registered Indigenous Land Use Agreement (ILUA) between Traditional Owners of the East Kimberley region of Western Australia, the Kimberley Land Council and Argyle Diamond Mine (Argyle Diamonds).³³ The ILUA area covers 797.5 square kilometres and is located within the Shire of Wyndham-East Kimberley and the Wunan Regional Council, 100 kilometres south west of Kununurra. The communities affected by the mining include those at Warmun, Doon Doon, Glen Hill, Bow River and Crocodile Hole.

The Argyle Diamond Mine covers two significant story places for the traditional owners of this region, Barramundi Gap and Devil Devil Springs. The traditional owners have a responsibility to protect and maintain these sites of significance and ceremony. It is the responsibility of the Mirriuwung and Gidja people, particularly the women, to protect their ancestor the Barramundi, who will in turn take care of them. The Ngarranggarni (sometimes referred to as the Dreaming) is a living belief system that establishes continuity between past, present and future. It continues to inform the day to day activity of the Mirriuwung and Gidja peoples and their relationships to country.³⁴

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 Indigenous Land Use Agreement regulations met the requirements of Western law, while the conduct of particular ceremonies at the mine site met the responsibilities of Indigenous traditional law.

The parties to the 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
- taking traditional owners on tours of the mine, including the underground mine
- developing different visual strategies to assist with explanations of the impact of the mining activity on their country
- using translators throughout to ensure that everyone could follow and participate in the negotiations
- preparing all key documents 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

32 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/pdf/ntr_ch05.pdf (viewed 16 September 2011).

33 The Argyle Diamond Mine is owned by the Rio Tinto Group.

34 Argyle Diamonds, *The Argyle Participation Agreement: Breaking New Ground*, Information Brochure (2005), p 7. At <http://www.argylediamonds.com.au/docs/BreakingNewGround.pdf> (viewed 14 October 2011).

- 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'.³⁵

The legacy of the Argyle Agreement is that it has provided the traditional owners with a range of social, economic and development opportunities. These opportunities are managed and decided by the traditional owners on their own terms.

When they (traditional owners) were engaging with the mine they did so on their own terms. By performing ceremonies and reinforcing their relationships to the land and the Dreaming in the land, they were actually using very critical ways of engaging with the mining company that reinforced their difference, that ensured that they were not lost in a blended amorphous relationship. They really wanted the mining company to know that we are different from you, we have a very different way of being in the world, but we can be in this world with you. What I think is so exciting about Argyle is that those Aboriginal people who were engaging at that level, within their own cultural framework were never compromised in their relationship with the mine.³⁶

(b) Cultural safety and security

A key element of the Argyle Agreement was the care taken to ensure that cultural safety and security were provided throughout the negotiation process.

The concepts of cultural safety and security can provide the impetus for the cultural renewal and cultural resilience that is needed to challenge lateral violence. This is a key step in implementing the human rights framework to address lateral violence.

Cultural safety encapsulates the relationships that we need to foster in our communities, as well as the need for cultural renewal and revitalisation.

Cultural safety is diminished through a lack of respect and recognition of the positive aspects of Aboriginal and Torres Strait Islander culture and its centrality in creating a sense of meaning and purpose for Aboriginal and Torres Strait Islander peoples. For all Indigenous peoples, culture is essential for spiritual, emotional and social growth and maintenance and provides the 'spear and shield'; it provides our resistance and resilience.³⁷

Cultural security, on the other hand, speaks more to the obligations of those working with Aboriginal and Torres Strait Islander communities to ensure that there are policies and practices in place to guarantee that all interactions adequately meet cultural needs.

Cultural safety and security requires the creation of:

- environments of cultural resilience from within Aboriginal and Torres Strait Islander communities
- cultural competency by those who engage with Aboriginal and Torres Strait Islander communities.

35 K Doohan, Interview with Human Rights and Equal Opportunity staff, 17 October 2006.

36 K Doohan, Interview with Human Rights and Equal Opportunity staff, 17 October 2006.

37 R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 5.

(i) Cultural safety

The concept of cultural safety is drawn from the work of Maori nurses in New Zealand and can be defined as:

[A]n environment that is safe for people: where there is no assault, challenge or denial of their identity, of who they are and what they need. It is about shared respect, shared meaning, shared knowledge and experience of learning, living and working together with dignity and truly listening.³⁸

For Aboriginal and Torres Strait Islander peoples, a culturally safe environment is one where we feel safe and secure in our identity, culture and community.

Cultural safety can be conceived as re-claiming cultural norms and creating environments where our communities are able to become achievers and contributors.³⁹ Revitalising our culture and renewing cultural norms within our communities brings resilience and can prevent lateral violence.

The idea of cultural safety envisages a place or a process that enables a community to debate, grapple with and ultimately resolve the contemporary causes of lateral violence without fear or coercion.⁴⁰

The native title process and particularly mediation and negotiation processes provide us with opportunities to have open and frank discussions about issues concerning us. While these discussions may not seem relevant to external stakeholders, these issues must be addressed in order to progress negotiations positively and effectively. However, appropriate frameworks must be established and culturally safe environments must be provided to ensure that participants can have these necessary discussions in an environment that does not foster lateral violence.

(ii) Cultural security

Cultural security is subtly different from cultural safety in that it imposes a stronger obligation on those that work with Aboriginal and Torres Strait Islander peoples to move beyond 'cultural awareness' to actively ensure that our cultural needs are met. This means our cultural needs are addressed in policies and practices, and that all Aboriginal and Torres Strait Islander peoples have access to services that address our cultural needs. This needs to happen in all policy and service areas, not just in areas where there are particularly culturally competent workers.

A culturally secure environment cannot exist where external forces define and control cultural identities. The role for government and other stakeholders in creating cultural safety is to ensure that our voices are heard and respected in relation to our community challenges, aspirations and identities.⁴¹ In this way, cultural security is about government and stakeholders working with us to create an environment for our community to exert ownership of ourselves. Through this ownership we are empowered.

38 R Williams, 'Cultural Safety – what does it mean for our work practice?' (1999) 23(2) *Australian and New Zealand Journal of Public Health* 213, p 213. See also R Frankland, M Bamblett, P Lewis and R Trotter, *This is 'Forever Business': a framework for maintaining and restoring cultural safety in Aboriginal Victoria* (2010), p 12.

39 R Frankland and P Lewis, *Presentation to Social Justice Unit staff*, Australian Human Rights Commission, 14 March 2011.

40 See S Gorringe, J Ross, C Fforde, '*Will the Real Aborigine Please Stand Up*': *Strategies for breaking the stereotypes and changing the conversation*, AIATSIS Research Discussion Paper 28 (January 2011), p 11. At <http://www.aiatsis.gov.au/research/documents/AIATSISDiscussionPaper28.pdf> (viewed 14 October 2011). This AIATSIS Workshop on identity identified creating safety to enable a place and process for robust discussion was crucial to changing the negative conversations about identity to focus on solutions.

41 M Dodson, *The End in the Beginning: Re(de)fining Aboriginality* (Speech delivered at Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1994). At http://www.humanrights.gov.au/about/media/speeches/social_justice/end_in_the_beginning.html (viewed 23 September 2011).

The experience of Queensland South Native Title Services (QSNTS) to manage their native title case load with a significant number of overlapping claims demonstrates the need for culturally secure frameworks that establish a protocol for progress at all stages of the native title process.

Without these frameworks in place, NTRBs and NTSPs that have a legal responsibility to represent native title holders as well as to manage the conflicting interests of ‘aspiring claimants’ may unintentionally incite lateral violence both within the communities they are working with and also within their organisations.

Text Box 4.5 sets out the Legal Services Strategic Plan (LSSP) adopted by QSNTS in 2005–2008 to provide a fair, transparent and culturally relevant framework for resolving native title in the region. This included developing clear objectives, principles and policies for managing native title claims, and using land summits as a forum for mediating and negotiating overlapping native title claim areas. Time was set aside to ensure that native title claim groups within the QSNTS region were aware of the LSSP, the way it works and its implementation across the region.

Text Box 4.5:

**Legal Services Strategic Plan – Queensland South Native Title Services
(2005–2008)**

By mid 2004, 29 of the 30 native title claims in the Queensland South region were wholly or partially subject to overlap with at least one other claim.⁴²

QSNTS, the NTSP for the region, implemented a Legal Services Strategic Plan (LSSP) to guide the resources and activities of the organisation. This provided a framework to enable traditional owners to see their native title processes to conclusion and a process to reduce the number of overlapping native title claims in the region.

The LSSP approach created administrative sub-regions, introduced progressive stages for the preparation of claims and associated agreements, and allocated funds on the basis of the strength and merit of the native title claim.

Objectives of the LSSP

The primary objectives of QSNTS in adopting the LSSP were to:

1. work with the traditional owners of southern Queensland to achieve the best results possible within the existing legislative framework and the available resources
2. ensure that the available resources were allocated between claim groups in a fair and equitable manner
3. ensure that QSNTS service delivery was transparent
4. ensure that the traditional owners of southern Queensland were aware of the policies upon which decisions regarding the management of native title will be made by QSNTS

⁴² T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008), p 3. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

5. ensure that the traditional owners of southern Queensland had access to information and understood their obligations and responsibilities arising from their participation in the native title process
6. work with the traditional owners of southern Queensland to ensure any social infrastructure flowing from the native title process was complementary to the traditional owners' broader aspirations.⁴³

Principles of the LSSP

The underlying principles informing the preparation and adoption of this policy were that:

1. litigation was the option of last choice
2. the law was settled and failing amendment to the Native Title Act will not change greatly regarding connection
3. the native title process was unlikely to deliver substantial areas of land or water to the traditional owners of southern Queensland
4. the native title process may deliver mechanisms through which recognition and substantial empowerment could be achieved
5. QSNTS was a service provider and not a funding provider.⁴⁴

LSSP policy framework

The LSSP set out the way in which QSNTS performed and delivered its services in relation to:

- native title determination application case management
- future acts
- ILUAs.⁴⁵

The management of native title claims consisted of three stages:

- Stage One required satisfying Queensland Government requirements to ensure the 'right people' have been satisfactorily identified for the 'right country'.
- Stage Two involved the preparation of comprehensive connection materials and negotiations with governments and other respondents to achieve negotiated outcomes.
- Stage Three involved litigated proceedings which are limited to claims that were able to satisfy the requirements of the FaHCSIA for special funding.⁴⁶

43 Queensland South Native Title Services, *Annual Report (2006–2007)*, p 10.

44 Queensland South Native Title Services, *Annual Report (2006–2007)*, p 10.

45 Queensland South Native Title Services, *Annual Report (2006–2007)*, pp 10, 13.

46 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008), p 4. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011). Also see Queensland South Native Title Services, *Annual Report (2006–2007)*, p 18.

Land summits

The cornerstone of the implementation of the LSSP was land summits within the sub-regions where the claimants met with the aim of either resolving overlaps at the summit or agreeing on a process that would lead to a resolution of the overlap.⁴⁷ While land summits were resource intensive, they were viewed as a critical step in the process to resolve overlaps between native title claims in the Queensland South region.⁴⁸

I refer to the extensive discussion by McAvoy and Cooms to explain the logistics, experiences and review of two land summits undertaken by QSNTS in 2005 and 2006;⁴⁹ however, the following points set out some 'tips' that helped to make land summit processes in the QSNTS region successful for the native title applicant and their claims.

Pre-land summit:

- comprehensive planning and preparation of logistics as well as ways to manage substantive anthropological and legal issues
- holding the meetings over weekends with plenty of time for negotiations
- choosing suitable venues
- good food in large supply
- clear consistent travel allowance payment policies
- high level research and understanding of each claims current status and potential way forward.

Land summit:

- highly skilled and well briefed Indigenous facilitators for each group (pay them well so you can utilise them again)
- skilled provision of information about the LSSP
- health services for the duration of the land summit
- Indigenous security services that are not intrusive
- digital mapping facilities and high quality maps
- involvement of the Federal Court and the Tribunal in process development and in the provision of information and advice
- high quality legal and anthropological advice
- clear consistent and transparent rules of engagement
- memorabilia.

47 Queensland South Native Title Services, *Annual Report* (2005–2006), p 4.

48 Queensland South Native Title Services, *Annual Report* (2006–2007), p 20.

49 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008), pp 11–25. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

Post-land summit:

- timely follow-up on recommendations and instructions
- ongoing positive relationships between QSNTS and relevant government departments and between QSNTS and the applicants
- early establishment of native title corporations which have carefully thought-out decision-making processes
- a range of capacity building assistance including in the areas of governance, finance and land acquisition and management.⁵⁰

(c) Cultural competence

Whether we like it or not, the way our communities operate will always be shaped and informed by external influences. These influences can either support and empower our communities or undermine and disempower them.

While this Chapter promotes our self-determination and our ability to control our own destinies, we cannot do this without the support of governments and other stakeholders who rely on us to engage effectively with them.

I argue that governments and industry cannot 'fix' lateral violence through intervention; this is likely to only exacerbate the issue. Aboriginal and Torres Strait Islander relationships must be addressed by us from within our communities. However, this does not absolve external stakeholders of responsibilities to:

- remove the road blocks that inhibit Aboriginal and Torres Strait Islander peoples from taking control
- refrain from actions and processes that divide us
- create environments where our cultural difference is respected and nurtured
- remove the structural impediments to healthy relationships in our communities.

To meet these responsibilities governments and industry must be sufficiently culturally competent. Cultural competency extends beyond individual awareness to incorporate systems-level change. Much of the research in this regard has been conducted in the health sector, but should apply more broadly across all sectors and in particular, agencies involved in advancing the rights of Aboriginal and Torres Strait Islander peoples.

50 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008), p 25. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011). Also see Queensland South Native Title Services, *Annual Report (2006–2007)*, p 25.

The National Health and Medical Research Council defines cultural competence as:

Cultural competence is a set of congruent behaviours, attitudes and policies that come together in a system, agency or among professionals and enable that system, agency or those professions to work effectively in cross-cultural situations. Cultural competence is much more than awareness of cultural differences, as it focuses on the capacity of the health system to improve health and wellbeing by integrating culture into the delivery of health services.

To become more culturally competent, a system needs to:

- value diversity
- have the capacity for cultural self-assessment
- be conscious of the dynamics that occur when cultures interact
- institutionalise cultural knowledge
- adapt service delivery so that it reflects an understanding of the diversity between and within cultures.⁵¹

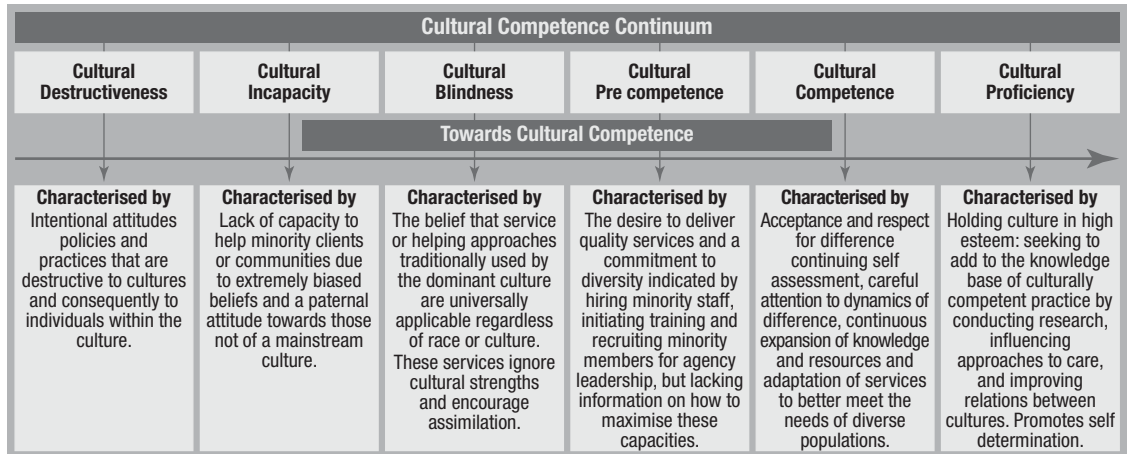
The Victorian Aboriginal Child Care Agency has developed an *Aboriginal Cultural Competency Framework* that guides the mainstream child and family services towards cultural competency and includes a cultural competence continuum that can be used to assess cultural competence. The framework for the cultural competence continuum is set out below at Diagram 4.1.

Cultural competency must be built over time through a deliberate process that seeks to build the capacity of the entire organisation and this must be done in partnership with Aboriginal and Torres Strait Islander communities.

The concept of the continuum outlined in the diagram below can be applied universally, to all who are working with Aboriginal and Torres Strait Islander communities.

51 National Health and Medical Research Council, *Cultural Competency in Health: A guide for policy, partnerships and participation* (2006), p 7. At <http://www.nhmrc.gov.au/guidelines/publications/hp19-hp26> (viewed 12 September 2009). In text references excluded.

Diagram 4.1:
Cultural competence continuum⁵²



In developing the cultural competency of an agency or organisation it is essential to remember that cultural competency:

- needs to be developed over time
- requires a whole-of-agency approach and needs to be driven by strong leadership within the agency
- relies on respectful partnerships with Aboriginal and Torres Strait Islander organisations
- requires personal and organisational reflection
- is an ongoing journey and partnership with Aboriginal and Torres Strait Islander communities.⁵³

I encourage all agencies and external stakeholders to use this framework to self-assess approaches to developing legislation, policies and programs that affect the lives of Aboriginal and Torres Strait Islander peoples.

(d) Culturally appropriate decision-making and conflict management

Conflict must be seen as natural, particularly given the multidirectional and contextual relationships between individuals and communities. However, in Aboriginal and Torres Strait Islander communities the potential for conflict that leads to lateral violence is heightened as a result of the ‘inter-relationships and interconnections between people’, and often does not account for the range of differentiations within the group.

⁵² Victorian Aboriginal Child Care Agency, *Aboriginal Cultural Competence Framework* (2008), p 24. At <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/plans-and-strategies/children,-youth-and-family-services/aboriginal-cultural-competence-framework-2008> (viewed 9 September 2011).

⁵³ Victorian Aboriginal Child Care Agency, *Aboriginal Cultural Competency Framework* (2008), p 54. At <http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/plans-and-strategies/children,-youth-and-family-services/aboriginal-cultural-competence-framework-2008> (viewed 9 September 2011).

An understanding of culture must recognise the diversity within Aboriginal and Torres Strait Islander communities. As it currently stands, much of the political and media landscape that directly affects the lives of Aboriginal and Torres Strait Islander communities fails to reflect this diversity. Any difference in opinion, even with contentious and personal views like politics or ideology, is portrayed as dysfunction.⁵⁴ Meanwhile, difference in opinion is accepted as the norm for mainstream Australia. Michael Mansell reflects on this false homogeneity:

We are no different from any other people anywhere in the world. We have different lifestyles and different communities. We have different political attitudes and we have different aspirations. Even though there are many common threads which run throughout the Aboriginal [and Torres Strait Islander] communities in Australia, we tend to encourage the differences because they are healthy. The worst aspect of political life that can be imposed on Aboriginal people [and Torres Strait Islanders] is that we must all speak with one voice and say exactly the same thing.⁵⁵

(i) Understanding conflict?

I believe that many of the conflicts that arise within Aboriginal and Torres Strait Islander communities may never be resolved. This is a consequence of the deep hurt, trauma and ongoing effects associated with our experience of colonisation, dispossession, dispersal and oppression. It is likely that this will also be the case in addressing our relationships with governments into the future.

In successful processes that do not create lateral violence, conflict is transformed to something that both parties can live with. Conflict never truly goes away because individuals and communities have to live with the impact of the original conflict. Nonetheless, it is possible and important to put in place healthier ways of dealing with conflict to prevent it further impacting on our communities into the future.

As such, frameworks designed to address conflict must be developed on the basis of 'conflict or dispute management' rather than the expectation of 'conflict or dispute resolution'. In engaging these processes, however, we can come to an agreed resolution that provides a pathway forward.

Further, in developing appropriate frameworks to manage conflict, we must be conscious that inter or intra-Indigenous disputes are not between Aboriginal and or Torres Strait Islander peoples in isolation to the world around them. While conflict is natural within communities, outside influences including those from the Native Title Act contribute to it.⁵⁶

When we are afforded the ability to disagree, we can develop responses to disputes that arise within our communities and more broadly within the Indigenous sector. Recognition and respect for diversity within Aboriginal and Torres Strait Islander communities is an essential platform for developing processes to effectively manage conflict and reduce the potential for lateral violence.

(ii) Frameworks for decision-making and managing conflict

A key component of effective participation in decision-making is the ability to resolve disputes when they arise.

54 S Maddison, 'Voice and Diversity in Indigenous Politics' (2009) 7(11) *Indigenous Law Bulletin* 19. At <http://www.austlii.edu.au/au/journals/IndigLawB/2009/14.html> (viewed 23 September 2011).

55 M Mansell quoted in F Brennan, *One Land, One Nation: Mabo – Towards 2001* (1995), 73; S Maddison, 'Voice and Diversity in Indigenous Politics' (2009) 7(11) *Indigenous Law Bulletin* 19, pp 19–20. At <http://www.austlii.edu.au/au/journals/IndigLawB/2009/14.html> (viewed 23 September 2011).

56 T Bauman and R Williams, *The Business of Process Research Issues in Managing Indigenous Decision-Making and Disputes in Land*, Research Discussion Paper No 13, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, p 13. At <http://www.aiatsis.gov.au/research/docs/dp/DP13.pdf> (viewed 3 October 2011).

The ability of Indigenous communities to deal with conflict in ways that reflect their local practice and reinforce local community authority not only help make communities safer and more enjoyable places to live, they also go some way to addressing the sources of dysfunctional and systemic conflict.⁵⁷

External stakeholders have obligations to ensure that Aboriginal and Torres Strait Islander peoples actively participate in decisions and processes that affect their rights.⁵⁸

Governments and industry need to understand that when engaging with us, conflict and disagreement within our communities is not something that can simply be ignored in the hope it will go away. It won't. These conflicts are often ingrained and external engagement becomes another avenue to play out these feuds. This is often seen in native title negotiations.

Similarly, community disputes should not be used by external parties as an excuse for saying 'it's all too hard'. The presence of community disputes does not absolve external parties of their obligations to ensure we actively participate in decision-making that affects us.

'Ultimately the aim is to negotiate the principles of a dispute management framework which is integrated with the decision-making one and which also contains contingency plans in the event that a dispute cannot be managed'.⁵⁹ However, external consultation and engagement processes need to be adequately established so that our internal decision-making and if necessary, conflict management processes, can operate effectively without pressure from governments and other parties.

For example, processes for resolving difficult issues must include reasonable timeframes that are set by Aboriginal and Torres Strait Islander peoples rather than by third parties. Identifying who has decision-making authority within the community and ensuring all community members participate in decision-making also assists to address conflict and reduce the potential for future conflict.

There are many options and mechanisms designed to deal with conflict including mediation, arbitration and conciliation. In the native title environment, mediation seems to be the main mechanism for negotiation and conflict management. However, mediation may not always be the most appropriate option. Throughout native title negotiations, a variety of mechanisms and capacity building strategies may be needed to address different types of conflict or to facilitate discussions at various points of the negotiation process.

As identified by Behrendt and Kelly:

There is a recurring need for intra-cultural dispute resolution in the native title system. Before any substantive negotiations can take place between native title claimants and non-Indigenous parties under the *Native Title Act 1993* (Cth) (*NTA*), 'it is necessary for Indigenous parties to negotiate a framework for Indigenous decision-making and conflict management processes in relation to particular local contexts and proposals'.⁶⁰

57 Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid work you mob are doing: Case studies in Indigenous Dispute Resolution & Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council (2009), p 101. At http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport (viewed 3 October 2011).

58 Human Rights Council, *Progress report on the study on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, paras 3–5. At <http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/ExpertMechanismDocumentation.aspx#session3> (viewed 26 September 2011).

59 T Bauman, 'Waiting for Mary: Process and Practice Issues in Negotiating Native Title Indigenous Decision-making and Dispute Management Frameworks' (2006) Vol. 3, Issues Paper No. 6. *Land, Rights, Laws: Issues of Native Title*, p 8. At <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip06v3n6.pdf> (viewed 12 October 2011).

60 T Bauman, 'Whose Benefits? Whose Rights? Negotiating Rights and Interests Amongst Indigenous Native Title Parties', (2005) Vol. 3, Issues Paper No. 2. *Land, Rights, Laws: Issues of Native Title*, p 17. At <http://www.aiatsis.gov.au/ntru/docs/publications/issues/ip05v3n2.pdf>, as cited in L Behrendt and L Kelly, *Resolving Indigenous Disputes: Land Conflict and Beyond* (2008), p 103.

Considerable work has been done in developing appropriate frameworks for managing conflict and resolving disputes, particularly in relation to native title. This includes:

- The *Solid work you mob are doing Project*⁶¹ conducted by the Federal Court of Australia in partnership with the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).
- The *Indigenous Facilitation and Mediation Project*⁶² (IFaMP) conducted by AIATSIS.

The outcomes of these two projects reflect an alternative dispute resolution (ADR) model. ADR processes are based on 'traditional dispute resolution mechanisms and the values of many Aboriginal communities'.⁶³ They are 'designed to reflect the values of the Aboriginal community'.⁶⁴ The ADR model also assists with developing 'practicable alternatives that will create better outcomes than current mediation models'.⁶⁵

Recognising the role of culture in conflict management processes is essential to success and is a central element of the ADR approach. The Report of the *Solid work you mob are doing Project* concludes that:

Cultural understandings, priorities and responsibilities to land and kin differ markedly between and amongst Indigenous communities across Australia ...

Cultural meanings are embedded in the social, economic and political dynamics of a community ... every dispute is different, and every process is a site of collaboration and negotiation.⁶⁶

The need to accommodate this difference in the development of frameworks for negotiation and conflict management is highlighted in the work of the *Solid work you mob are doing Project* outlined in Text Box 4.6.

61 Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid work you mob are doing: Case studies in Indigenous Dispute Resolution & Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council (2009). At http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport (viewed 3 October 2011).

62 See the work the Australian Institute of Aboriginal and Torres Strait Islander Studies have completed on dispute resolution (including mediation, negotiation and facilitation) at <http://www.aiatsis.gov.au/ntru/projects.html#neg> (viewed 3 October 2011).

63 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 103.

64 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 103.

65 L Behrendt and L Kelly, *Resolving Indigenous Disputes: land conflict and beyond* (2008), p 103.

66 Federal Court of Australia's Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid work you mob are doing: Case studies in Indigenous Dispute Resolution & Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council (2009), p 99. At http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport (viewed 3 October 2011).

Text Box 4.6:

*Solid work you mob are doing Project*⁶⁷

The Project Report identifies a number of critical factors for effective practice in managing conflict in Aboriginal and Torres Strait Islander communities. These factors include:

1. The role of culture

This recognises:

- that both historical and contemporary cultural issues are inseparable from other issues affecting the lives of Aboriginal and Torres Strait Islander peoples
- that in negotiating with parties, managing conflicts in ways that are congruent with cultural values, priorities and governance structures – including kinship protocols, respect for Elders and traditional, use of ceremony and approaches to gender
- the need to assist the community to develop processes that are owned by the community
- the need to evolve processes and services in response to local needs and issues
- the need to adapt and modify approaches according to the context in which they are employed.

2. The importance of preparation

- design the preparation phase thoroughly and allow sufficient time and resources
- map relationships to identify whose dispute it is and appropriate support people – the dispute may be ‘owned’ by individuals, or small or large groups, depending on the nature of the families and communities involved
- build willingness to participate by fostering goodwill, instilling confidence and trust, and explaining the process in clear language
- support local people to take responsibility for fixing their own problems by initiating dispute management processes themselves
- prepare thoroughly and ensure timeframes are appropriate

3. Effective Practice – process design

- build on work carried out during preparation to design effective process
- engage with, and respond to preferred ways of doing things and confirm the appropriateness and acceptability of the approach
- use team, co-mediation or panel approaches to:
 - better account for the broad range of interests and needs in multi-party disputes

67 Federal Court of Australia’s Indigenous Dispute Resolution & Conflict Management Case Study Project, *Solid work you mob are doing: Case studies in Indigenous Dispute Resolution & Conflict Management in Australia*, Report to the National Alternative Dispute Resolution Advisory Council (2009), pp 99–114. At http://www.nadrac.gov.au/www/nadrac/nadrac.nsf/Page/Publications_PublicationsbyDate_SolidWorkyouMobaredoingReport (viewed 3 October 2011).

- offer a choice of mediators including Indigenous practitioners that allow for matching gender, cultural background, and other relevant factors such as localness
- establish local and regional infrastructure to facilitate access to services and to enable quick responses to requests for assistance to avoid disputes escalating to the point of intractability
- consider who should be invited to attend after extensive discussions with parties – bringing everyone together in ‘big meetings’ without adequate preparation will be ineffective
- ensure that all parties agree with the venue
- create physically safe places where feelings can be expressed, and strong emotions can be vented
- create culturally safe places which use language and communication styles that are understood, involve appropriate support including interpreters and are located in casual environments
- promote and model effective non-violent ways of managing conflict
- respect the importance and complexity of relationships and design processes that build positive relationships.

The IFaMP was particularly focused on identifying, promoting and supporting best practice approaches to Aboriginal and Torres Strait Islander decision-making and conflict management particularly in relation to the operation of the Native Title Act.

Native title stakeholders and the Australian Government have identified the need to transform the adversarial nature of the native title system and have significantly focused on improving agreement making processes and developing non-adversarial approaches such as mediation, facilitation and negotiation.⁶⁸

The principles promoted by IFaMP and that are outlined in Text Box 4.7 assist in creating culturally appropriate frameworks for decision-making, conflict management and agreement making.

Text Box 4.7:

IFaMP – Ten best practice principles in decision-making, agreement making and dispute management processes⁶⁹

IFaMP has developed a best practice framework that is relevant to processes for Aboriginal and Torres Strait Islander decision-making and conflict management. This framework is underpinned by a set of principles to support these processes:

68 R McClelland, *3rd Negotiating Native Title Forum* (Speech delivered at the 3rd Negotiating Native Title Forum, Vibe Savoy Hotel, Melbourne, 20 February 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FirstQuarter_20February2009-3rdNegotiatingNativeTitleForum?open&query=adversarial (viewed 6 October 2011).

69 T Bauman, *Final Report of the Indigenous Facilitation and Mediation Project July 2003–June 2006: research findings, recommendations and implementation* (2006), Report No. 6, Australian Institute of Aboriginal and Torres Strait Islander Studies, pp 28–36. At <http://www.aiatsis.gov.au/ntru/docs/researchthemes/negmedfac/ifa/ifaReport.pdf> (viewed 9 September 2011).

1. Conflict is natural and can have positive outcomes when managed appropriately.
2. Indigenous people have the right to:
 - free, prior and informed consent to processes and agreement outcomes
 - say no to any processes or agreements
 - manage and own their decisions and disputes.
3. Indigenous decision making and dispute management processes are complex and should not be rushed.
4. Processes should do no harm.
5. How agreements are negotiated will have a major bearing on their sustainability; decisions must be owned by Indigenous parties to be sustainable.
6. 'Quick fix' solutions are to be avoided at the expense of long term resolution.
7. No one size fits all – processes should:
 - reflect, support and be tailored to local needs and ideas of how authority should be organised and decisions should be made
 - embody Indigenous values and Indigenous law
 - recognise that some Indigenous disputes may not be amenable to resolution and that their dynamics should be managed and accounted for in solutions
 - build on and support local capacity.
8. Early intervention and prompt responses can de-escalate conflict.
9. Agreement making processes and negotiations require arm's length facilitation.
10. Indigenous decision-making, agreement making and dispute management processes should be integrated with other processes and services in Indigenous communities in whole-of-government and whole-of-community approaches.

This framework also provides best practice guidelines for Indigenous decision-making, agreement making and dispute management processes. The guidelines focus on:

- resourcing processes adequately
- strategic planning, preparation, design and time frames
- team cohesion
- consent to process
- meeting the needs of those outside the process
- capacity to participate
- dialogue, relationship building and interactive techniques
- community education
- mapping underlying issues and disputes

- an integrated approach
- negotiating local decision-making and dispute management frameworks
- effective group representation, roles and responsibilities
- conflict of interest
- implementation
- complaints processes
- employment of process experts and codes of conduct.

These culturally based principles and guidelines can be translated into engagement protocols or codes of conduct that can guide internal community decision-making and conflict management processes, and assist Aboriginal and Torres Strait Islander people to participate in external processes that affect their communities.

The above case studies reflect the human rights principles that I outline in Chapter 3 and provide a good starting point to equip our communities to find local solutions to local problems. Applied within strong governance frameworks, these structures can assist Aboriginal and Torres Strait Islander communities to combat and neutralise behaviours that result in lateral violence.

(e) Creating strong and sustainable governance

A key requirement that is necessary to fully exercise our right to self-determination and to participate effectively in decisions affecting us is 'good governance'. However, simply applying a non-Indigenous governance framework to Aboriginal and Torres Strait Islander community organisations – in particular PBCs – is misplaced and inappropriate. This is due to the fact that:

Indigenous governance structures are a complex mix of formal and informal structures and processes. Extended Indigenous families have many levels of inclusiveness. There are local institutions informed by long held Indigenous laws and cultural priorities, local government councils, incorporations of native title holders and traditional owners, and a range of other Aboriginal resource and interest groups.

Functioning PBCs are essential to native title. Good governance helps to reduce the potential for conflict by establishing agreed frameworks and accountability mechanisms that accommodate the diversity of rights and responsibilities required within Aboriginal and Torres Strait Islander organisations, particularly those set up for the purposes of managing native title rights and interests.

Governance is:

... about how a group of people organise themselves to make sure things are run well, so that they can successfully achieve the outcomes that are important to them.

That means people have to have processes, structures and rules in place so that they can make decisions and take action together to ...

- determine who is a member of their group
- exercise their authority and power
- hold their leaders accountable
- represent their collective rights and interests
- steer their future direction
- negotiate with each other and outside parties
- manage their own affairs.

At its heart, governance is about who has power and authority, and how they use it ... Without genuine decision-making power, and the practical capacity to exercise legitimate and accountable authority, any system of governance will fail.⁷⁰

In designing, developing and assessing governance frameworks, we are able to rely on guidance provided by the Declaration. For example, the Declaration says that in order to advance our rights to participate in decision-making that affects us, our representative bodies should ensure they echo the voices of the Aboriginal and Torres Strait Islander peoples that they represent.

(i) 'Good governance' in a cultural context

Governance in Aboriginal and Torres Strait Islander communities is directly related to consultation and engagement, and encompasses genuine decision making power.

Good governance means having good rules for deciding how people work together to do the things they need to get done, how decisions are made, who has the authority to act for the group, how are disputes resolved and how to get community business done.⁷¹

Good governance frameworks must be supported by principles of self-determination, free, prior and informed consent, non-discrimination, and the protection of culture. Good governance is compromised in the absence of these key human rights principles, which results in conflict, dysfunction and lateral violence rather than good governance and good outcomes.

One of the critical barriers to ensuring strong and sustainable governance in PBCs is the tendency to leave establishing governance frameworks until the end of the negotiation process rather than creating them at the beginning of the process. If appropriate governance structures are established early in the process, they can

70 D Smith, J Hunt, *Do They Get It? Indigenous Governance: The Research Evidence and Possibilities for a Policy Dialogue with Australian Governments* (Presentation delivered at the Inaugural National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 18 November 2010). At http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith_Hunt.pdf (viewed 17 September 2011). Emphasis in original.

71 S Cornell, *Starting and Sustaining Strong Indigenous Governance* (Presentation at the Building Effective Indigenous Governance Conference, Jabiru, Northern Territory, 5 November 2003), p 3.

define the decision-making protocols and be a key source to manage conflict. They can also enable ongoing review throughout the process to ensure the structure accurately reflects and delivers the aspirations of the group.

An example of establishing governance structures early in the native title process is demonstrated by requiring a native title claim group to have an incorporated body or PBC that accurately reflects the group as a threshold requirement to access funding from the service to enter negotiations.⁷²

McAvoy and Cooms argue that the early establishment of PBCs is necessary because the ‘capacity building that takes place on the way to the resolution of the native title proceedings is perhaps the most enduring outcome of the native title process’:

Involvement in establishing a corporation and settling upon well thought-out and agreed decision making processes will also ensure that the claim group remains cohesive and that decisions are made according to a well planned process and are appropriately integrated into the structure of the corporations. It can also ensure the inequities present in any other corporate structures with which members of the claim group might be involved are exposed and rectified at an early stage.⁷³

Establishing governance frameworks early in the process can also assist in avoiding conflict and lateral violence associated with the perceived issue of nepotism.⁷⁴ I argue that this is a perceived issue because the imposition of non-Indigenous forms of governance has distorted our own understanding of familial and community relationships and responsibilities, and our ways of governing. Hunt, Smith, Garling and Sanders articulate this as follows:

[Families] form the backbone of Indigenous communities and many local organisations, thereby linking an extended family group identity to organisational identities and forms of political representation. In this manner, extended families not only have a form of internal governance, they are also embedded into other layers of governance at community and regional levels, and outwards... The Indigenous family lies at the heart of values of reciprocity, mutual responsibility and obligation. Because of this, it is argued that these institutional rules of family life cannot be trusted in the world of capitalism, business management and profit making.⁷⁵

Unfortunately, this lack of trust not only affects our relationships with external stakeholders but also influences our relationships with each other. This is particularly destructive in PBCs because they are established to manage and distribute the benefits acquired through a determination of native title and the negotiation of native title agreements. The effective management of these processes must be sustainable over the long-term. Good governance assists in ensuring this is achieved.

72 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008) pp 18–19. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

73 T McAvoy and V Cooms, *Even as the Crow Flies, it is Still a Long Way: implementation of the Queensland South Native Title Services Ltd Legal Services Strategic Plan*, Native Title Research Monograph 2 (2008) pp 18–19. At <http://www.aiatsis.gov.au/ntru/docs/publications/monographs/MonographCrowFlies.pdf> (viewed 27 September 2011).

74 Nepotism is widely understood to mean advantages obtained through family relationships, and is not necessarily illegal: Office of the Registrar of Aboriginal Corporations, *Report–Forum on Risk Issues for Programs Funding Indigenous Corporations* (2004), p 19, as cited in J Hunt, D Smith, S Garling and W Sanders (Eds), *Contested Governance: Culture, power and institutions in Indigenous Australia*, Centre for Aboriginal Economic Policy Research, Research Monograph No. 29 (2008), p 211. At http://epress.anu.edu.au/caepr_series/no_29/pdf/whole_book.pdf (viewed 17 October 2011).

75 J Hunt, D Smith, S Garling and W Sanders (Eds), *Contested Governance: Culture, power and institutions in Indigenous Australia*, Centre for Aboriginal Economic Policy Research, Research Monograph No. 29 (2008), pp 210–211. At http://epress.anu.edu.au/caepr_series/no_29/pdf/whole_book.pdf (viewed 17 October 2011).

Again, I refer to the Argyle Participation Agreement to demonstrate how establishing appropriate governance frameworks that meet the needs of the groups involved can reduce the potential for lateral violence as a result of the effective management and distribution of resources.

Text Box 4.8:

The Argyle Participation Agreement⁷⁶ – Part 2

The ILUA negotiations were conducted by two committees: the traditional owners and Argyle Diamonds. The traditional owner Negotiation Committee was structured to include the various cultural groupings. It comprised 22 representatives from all family groups with traditional rights and interests as defined by the ethnographic studies. The Negotiating Committee attended meetings on behalf of the traditional owner groups and other senior men came to the meetings and observed.

My personal view is that this is a governance practice that you just can't buy in any other way ... that group on traditional lines came together, exercised traditional decision-making power ... They demonstrated the power of traditional decision-making and they constructed that group so it was a blend of men and women, old people, young people, the right composition of family. It held, the composition held, everybody came to every meeting, everybody worked hard at every meeting, it was just phenomenal. The old people were just sagging in their seats, they were so exhausted, but none of them left.⁷⁷

The experience of negotiating the Argyle Participation Agreement reinforces the importance of Indigenous models of governance.

The unique structure of the agreements reflects the aspirations of both Argyle Diamond Mine and the traditional owners that the agreements provide a firm base for an enduring partnership and sustainable prosperity for traditional owners during the life of the Argyle mine and once mining is completed.⁷⁸

The ILUA established two trusts: the Gelganyem Trust and the Kilkayi Trust. The names of the trusts are derived from the Mirriuwung and Gidja peoples words that describe traditional fishing methods and are used by the women for stories associated with Barramundi Gap.

The Gelganyem Trust is made up of eleven trustees, nine representing the seven traditional owner estate groups that are party to the ILUA and two independent trustees. The Gelganyem Trust was established to manage the financial contributions split between the Sustainability Fund, the Law and Culture Fund, the Education and Training Fund, and the Miriuwung and Gija Partnership Fund. Training was provided to the trustees prior to assuming their roles and responsibilities.

The Kilkayi Trust has only two independent trustees. This trust has two roles:

1. To administer the annual payments from Argyle to the individual families party to the ILUA.
2. To assist each family to develop an annual expenditure plan outlining specific community projects and initiatives.

76 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/pdf/ntr_ch05.pdf (viewed 16 September 2011).

77 S Nish, Interview with Human Rights and Equal Opportunity Commission staff, 19 October 2006.

78 Gelganyem Trust and Kilkayi Trust, Email correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 17 November 2006.

The independent trustees are appointed by agreement of the ILUA parties and bring high level management, financial and community development skills to the trusts.⁷⁹ Traditional owners agreed that they are not representatives on trusts that manage other families business.⁸⁰

(ii) Challenges to achieving good governance in the native title context

I am concerned that the Australian Government's own culture of governance in Aboriginal and Torres Strait Islander affairs is an entrenched barrier to overcoming this challenge – particularly as it is based on institutionalised forms of policy and control rather than empowerment and development. The result is that 'Indigenous governance becomes a matter of all responsibility, but no power'⁸¹, and creates an environment that encourages lateral violence.

For example, where governments impose non-Indigenous legal concepts, structures and governance institutions through legislative and policy frameworks on Aboriginal and Torres Strait Islander peoples, they require:

- the incorporation of social groups into organisations
- the ordering concepts of democratic elections and voting systems
- the asserted primacy of individual citizenship over collective rights
- the statutory naming of newly-created categories of people on whom are bestowed specified decision-making rights, responsibilities and authority by the state.⁸²

In exercising our rights to our lands, territories and resources, Aboriginal and Torres Strait Islander peoples are required to navigate and conform to a myriad of non-Indigenous governance structures and requirements, including:

- engaging with governance structures established by government to facilitate access to lands and resources, such as NTRBs, NTSPs, Land Councils, and Indigenous Advisory Committees
- establishing negotiating committees to prepare for the establishment of formal governance structures, such as defining applicants in a native title or land rights claim, or determining who should negotiate an ILUA on behalf of the group
- establishing governance organisations in accordance with legislative and policy requirements such as NTRBs, NTSPs, Land Councils, Prescribed Bodies Corporate or Land Trusts

79 Gelganyem Trust and Kilkayi Trust, Email correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Human Rights and Equal Opportunity Commission, 17 November 2006.

80 S Nish, Interview with Human Rights and Equal Opportunity Commission staff, 19 October 2006.

81 D Smith, J Hunt, *Do They Get It? Indigenous Governance: The Research Evidence and Possibilities for a Policy Dialogue with Australian Governments* (Presentation delivered at the Inaugural National Indigenous Policy and Dialogue Conference, University of New South Wales, Sydney, 18 November 2010). At http://nipdc.arts.unsw.edu.au/assets/Powerpoints/Smith_Hunt.pdf (viewed 17 September 2011).

82 J Hunt, D Smith, S Garling and W Sanders (Eds), *Contested Governance: Culture, power and institutions in Indigenous Australia*, Centre for Aboriginal Economic Policy Research, Research Monograph No. 29 (2008), p 79. At http://eprss.anu.edu.au/caepr_series/no_29/pdf/whole_book.pdf (viewed 17 October 2011).

- incorporating governance organisations under government established and regulated legal frameworks.

These legislative and policy frameworks create 'legal categories of people' – such as 'traditional owners', 'authorised claimants' and 'native title holders' – who have to be registered and certified; and 'councillors', 'chairpersons', 'bodies corporate' and 'governing boards' who are required to operate under legal and constitutional guidelines.⁸³

Governments must ensure processes that contribute to the effective functioning of the native title system progress native title outcomes and minimise the potential for conflict within these organisations and native title groups.

I also encourage the Australian Government to ensure that PBCs are able to independently access financial and technical support⁸⁴ to facilitate their successful establishment, capacity development, and to ensure they are well-functioning, sustainable and self-governing.

83 J Hunt, D Smith, S Garling and W Sanders (Eds), *Contested Governance: Culture, power and institutions in Indigenous Australia*, Centre for Aboriginal Economic Policy Research, Research Monograph No. 29 (2008), p 79. At http://epress.anu.edu.au/caepr_series/no_29/pdf/whole_book.pdf (viewed 17 October 2011).

84 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 12 July 2011).

4.5 Conclusion

In this Chapter, I have discussed a number of options for addressing lateral violence in a native title context. In particular, I have highlighted the need to ensure that legislative and policy frameworks advance our development and empower us to reach our full potential in accordance with the Declaration on the Rights of Indigenous Peoples. I have also set out some examples of initiatives established by Aboriginal and Torres Strait Islander peoples and their organisations to transform lateral violence behaviours from negative interactions to positive engagement with each other.

I encourage Aboriginal and Torres Strait Islander peoples to continue to actively develop local solutions to lateral violence in their communities. However, governments and industry must work with us to ensure that their interactions assist us to prevent rather than promote lateral violence in our communities.

The recognition of our native title provides a unique opportunity for many Aboriginal and Torres Strait Islander peoples to overcome disadvantage. However, the native title system must operate in a way that empowers us to achieve this outcome. It must be supported by strong foundations that ensure our self-determination and enable our effective participation in decision-making. And the native title system must be developed with a holistic approach to overcoming the impacts of colonisation.

I look forward to watching our communities grow in their efforts to address lateral violence, and to working with governments and others to ensure their contributions to our communities are positive and empowering.

Recommendations

6. That targeted research is undertaken to develop the evidence base and tools to address lateral violence as it relates to the native title system. This research should be supported by the Australian Government.
7. That Aboriginal and Torres Strait Islander communities and their organisations work together to develop engagement and governance frameworks that promote cultural safety and comply with the *United Nations Declaration on the Rights of Indigenous Peoples*.
8. That all governments working in native title ensure that their engagement strategies, policies and programs are designed, developed and implemented in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*. In particular, this should occur with respect to the right to self-determination, the right to participate in decision making guided by the principle of free, prior and informed consent, non-discrimination, and respect for and protection of culture.
9. That the Australian Government pursue legislative and policy reform that empowers Aboriginal and Torres Strait Islander peoples and their communities, in particular:
 - a) reforming the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples, and address the provisions that permit discrimination on the basis of race
 - b) ensuring that the National Human Rights Framework includes the *United Nations Declaration on the Rights of Indigenous Peoples* to guide its application of human rights as they apply to Aboriginal and Torres Strait Islander peoples
 - c) creating a just and equitable native title system that is reinforced by a Social Justice Package.

10. That all governments, key organisations and industry partners working in native title conduct an audit of cultural safety and security in relation to their programs and policies that impact on Aboriginal and Torres Strait Islander peoples; and in consideration of the results, develop strategies to increase cultural competence within their agencies and organisations.

11. That all governments, key organisations and industry parties working in native title, conduct education and awareness raising sessions on lateral violence for both Aboriginal and Torres Strait Islander and non-Indigenous staff.

Appendices

Appendix 1: Acknowledgments **192**

Appendix 2: Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011 (Cth) **193**

Appendix 3: Recommendations from the *Native Title Report 2010* **202**



Appendix 1

Acknowledgments

The Aboriginal and Torres Strait Islander Social Justice Commissioner thanks the following people and organisations for their assistance in preparing the *Native Title Report 2011*.

Louise Anderson

Deputy Registrar
Federal Court of Australia Registry

Maryse Aranda

Principal Legal Officer
South West Aboriginal Land and Sea Council

Valerie Cooms

Director
Quandamooka Yoolooburrabee Aboriginal Corporation

John T Kris

Chairperson
Torres Strait Regional Authority

Michael Meeghan

Principal Legal Officer
Yamatji Marlpa Aboriginal Corporation

Graeme Neate

President
National Native Title Tribunal

Ian Rawlings

CEO
Central Desert Native Title Services Ltd

Kevin Smith

CEO
Queensland South Native Title Services

Sally Smith

Project Manager
Right People for Country Project

Stephen Sparkes

Manager Legal, Research and Library Services
National Native Title Tribunal

Attorney General's Department

Native Title Unit
Social Inclusion Division

Cape York Land Council

Central Land Council

Department of Families, Housing, Community Services and Indigenous Affairs

Native Title and Leadership Branch

Native Title Services Victoria Ltd

NTSCORP Ltd

Queensland Government

Department of Finance, Natural Resources and The Arts

Right People for Country Project Committee

Appendix 2

Australian Human Rights Commission submission to the Senate Legal and Constitutional Affairs Committee's Inquiry into the Native Title Amendment (Reform) Bill 2011¹

1. Introduction

1. The Australian Human Rights Commission welcomes the opportunity to comment on the proposed changes to the *Native Title Act 1993* (Cth) in the Native Title Amendment (Reform) Bill 2011.
2. The Commission is Australia's national human rights institution and is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act).
3. The Commission has responsibilities under the AHRC Act to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples. The Commission also has responsibilities to report annually on the effect of the Native Title Act on the exercise and enjoyment of human rights of Aboriginal people and Torres Strait Islanders.²
4. The Commission congratulates Senator Siewert for moving the Reform Bill; particularly to the extent the proposed amendments implement the Aboriginal and Torres Strait Islander Social Justice Commissioner's *Native Title Report 2009*.
5. This submission outlines the Commission's support for the stated intention of the Reform Bill. As the Commission has consistently urged, native title reform is required to address current inequalities in the law. However, the Commission cautions against making amendments to the Native Title Act without comprehensive consultation with Aboriginal and Torres Strait Islander peoples.

2. Summary

6. The Native Title Act does not create a fair process for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.³
7. Within the native title system there are significant obstacles to the full realisation of Aboriginal and Torres Strait Islander rights, including, for example, the onerous burden of proof, the injustices of extinguishment, and the weakness of the good faith requirements.⁴
8. The Commission welcomes reforms which aim to address the barriers to creating a just and fair native title system and broadly supports the intent of the following reforms:
 - inserting additional objects into the objects clause (item 1)
 - reverting to the original wording of s 24MD(2)(c) (item 3)
 - enabling prior extinguishment of native title rights and interests to be disregarded (item 11)
 - repealing s 26(3) of the Native Title Act to recognise procedural rights over offshore areas (item 4)

1 This submission is available at: http://www.aph.gov.au/senate/committee/legcon_ctte/native_title_three/submissions.htm.

2 *Native Title Act 1993* (Cth), s 209.

3 See for example, M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 12–14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).

4 See further discussion in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2010), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).

- strengthening the good faith requirements under the right to negotiate provisions (items 5–9)
 - shifting the onus of proof to the respondent to rebut presumptions that support native title interests (item 12)
 - amending the definitions of ‘traditional laws acknowledged’, ‘traditional customs observed’ and ‘connection with the land or waters’ in s 223(1) of the Native Title Act (item 13)
 - amending s 223(2) of the Native Title Act to clarify that native title rights and interests can include commercial rights and interests (item 14).
9. However, the Commission believes that these reforms should be addressed through an independent inquiry on possible law reform options.

3. Recommendations

10. The Australian Human Rights Commission recommends that:

Recommendation 1: The Committee endorse the stated intention of the Reform Bill.

Recommendation 2: The Committee recommend the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3: A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.

Recommendation 4: The Committee recommend the Australian Government give full consideration to items 5–9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.

4. Creating a just and fair native title system

11. The *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration) provides that States are to establish and implement ‘a fair, independent, impartial, open and transparent process ... to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources’.⁵ The Australian Government has formally supported the Declaration.
12. However, international human rights mechanisms have noted with concern the inability of Aboriginal and Torres Strait Islander peoples to fully exercise and enjoy their rights to their lands, territories and resources.⁶ For example, the Committee on the Elimination of Racial Discrimination expressed regret that as a result of ‘the persisting high standards of proof required for recognition of the relationship

5 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 27. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 12 July 2011).

6 See, for example, 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://www2.ohchr.org/english/bodies/cerd/cerds66.htm> (viewed 18 July 2011); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm> (viewed 18 July 2011).

between indigenous peoples and their traditional lands, ...many are unable to obtain recognition of their relationship to land (art. 5)⁷.

13. While the Australian Government has introduced some reforms to the native title system in recent years, they have been minor and have failed to address the most significant obstacles within the native title system to the full realisation of Aboriginal and Torres Strait Islander peoples' land rights. These obstacles include the onerous burden of proving native title, and the injustices of extinguishment.⁸
14. Accordingly, it is the Commission's view that the Native Title Act does not currently create a fair process for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.
15. The Commission notes that the objects of the Reform Bill are to:
 - a) Refer to the *United Nations Declaration on the Rights of Indigenous Peoples* and provide for principles of the Declaration to be applied in decision-making under the *Native Title Act 1993*; and
 - b) Implement reforms to the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal peoples and Torres Strait Islanders.
16. The Commission strongly supports the stated objects of the Reform Bill. The Commission further recommends an independent inquiry to review the operation of the native title system to explore options for native title reform.
17. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples.

Recommendation 1: That the Committee endorse the stated intention of the Reform Bill.

Recommendation 2: That the Committee recommend that the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the Declaration.

5. The Native Title Amendment (Reform) Bill 2011

18. The Reform Bill proposes a number of amendments to the Native Title Act which the Social Justice Commissioner and the Commission have been recommending for a number of years.⁹
19. The Reform Bill aims to 'enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples'¹⁰ by addressing:
 - a. the barriers claimants face in making the case for a determination of native title rights and interests and
 - b. procedural issues relating to the future act regime.¹¹

7 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/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 18 July 2011).

8 *Native Title Report 2010*, p 13.

9 See, for example, *Native Title Report 2009*, ch 3.

10 Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth), p 2.

11 Explanatory Memorandum, p 2.

5.1 Consistency with the Declaration

20. Proposed s 3A of the Reform Bill, if passed, will insert three additional objects into the objects clause of the Native Title Act:
 - a. that governments in Australia take all necessary steps to implement specific principles set out in the Declaration¹²
 - b. that the provisions of the Native Title Act are to be interpreted and applied consistently with the Declaration¹³
 - c. that the specific principles set out in the Declaration are applied by each person exercising a power or performing a function under the Native Title Act.¹⁴
21. Explicit support for some of the principles of the Declaration in the Native Title Act is a positive step towards the implementation of the Declaration into all Australian laws and policies that affect the rights of Aboriginal and Torres Strait Islander peoples.
22. To the extent that an objects clause can provide interpretative guidance to courts applying the Native Title Act,¹⁵ the Commission broadly supports the intention of this proposed amendment.
23. However, courts will ascertain the intention of the Native Title Act with reference to all of its provisions. Therefore, the Commission notes that this step alone will not substitute for amending the Native Title Act to ensure the substance of its provisions are consistent with the Declaration.
24. In the Commission's view, all laws and policies, especially the Native Title Act, should be aligned with the Declaration.¹⁶

5.2 Extinguishment

(a) *Compulsory acquisition and extinguishment*

25. Section 24MD(2)(c) of the Native Title Act currently states that 'compulsory acquisition extinguishes the whole or the part of the native title rights and interests'.
26. Item 3 of the Reform Bill proposes to revert s 24MD(2)(c) of the Native Title Act to its original wording.¹⁷ As originally enacted, this section 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'.¹⁸
27. There appears to be no policy justification for the current position. The Commission therefore welcomes item 3 of the Reform Bill.

12 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(1).

13 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(2).

14 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(3).

15 *Re Credit Tribunal; Ex parte General Motors Acceptance Corp, Australia* (1977) 14 ALR 257, 260.

16 *Native Title Report 2010*, rec 2.1.

17 Formerly s 23(3) of the *Native Title Act 1993* (Cth).

18 See: *Native Title Report 2009*, p 106.

(b) Agreements to disregard prior extinguishment

28. Item 11 of the Reform Bill proposes to insert a new s 47C. The new s 47C is intended to enable an applicant and a government party to make an agreement, at any time prior to a determination, that the extinguishment of native title rights and interests is to be disregarded.¹⁹
29. Following his visit to Australia in August 2009, the Special Rapporteur observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the Declaration and other international instruments.²⁰
30. The Commission therefore supports expanding the range of circumstances in which extinguishment can be disregarded.²¹
31. The Commission notes that proposed s 47C(1)(b) of the Reform Bill requires the agreement of the parties to disregard the extinguishment of native title rights. Accordingly, if passed, the impact of the proposed amendment will be limited to situations where government parties are prepared to be flexible and approach agreement-making processes in good faith.
32. The Commission therefore recommends that the Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.²²

Recommendation 3: A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.

5.3 Procedural rights over offshore areas

33. Item 4 of the Reform Bill proposes to repeal s 26(3) of the Native Title Act. Section 26(3) of the Native Title Act limits the right to negotiate to acts that relate 'to a place that is on the landward side of the mean high-water mark of the sea'.
34. The Commission supports the repeal of s 26(3) of the Native Title Act. The Australian Government has recognised that native title can exist up to 12 nautical miles out to sea.²³
35. The lack of procedural rights in relation to offshore areas in the Native Title Act is therefore inconsistent with the Government's recognition that native title can exist in offshore areas. The Commission therefore supports repealing s 26(3) of the Native Title Act which should improve this situation.

19 Explanatory Memorandum, note 7, p 6.

20 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 18 July 2011).

21 For further discussion see *Native Title Report 2010*, pp 39–41.

22 See *Native Title Report 2010*, p 39.

23 The Australian Government has recognised that native title can exist up to 12 nautical miles out to sea: 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/mcclelland.nsf/Page/Speeches_2009_FirstQuarter_20February2009-3rdNegotiatingNativeTitleForum (viewed 18 July 2011).

5.4 Negotiating in good faith

36. Items 5 to 9 of the Reform Bill propose amendments to strengthen the requirements to negotiate in good faith. These amendments include:
- requiring parties to negotiate ‘for a period of at least 6 months’²⁴
 - requiring parties to negotiate in good faith ‘using all reasonable efforts’²⁵
 - outlining explicit criteria to guide what constitutes negotiating ‘in good faith using all reasonable efforts’²⁶
 - providing that the onus of proving negotiation has been in good faith is on the party asserting good faith²⁷
 - requiring a party to negotiate in good faith using all reasonable efforts before applying to the arbitral body.²⁸
37. The good faith negotiation requirement is one of the few legal safeguards that native title parties have under the future act regime.²⁹ In *FMG Pilbara Pty Ltd v Cox (FMG)*³⁰, the Federal Court considered the obligation to negotiate in good faith. It found that
- there 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.³¹
38. The Social Justice Commissioner considers that the Federal Court decision in *FMG v Pilbara* has diluted the content of this important procedural right for native title parties.³² Accordingly, the Commission welcomes reforming the good faith negotiation requirements.
39. The Commission supports the inclusion of explicit criteria as to what constitutes ‘good faith’ in the Native Title Act. Previously the Commission has submitted that s 228 of the *Fair Work Act 2009* (Cth) (the Fair Work Act) could provide a model for developing such ‘good faith’ criteria within the native title system.³³ Proposed s 31(1A) includes many of these criteria.
40. The Commission therefore broadly supports the intent of items 5–9 of the Reform Bill. However, the Commission considers that a statutory requirement to negotiate for a period of at least 6 months should also allow parties to negotiate in good faith for a period of less than 6 months where circumstances support a shorter negotiation period.

24 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 5, proposed s 31(1)(b).

25 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 5, proposed s 31(1)(b).

26 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 6, proposed s 31(1A).

27 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 7, proposed s 31(2A).

28 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 9, proposed s 35(1A).

29 *Native Title Report 2009*, p34.

30 (2009) 175 FCR 141. This decision was discussed in *Native Title Report 2009*, pp 31–35.

31 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 [27].

32 *Native Title Report 2009*, p 34.

33 See Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), paras 72–74. At: http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 18 July 2011).

41. Further consideration should also be given to:

- including a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith
- inserting a 'reasonable person' test which may be used in assessing the actions of a proponent seeking a determination when negotiations are at a very early stage.³⁴

42. The Commission further submits that the legislative provisions outlining the elements of good faith could be supplemented by a code or framework to guide the parties as to their duty to act in good faith.³⁵

43. The Commission understands that the Government is currently reviewing the good faith requirements and encourages the Government to consider items 5–9 of the Reform Bill as part of this review.³⁶

Recommendation 4: The Committee recommend that the Australian Government give full consideration to items 5–9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.

5.5 Shifting the burden of proof

44. Chief Justice French AC 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'.³⁷

45. Proposed s 61AA establishes a presumption of continuous connection in relation to a native title claim provided that certain circumstances are met.³⁸ Under proposed s 61AB, the onus shifts onto the respondent, usually the State, to demonstrate that there is evidence of 'substantial interruption' in the acknowledgment of traditional laws or the observation of traditional customs that sets aside the presumption.

46. If passed, proposed s 61AA and s 61AB will clarify that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity.

34 For further information on these options, see *Native Title Report 2009*, pp 31–35, 104–107; S Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, p 15. At www.aiatsis.gov.au/ntru/docs/publications/issues/ip09v4n3.pdf (viewed 18 July 2011). See also: Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [76].

35 This could also guide the National Native Title Tribunal. For further discussion see: Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [75].

36 In July 2010 the Government released *Leading practice agreements: maximising outcomes from native title benefits* which proposed a review of the good faith requirements: Department of Families, Housing, Community Services and Indigenous Affairs, *Leading practice agreements: maximising outcomes from native title benefits*, http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 18 July 2011).

37 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), [29]. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 18 July 2011).

38 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AA.

47. This is an important proposal given that the United Nations Committee on the Elimination of Racial Discrimination has expressed concern about the onerous evidential burden on claimants proving native title.³⁹
48. The application of the tests for continuity, derived from *Yorta Yorta v Victoria (Yorta Yorta)*⁴⁰ has had a detrimental effect on native title claims.⁴¹ 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’.⁴²
49. The Commission therefore supports the intent of proposed s 61AA and s 61AB. However, the Commission prefers the model recommended by the Social Justice Commissioner in the *Native Title Report 2009* whereby the burden of proof shifts to the respondent once native title claimants have met the registration test.⁴³
50. Proposed s 61AB(2) provides that, in considering the primary reason for the interruption, the Court must treat as relevant whether the primary reason for the interruption is the action of ‘a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander’.⁴⁴ This proposal is broadly consistent with the recommendations of the Social Justice Commissioner in the *Native Title Report 2009*⁴⁵ and the Commission therefore supports the intent of proposed s 61AB(2).

(a) Clarifying the definitions of ‘traditional’ and ‘connection’

(i) Clarify the definition of ‘traditional’

51. Proposed s 223(1A) and s 223(1B), if passed, will define ‘traditional laws acknowledged’ and ‘traditional customs observed’ to encompass laws and customs that ‘remain identifiable through time’.
52. The interpretation of ‘traditional’ under the Native Title Act sets too high a test and may not allow for traditional laws and customs to develop and progress over time in the way that all cultures adapt and change over time. Further, the proposed presumption of continuity would be undermined if respondents could rebut the presumption simply by establishing that a law or custom is not practised as it was at the date of sovereignty.⁴⁶
53. The Commission submits that an approach that allows for ‘traditional’ laws and customs to change over time provided they remain ‘identifiable’ is consistent with the recognition of Aboriginal and Torres Strait Islander peoples’ rights to culture and would clarify the level of adaptation allowable under the law.⁴⁷

39 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/15-17 (2010), [18].

40 *Yorta Yorta v Victoria* (2002) 214 CLR 422.

41 *Native Title Report 2009*, p 84.

42 *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.

43 *Native Title Report 2009*, pp 82–83.

44 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AB(2).

45 See *Native Title Report 2009*, p 87.

46 This is discussed further in *Native Title Report 2009*, p 85.

47 For a discussion of the rights of Indigenous peoples to culture, including 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 18 July 2011).

(ii) Clarify the definition of ‘connection’

54. If passed, proposed s 223(1C) will clarify that claimants are not required to have a physical connection with the land or waters.⁴⁸ Section 223 of the Native Title Act currently 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.
55. Requiring evidence of a physical connection sets a standard that may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.⁴⁹
56. Since the Full Federal Court decision in *De Rose*,⁵⁰ the courts have rejected the need for the claimants to demonstrate an ongoing physical connection with the land.⁵¹ If passed, proposed s 223 will clarify that the required connection may be spiritual.

5.6 Commercial rights and interests

57. If passed, item 14 will amend section 223(2) of the Native Title Act to specify that native title rights and interests include ‘the right to trade and other rights and interests of a commercial nature’. Currently, the Native Title Act does not clearly specify that native title rights and interests can be of a commercial nature.
58. The Declaration affirms the right of Aboriginal and Torres Strait Islander peoples to self-determination. By virtue of that right, Aboriginal and Torres Strait Islander peoples ‘freely determine their political status and freely pursue their economic, social and cultural development’.⁵²
59. The Commission notes the recent Federal Court decision of *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*⁵³ in which Justice Finn found that in some cases native title rights may include the right to access, take and use resources for trading or commercial purposes.⁵⁴
60. The Commission welcomes this interpretation and submits that the Native Title Act should be amended to clarify that native title rights and interests can include commercial rights and interests.
61. The Commission therefore supports item 14 of the Reform Bill.

48 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 13, proposed s 223(1C).

49 See *Native Title Report 2009*, p 86.

50 *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

51 *Native Title Report 2009*, p 86.

52 *United Nations Declaration on the Rights of Indigenous Peoples*, art 3. Indigenous peoples also have the right to ‘determine and develop priorities and strategies for exercising their right to development’: art 32.

53 [2010] FCA 643 (2 July 2010).

54 [2010] FCA 643, 752–757 (2 July 2010).

Appendix 3

Recommendations from the *Native Title Report 2010*

Chapter 1: Working together in ‘a spirit of partnership and mutual respect’: My native title priorities

Recommendations

- 1.1 That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 1.2 That the Australian Government introduce legislation into Parliament to require the Attorney-General to table the annual *Native Title Report* within a set timeframe.
- 1.3 That the Australian Government introduce legislation into Parliament to require the Attorney-General to provide a formal response to the annual *Native Title Report* and the *Social Justice Report* within a set timeframe.

Chapter 2: The basis for a strengthened partnership’: Reforms related to agreement-making

Recommendations

- 2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of:
 - the impact of the current burden of proof
 - the operation of the law regarding extinguishment
 - the future act regime
 - options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).
- 2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure.
- 2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making.

2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011.

2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the *Native Title Amendment Act (No 1) 2010* (Cth)) as a measure of last resort.

2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the *Native Title Amendment Act (No 1) 2010* (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.

2.7 That the Australian Government:

- consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples
- provide a clear, evidence-based policy justification

before introducing reforms that are designed to ensure the ‘sustainability’ of native title agreements.

2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.

Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement

Recommendations

3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should:

- explain whether, in the Australian Government’s opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.

3.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, that the Australian Government commit to using this framework to guide the development of consultation processes on a case-by-case basis, in partnership with the Aboriginal and Torres Strait Islander peoples that may be affected by a proposed legislative or policy measure.

3.4 That Part 4 of the NTNER Act be amended to remove the capacity to compulsorily acquire any further five-year leases. Further, in respect of the existing five-year lease arrangements, that the Australian Government implement its commitment to transition to voluntary leases with the free, prior and informed consent of the Indigenous peoples affected; and that it ensure that existing leases are subject to the *Racial Discrimination Act 1975* (Cth).

Note: Terminology

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.

The word '**peoples**' recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.¹

There is a growing debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.² Accordingly, the terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this Report.

Sources quoted in this Report use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. International documents frequently use the term 'indigenous peoples' when referring to the Indigenous peoples of the world. To ensure consistency, these usages are preserved in quotations, extracts and in the names of documents.

1 GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At www.un.org/esa/socdev/unpfii/en/drip.html (viewed 5 November 2010).

2 See Steering Committee for the creation of a new National Representative Body, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Australian Human Rights Commission (2009), pp 15, 43. At www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 5 November 2010).

Further Information

Australian Human Rights Commission

Level 3, 175 Pitt Street
SYDNEY NSW 2000

GPO Box 5218
SYDNEY NSW 2001

Telephone: (02) 9284 9600
Complaints Infoline: 1300 656 419
General enquiries and publications: 1300 369 711
TTY: 1800 620 241
Fax: (02) 9284 9611
Website: www.humanrights.gov.au

For detailed and up to date information about the Australian Human Rights Commission visit our website at: www.humanrights.gov.au. To order more publications from the Australian Human Rights Commission download a Publication Order Form at: www.humanrights.gov.au/about/publications/ or call: (02) 9284 9600, fax: (02) 9284 9611 or email: publications@humanrights.gov.au

