Australian Human Rights Commission

Native Title Report 2012

ABORIGINAL AND TORRES STRAIT ISLANDER SOCIAL JUSTICE COMMISSIONER

Aboriginal & Torres Strait Islander Social Justice Commissioner

Native Title Report 2012

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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.

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The Australia Council for the Arts: http://www.australiacouncil.gov.au. This image of Torres Strait Islander dancers Ses Bero and George Dow was taken by Sam Oster during the 2012 Aboriginal and Torres Strait Islander Performing Arts Market networking event at Carclew Youth Arts in Adelaide, South Australia. This was the first time in 20 years that an Aboriginal and Torres Strait Islander event was held during the Australian Performing Arts Market.

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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

26 October 2012

The Hon Nicola Roxon MP

Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2012* (the Report), which I have prepared in accordance with section 209 of the *Native Title Act 199*3 (Cth) (the Native Title Act).

The Report reviews developments in native title law and policy from 1 July 2011 to 30 June 2012 (the Reporting Period).

I have 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.

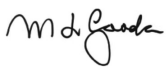
The theme of Indigenous governance in the Social Justice and Native Title Reports for 2012 reflects my priorities of giving full effect to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and enhancing the capacity of Aboriginal and Torres Strait Islander peoples to realise our social, cultural and economic development aspirations.

In Chapter 2, I examine how Indigenous governance over our lands, territories and resources needs to incorporate the principles that are set out in the Declaration; and in Chapter 3, I consider Indigenous governance within the Native Title Act, focusing on our governance following a native title determination.

The Report also provides five 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

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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.

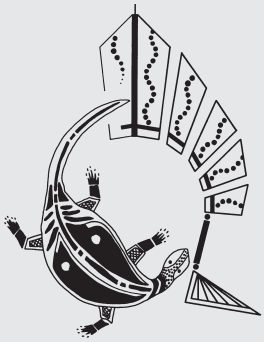
The Social Justice Commissioner:

- reports annually on the enjoyment and exercise of human rights by Aboriginal and 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 and 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.

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 is a descendent of the Gangulu people of central Queensland.

As Social Justice Commissioner, he advocates for the recognition of the rights of Aboriginal and Torres Strait Islander peoples in Australia and seeks to promote respect and understanding of these rights among the broader Australian community.

Mick has been actively involved in advocacy in Aboriginal and Torres Strait Islander affairs throughout Australia for over 25 years and has delivered strategic and sustainable results in remote, rural and urban environments.

His focus has been on the empowerment of Aboriginal and Torres Strait Islander peoples. Immediately prior to taking up the position of Social Justice Commissioner, Mick was the Chief Executive Officer of the Cooperative Research Centre for Aboriginal Health 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.

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

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Executive Summary

It is with great pleasure that I present my third *Native Title Report* as the Aboriginal and Torres Strait Islander Social Justice Commissioner. These reports are produced each year in accordance with the requirement in the *Native Title Act 1993* (Cth) (the Native Title Act) for me to report annually on the operation of the Native Title Act and the effect of the Act on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.[1]

In my first *Native Title and Social Justice Reports* in 2010, 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 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 lands, territories and resources[3] and outlined four broad themes in native title and land rights that I will focus on during my term. In this Native Title Report, I consider three of these themes, which are:

- building an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia
- 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.[4]

1 See s 209 of the *Native Title Act 1993* (Cth).

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 19 October 2012) and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner*, Social Justice Report 2010,* Australian Human Rights Commission (2011), ch 1. At http://humanrights.gov.au/social_justice/sj_report/sjreport10/chap1.html (viewed 19 October 2012).

3 Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples.*

4 *Native Title Report 2010*, note 2.

Chapter 1: Glancing back, looking forward: reviewing key developments in native title

In Chapter 1, I review key developments within the native title system that occurred throughout the Reporting Period (1 July 2011 to 30 June 2012) and consider the effect of these events on the exercise and enjoyment of Aboriginal and Torres Strait Islander peoples' human rights.

A significant anniversary during the Reporting Period was the 20 year anniversary since the High Court of Australia handed down its decision in *Mabo v Queensland* (Mabo)[5]. This decision acknowledged our lawful place as the First Peoples of Australia and created the opportunity for us to access the unique form of land tenure set out in the Native Title Act that recognises our native title rights and interests in our traditional lands, territories and resources.

The anniversary of the Mabo decision provided an opportunity to acknowledge the tremendous leadership displayed by Koiki (Eddie) Mabo, David Passi and James Rice who, on behalf of the Meriam People from the Murray Islands in the Torres Strait, challenged the Queensland Government in the High Court. It also gave us reason to pause and reflect on what native title has delivered for our peoples and our human rights over the past 20 years, and to consider future directions for native title.

Guided by Australia's human rights obligations that are set out in the Australian Human Rights Framework[6] and the Declaration, this Chapter reviews a number of legislative and policy reforms in terms of their contribution to the creation of a fair and equitable system to recognise and adjudicate our rights to native title and our lands, territories and resources.

The Reporting Period saw significant discussion around legislative reforms to the Native Title Act. Senator Rachel Siewert introduced the Native Title Amendment (Reform) Bill (No 1) 2012 (Reform Bill 2012). This is the second reform of native title proposed by the Australian Greens and I set out a comparison between the original Reform Bill (the Native Title Amendment (Reform) Bill 2011) and the Reform Bill 2012.

The Attorney-General also announced legislative amendments to the native title system. As consultation on the exposure draft legislation for these proposed amendments occurred outside of the Reporting Period, these reforms are discussed in general terms only. While these proposals indicate a more flexible and responsive approach to native title, it is critical that further changes are made to remove the significant burden on Aboriginal and Torres Strait Islander peoples to prove that our connection to our traditional lands, territories and resources continues to exist.

Chapter 1 reviews implemented reforms and their effect on the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources during the Reporting Period. These reforms include:

- the Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1)
- the Indigenous Economic Development Strategy (2011–2018)
- land reform measures introduced under the Stronger Futures legislation in the Northern Territory
- native title institutional reforms involving the roles of the Federal Court of Australia (the Federal Court) and the National Native Title Tribunal (the Tribunal)
- the Carbon Farming Initiative.

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

6 Australian Government, Attorney-General's Department, *Australian Human Rights Framework* (2010). At http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx (viewed 10 July 2012).

There have been increasing numbers of native title applications being positively determined and Indigenous Land Use Agreements being negotiated across Australia during the Reporting Period. These outcomes are encouraging, particularly as they have occurred despite the inequalities that continue to exist in the native title system between native title claimants and governments and other external stakeholders involved in native title proceedings.

At the international level, there have been developments in international human rights law relevant to our rights to our lands, territories and resources. The Australian Government needs to consider and implement the recommendations from these mechanisms, which include the:

- Expert Mechanism on the Rights of Indigenous Peoples (July 2011)
- Conference of the Parties to the United Nations Framework Convention on Climate Change (November – December 2011)
- United Nations Permanent Forum on Indigenous Issues (May 2012)
- United Nations Conference on Sustainable Development (June 2012).

Finally, my annual 'Report Card' reviews the Australian Government's progress towards implementing my recommendations in the *Native Title Report 2011*. Yet again, the Attorney-General has not responded formally to recommendations made in either the *Native Title Report 2010* or the *Native Title Report 2011*.

Chapter 2: The Declaration on the Rights of Indigenous Peoples and Indigenous governance over lands, territories and resources

Chapter 2 considers how governance provides a foundation that enables Aboriginal and Torres Strait Islander peoples to realise our social, cultural and economic development aspirations. It reviews literature on Indigenous governance and examines how effective, culturally relevant and legitimate Indigenous governance over lands, territories and resources needs to incorporate our human rights set out in the Declaration.

Indigenous governance is about how we organise ourselves and make decisions about our lives in a culturally relevant way. While governance has always been at the core of our Aboriginal and Torres Strait Islander cultures and our community life, our traditional or customary governance can be distinguished from contemporary Indigenous governance that requires us to adjust our customary ways of governing to meet the expectations and regulations of non-indigenous institutions.

Effective governance for Aboriginal and Torres Strait Islander peoples needs to start with us – with our peoples and with our communities. However, because our contemporary models of Indigenous governance are required to exist within the policies and legislation of governments, there are requirements for our organisations to meet particular conditions of government and obligations to our peoples. This is illustrated by setting out a framework of Indigenous governance that has three components:

- Community governance is grounded in our right to self-determination which addresses 'who we are', 'who we represent', 'what we speak for' and 'how we make decisions'.
- Organisational governance is reflected in our institutions, our processes and the resources we can access.
- The role of governments is to enable governance by our peoples and within our communities to ensure we achieve our economic, social and cultural development aspirations.

Each of these components of governance is interrelated and must be grounded in the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality.

Effective Indigenous governance in relation to our traditional lands, territories and resources requires:

- Community governance over lands, territories and resources to ensure that:
  - we have territorial integrity over our lands, territories and resources
  - we can participate in decisions about our lands, territories and resources
  - we can determine the development and use of our lands, territories and resources.
- Organisational governance to be adequately resourced and our institutions and decision-making processes to incorporate culturally legitimate representation, leadership and accountability. This enables us to:
  - make considered decisions about lands, territories and resources
  - undertake culturally safe negotiations with governments and external stakeholders
  - enact rules about dispute resolution, conflicts of interests, non-discrimination, equality and fairness, financial transparency and accountability, and the limitation and separation of powers.
- Governments to acknowledge the inherent imbalance of power that exists between Indigenous peoples and governments/external stakeholders in relation to our lands, territories and resources, and to prioritise:
  - building the capacity of our communities and organisations to make decisions through providing adequate resources, relevant expertise and appropriate information
  - ensuring that government policies, legislation and structures facilitate and enable our communities and organisations to make decisions about the development and use of our lands, territories and resources.

Chapter 3: Prescribed Bodies Corporate – an example of effective Indigenous governance over lands, territories and resources?

Chapter 3 examines Indigenous governance within the Native Title Act. It focuses on our governance following a native title determination and considers whether Prescribed Bodies Corporate (PBCs)[7] set up to hold and manage our determined native title rights and interests can meet the standards of effective, legitimate and culturally relevant Indigenous governance over our lands, territories and resources.

The Chapter examines the factors that enable PBCs to effectively govern their native title rights and interests in their lands, territories and resources, and outlines changes that can be made to assist PBCs to achieve the social, cultural and economic aspirations of native title holders. It also provides several case studies that demonstrate some of the innovative governance frameworks being established to enable our peoples and organisations to achieve their aspirations, and meet their cultural obligations in relation to their lands, territories and resources while addressing the statutory requirements of governments.

7 A Prescribed Body Corporate may also be referred to as a Registered Native Title Body Corporate (RNTBC), which is described in s 253 of the *Native Title Act 1993* (Cth).

We need to ensure PBCs can govern their traditional lands, territories and resources in a way that is consistent with the principles set out in the Declaration. This includes:

- our right to self-determination and participation in decision-making (see Article 32(1))
- our right to free, prior and informed consent over projects on our lands, territories and resources (see Article 32(2))
- our right to maintain and protect our cultural heritage on and traditional knowledge about our lands, territories and resources (see Article 31(1))
- our right to conserve and protect the environment of our lands, territories and resources without discrimination (see Article 29(1)).

Likewise, the Declaration provides guidance on the obligations of governments to support our governance over our lands, territories and resources which include the requirement to:

- recognise our right to self-determination (see Articles 3 and 4)
- recognise and protect our lands, territories and resources (see Article 26(3))
- in conjunction with us, establish a process to recognise and adjudicate our rights pertaining to our traditionally owned and occupied lands, territories and resources (see Article 27)
- seek our free, prior and informed consent for projects on our lands, territories and resources (see Article 32(2))
- provide effective redress to mitigate adverse impacts on our lands, territories and resources (see Article 32(3)).

While there is the potential for PBCs to realise some of these principles, the Government must strengthen the legislative framework within which PBCs are established and operate by ensuring that all legislation is consistent with the Declaration.

Conclusion

As Aboriginal and Torres Strait Islander peoples, we must take control of our governance with the support of our organisations. But governments must also ensure that legislative and policy frameworks enable and empower us to realise our economic, social and cultural development aspirations.

The Declaration provides a guide to Aboriginal and Torres Strait Islander peoples and to governments about what we need to do to achieve these outcomes.

While the recognition of our native title provides a unique opportunity for many Aboriginal and Torres Strait Islander peoples to overcome disadvantage, the native title system must operate in a way that empowers us to achieve this outcome. This means that it must ensure our self-determination and enable our effective participation in decision-making and free, prior and informed consent.

Recommendations

1. That the Australian Government establish and resource a working group which includes members from Native Title Representative Bodies, Native Title Service Providers, Aboriginal and Torres Strait Islander peoples, Australian and State and Territory governments and respondent stakeholders including mining and pastoralists to be tasked with developing proposals to amend the Native Title Act.
2. 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.
3. That the Australian Government reviews the *Native Title Act 1993* (Cth), *the Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.
4. That the Australian Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.
5. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources.

Chapter 1: Glancing back, looking forward: reviewing key developments in native title

1.1 Introduction: the legacy of Koiki (Eddie) Mabo

In this Chapter, I review key developments in native title that occurred during the Reporting Period (1 July 2011 to 30 June 2012) and consider the effect of these events on the exercise and enjoyment of our human rights as Aboriginal and Torres Strait Islander peoples.

Towards the end of this Reporting Period we marked a significant anniversary; on 3 June 2012, we acknowledged the passing of 20 years since the High Court of Australia handed down its decision in *Mabo v Queensland* (Mabo)[1] rejecting the common law myth of *terra nullius.* It was the legacy of this decision that created the opportunity for us to access the unique form of land tenure set out in the *Native Title Act 1993* (Cth) (the Native Title Act) that recognises our native title rights and interests in our traditional lands, territories and resources.[2]

The anniversary of the Mabo decision provided an opportunity to acknowledge the tremendous leadership displayed by Koiki (Eddie) Mabo, David Passi and James Rice who, on behalf of the Meriam People from the Murray Islands in the Torres Strait, challenged the Queensland Government in the High Court. It also gave us reason to pause and reflect on what native title has achieved over the past 20 years, and to consider future directions for native title.

There is no doubt that the Mabo decision was a defining moment for Aboriginal and Torres Strait Islander peoples as we celebrated the acknowledgement of our territorial sovereignty and our lawful place as the First Peoples of Australia.

But the decision was also a moment of division within the Australian community. It is no secret that some state governments and the mining industry were particularly strident in their opposition to the Mabo decision, and fuelled headlines that peddled ill-founded fears that backyards would soon be swallowed up by land claims.

Within this context, it is critical to understand that the Mabo decision represented so much more than an argument about land rights for Aboriginal and Torres Strait Islander peoples. As Professor Mick Dodson, the inaugural Social Justice Commissioner observed in 1994, the 'recognition of native title [i]s more than a recognition of Indigenous property interests, it is also about the recognition of our human rights'.[3]

So 20 years after the Mabo decision, we owe it to ourselves to ask what the promise of native title has delivered for our peoples and our human rights.

The Native Title Act, as it was drafted in 1993, tried to balance the realities of the past with a fair way to deal with land in the future based on contemporary notions of justice. However, one of the fundamental flaws of the native title system was – and continues to be – the power of the Crown to extinguish traditional ownership of land.

The Australian Government had the chance to redress this flaw in the Native Title Act following the High Court's 1996 decision in *Wik v Queensland*,[4] which laid the ground rules for co-existence and reconciliation of shared interests in land. However, the Government instead amended the Native Title Act to significantly weaken our position and to ensure that the Native Title Act could override one of Australia's most important laws designed to protect our human rights – the *Racial Discrimination Act 1975* (Cth).

1 *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
2 'Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples.*
3 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission (1995), p 12. At http://www.austlii.edu.au/au/other/IndigLRes/1995/3/2.html (viewed 7 May 2012).
4 *Wik Peoples v Queensland* (1996) 187 CLR 1.

The process of recognising our native title has been frustrating. While on the one hand, native title brings us hope and expectation for the return of our country, on the other hand it is a process fraught with difficulties. It opens up wounds around connections to country, family histories and community relationships inflicted as a result of colonisation. In last year's *Native Title Report*,[5] I discussed how lateral violence fragments our communities as we navigate the native title system. Sadly, this diminishes the unique opportunity that native title provides our peoples and communities to achieve our economic, social and cultural aspirations.

Despite this, I remain hopeful that the original promise of the Mabo decision can still be realised. The Reporting Period saw Greens Senator Rachel Siewert introduce the Native Title Reform (Amendment) Bill (No 1) 2012. The Australian Government also proposed amendments to the Native Title Act that, although minor, make me optimistic that change can happen.

But real change requires removing the significant burden on Aboriginal and Torres Strait Islander peoples to prove that our connection to our traditional lands, territories and resources continues to exist. I strongly urge the Government to amend the Native Title Act to reverse this burden and guarantee the presumption that our connection to our traditional lands continues to exist unless proven otherwise.

As I sit here in 2012, I find myself wondering what Koiki Mabo would think about our experiences of native title over the past 20 years. I would like to think that he still holds out hope that the promise of the Mabo decision will be fulfilled.

As Koiki did all those years ago, I will use the platform available to me to challenge the Government and to consider how we can better recognise the human rights of our peoples.

5 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2011,* Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport11/chapter2.html (viewed 21 September 2012).

1.2 Native title in a human rights framework

Human rights standards are set out in international treaties and conventions ratified by the Australian Government and reaffirmed in the Australian Human Rights Framework.[6] The standards established in international law are 'relevant to native title in that they protect property against arbitrary and discriminatory interference'.[7]

In 2009, the Australian Government gave formal support to the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and it became part of the body of international instruments that guide our assessment of native title within a human rights framework. I discuss the legal status of the Declaration in Chapter 2.

The Declaration articulates Indigenous peoples' rights to lands, territories and resources. For example, the Preamble to the Declaration affirms the need to recognise, respect and promote the 'inherent rights of indigenous peoples... [deriving] from their political, economic and social structures, cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources'.[8]

Article 27 of the Declaration requires governments to:

> …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.

While the Native Title Act provides a process to recognise our native title rights and interests in our traditional lands, territories and resources, a gap exists between the rights affirmed in the Declaration and the realisation of these rights by Aboriginal and Torres Strait Islander peoples.

I note that the Australian Government has not ratified International Labour Organisation *Indigenous and Tribal Peoples Convention 1989 (No. 169*) (ILO 169). This is the only treaty which specifically addresses Indigenous peoples' rights to control their own economic, social and cultural development.[9] ILO 169 provides that governments establish procedures to consult with Indigenous peoples before undertaking or permitting programmes involving the exploration or exploitation of resources relating to their lands.[10]

Given the relevance of this convention to Indigenous peoples rights to lands, territories and resources in the Declaration, I urge the Government to continue considering its position regarding ILO 169.

I discuss human rights standards as they relate to Indigenous governance and native title in Chapters 2 and 3.

6 Australian Government, Attorney-General's Department, *Australian Human Rights Framework* (2010). At http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx (viewed 21 September 2012).
7 *Native Title Report January – June 1994,* note 3, p 12.
8 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), p 2. At www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf (viewed 4 October 2012).
9 G Triggs, 'Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1988 (Cth)' (1999) 23(2) *Melbourne University Law Review 372.* At http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/1999/16.html?stem=0&synonyms=0&query=^%20indigenous%20peoples%20international%20law (viewed 5 October 2012).
10 Triggs, above.

1.3 Proposed reforms over lands, territories and resources

(a) Bold efforts to reform the native title system

This year has seen significant discussion around legislative amendment to the Native Title Act. On 29 February 2012, Senator Rachel Siewert introduced the Native Title Amendment (Reform) Bill (No 1) 2012 (Reform Bill 2012). This is the second reform of native title proposed by the Australian Greens.[11] The first, the Native Title Amendment (Reform) Bill 2011 (Reform Bill 2011) was introduced by Senator Siewert on 21 March 2011. I reported on the Commission's submission to the Senate Legal and Constitutional Affairs Legislation Committee's Inquiry into the Reform Bill 2011 in last year's Native Title Report.[12]

On 9 November 2011, the Senate Committee tabled its report into the Reform Bill 2011 and recommended that the Senate should not pass the Bill.[13] As a result, Senator Siewert presented the revised version of the Greens' native title reform proposals in the Reform Bill 2012. In this section I compare the Reform Bill 2011 and the Reform Bill 2012.

(i) Native Title Amendment (Reform) Bill (No 1) 2012

The objectives of the Reform Bill 2012 are to address:

- 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 in the Native Title Act.[14]

The Reform Bill 2012 builds on suggestions provided through the Senate Committee Inquiry process on the Reform Bill 2011. Senator Siewert, in her second reading speech to the Senate, observed:

> In the original Bill we sought to address some of the 'low-hanging fruit' of native title reform – by targeting some of the areas of native title law where relatively simple amendments could have far-reaching implications for addressing some of the current barriers to effective native title outcomes. In this Bill we have chosen the most important and most urgent of those areas and drafted amendments which we hope will gain broad support.[15]

The key differences between the proposals in the Reform Bill 2011 and the Reform Bill 2012 are highlighted in Table 1.1 below and relate to:

- the Declaration
- Aboriginal and Torres Strait Islander heritage legislation
- extinguishment of native title by compulsory acquisition
- the requirement to negotiate in good faith
- profit sharing conditions

11 Commonwealth, Parliamentary Debates, Senate, 29 February 2012, p 1238 (Senator Rachel Siewert), Native Title Amendment (Reform) Bill (No 1) 2012, second reading speech.
12 *Native Title Report 2011,* note 5, pp 20–21.
13 Senate Legal and Constitutional Affairs Committee Report on Native Title Amendment (Reform) Bill 2011, p 39. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/native_title_three/report/index.htm (viewed 4 October 2012).
14 Explanatory Memorandum, Native Title Amendment (Reform) Bill (No 1) 2012 (Cth), p 2.
15 Commonwealth, Parliamentary Debates, Senate, 29 February 2012, p 1238 (Senator Rachel Siewert), Native Title Amendment (Reform) Bill (No 1) 2012 (Cth), second reading speech.

- disregarding historical extinguishment
- continuing connection.

Table 1.1:
Key Differences – the Reform Bill 2011 and the Reform Bill 2012

Area of Proposed Amendment	Reform Bill 2011	Reform Bill 2012	Comments
The Declaration	Proposed s 3A of the Reform Bill 2011 would have inserted three additional objects into the Native Title Act: • that governments in Australia take all necessary steps to implement specific principles set out in the Declaration [16] • that the provisions of the Native Title Act are to be interpreted and applied consistently with the Declaration [17] • that the specific principles set out in the Declaration must be applied by each person exercising a power or performing a function under the Native Title Act.[18]	The Reform Bill 2012 does not contain the object clauses from the Reform Bill 2011 relating to the Declaration.	I am encouraged that Senator Siewert has confirmed that the Greens remain 'committed to incorporating aspects of the United Nations Declaration on the Rights of Indigenous Peoples into the Native Title Act' and are currently exploring the best way to do this.[19]

16 Native Title Amendment (Reform) Bill 2011 (Cth), schedule 1, item 1, proposed s 3A(1).
17 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(2).
18 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(3).
19 Commonwealth, Parliamentary Debates, Senate, 29 February 2012, p 1238 (Senator Rachel Siewert), Native Title Amendment (Reform) Bill (No 1) 2012, second reading speech.

Area of Proposed Amendment	Reform Bill 2011	Reform Bill 2012	Comments
Aboriginal and Torres Strait Islander heritage legislation	The Reform Bill 2011 sought to amend s 24MB(1)(c) to ensure that, before a future act is permitted on native title land, the heritage values of any areas of particular cultural significance are protected.	The Reform Bill 2012 removed this amendment which proposed to strengthen the role of Aboriginal and Torres Strait Islander heritage legislation in the native title process.	I encourage proposals that consider the effectiveness of the cultural heritage legislation across state and territory jurisdictions.[20]
Extinguishment by compulsory acquisition	Item 3 proposed to revert s 24MD(2)(c) of the Native Title Act to its original wording.[21] As originally enacted, this section provided that compulsory acquisition itself does not extinguish native title, it was only an act done in giving effect to the purpose of the acquisition that led to extinguishment.[22]	The Reform Bill 2012 does not contain the proposal to amend s 24MD(2)(c).	There appears to be no policy justification for the current position and I encourage the amendment of s 24MD(2)(c) to revert to the wording as originally enacted.[23]

20 National Native Title Council, *Submission to the Senate Inquiry: Native Title Amendment (Reform) Bill 2011* (2011), p 2. At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/native_title_three/submissions.htm (viewed 3 October 2012).

21 Formerly s 23(3) of the *Native Title Act 1993* (Cth).

22 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 106. At http://humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 3 October 2012).

23 *Native Title Report 2009*, note 22, p 106.

Area of Proposed Amendment	Reform Bill 2011	Reform Bill 2012	Comments
The requirement to negotiate in good faith	The Reform Bill 2011 provided explicit criteria for good faith outlined in the proposed s 31(1A).	The Reform Bill 2012 also provides that: • it is not necessary that a negotiation party engage in misleading, deceptive or unsatisfactory conduct to be found to have failed to negotiate in good faith [24] • in determining whether or not a party has negotiated in good faith using all reasonable efforts, the arbitral body must have regard to the financial resources of the negotiation party and, if the negotiation party is a native title party, any demands imposed on the native title party in relation to cultural and religious practices.[25]	I welcome the intent of amendments on the requirement to negotiate in good faith.
Profit sharing conditions	The Reform Bill 2011 proposed an amendment to allow an arbitral body, such as the National Native Title Tribunal, to determine that royalties or profit-sharing arrangements can be made.[26]	This proposal has been removed from the Reform Bill 2012.	I encourage amendments allowing native title holders to be appropriately compensated through the negotiation of agreements that impact native title rights and interests.[27]

24 Native Title Amendment (Reform) Bill (No 1) 2012 (Cth), sch 1, item 4, proposed s 31(1B).
25 Native Title Amendment (Reform) Bill (No 1) 2012 (Cth), sch 1, item 4, proposed s 31(1C).
26 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 10, proposed s 38(2).
27 National Native Title Council, note 20, p 4.

Area of Proposed Amendment	Reform Bill 2011	Reform Bill 2012	Comments
Disregarding historical extinguishment	The Reform Bill 2011 proposed a new s 47C to allow the parties to agree to disregard historical extinguishment.	The Reform Bill 2012 retains this proposed section. It also includes an amendment to s 47C which allows for historical extinguishment to be disregarded where a native title application is made over an area set aside by or under a law of the commonwealth, a state or a territory for the purpose of preserving the natural environment of the area such as a national park or reserve.[28]	I support expanding the range of circumstances in which extinguishment can be disregarded.[29] However, I note that the impact of provisions will be limited to situations where government parties are prepared to be flexible and approach agreement-making in good faith.
Continuing Connection	Proposed new s 61AA and s 61AB clarified that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity in relation to a native title claim.[30]	The Reform Bill 2012 changes the language of proposed s 61AB. In the 2011 Bill it provided that the presumption of connection could be set aside only with evidence of substantial interruption. In the 2012 Bill it provides that a court may determine that native title continues despite a substantial interruption if the primary reason for the interruption was the action of another party.[31]	I support shifting the burden of proof from the native title claimants to the respondents to the claim to prove disruption.[32]

28 Native Title Amendment (Reform) Bill (No 1) 2012, sch 1, item 13, proposed s 47C.
29 For further discussion, see *Native Title Report 2010*, note 54, pp 39–41.
30 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AA.
31 Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AB.
32 *Native Title Report 2009*, note 22, pp 82-83.

I commend Senator Siewert for her leadership in relation to native title reform. The Reform Bill 2012 is currently before the Senate and I understand that debate will commence during the next sitting of the Senate.[33] I note that some of these reforms have been adopted by the Government in their recent announcement of legislative reforms to the native title system, which I consider in the following section.

I recommend the Australian Government establish and resource a working group which includes members from Native Title Representative Bodies, Native Title Service Providers, Aboriginal and Torres Strait Islander peoples, Australian and state and territory governments and respondent stakeholders including mining and pastoralists to be tasked with developing proposals to amend the Native Title Act. [Recommendation 1]

(b) Revisiting native title reforms

At the National Native Title Conference on 6 June 2012, the Attorney-General announced the following legislative reforms to the native title system:

- simplifying the process for amendments to Indigenous Land Use Agreements (ILUAs)
- creating requirements for good faith in negotiations
- allowing parties to form agreements about historical extinguishment of native title in parks and reserves
- clarifying that income tax and capital gains tax will not apply to payments from a native title agreement.[34]

I welcome the native title reforms that indicate a more flexible and responsive approach to the native title system. The reforms have the potential to improve outcomes for Aboriginal and Torres Strait Islander peoples to have our native title rights and interests in our lands, territories and resources recognised.

I note that these reforms have been released as exposure draft legislation outside the Reporting Period and consultation on the exposure draft legislation is occurring as this Report is being finalised. Therefore, I will only discuss these reforms in general terms.

(i) Flexibility and scope of ILUAs

The legislative reforms aim to streamline identified processes, ensure greater flexibility and provide greater certainty for all parties. The proposed approaches will endeavor to:

- clarify how amendments to ILUAs can be made
- ensure ILUAs can finally and completely resolve native title issues
- broaden the scope of body corporate ILUAs
- clarify ILUA authorisation requirements (to deal with the effects of *QGC v Bygrave* [2011] FCA 1457)

33 R Siewert Senator, 'Greens continue push for Native Title reform' (Media Release 2 June 2012). At http://rachel-siewert.greensmps.org.au/content/media-releases/greens-continue-push-native-title-reform (viewed 30 August 2012).

34 The Hon N Roxon MP, Attorney-General and the Hon J Macklin MP, Minister for Families, Communities and Indigenous Affairs, 'The future of Native Title' (Media Release, 6 June 2012). At: http://www.attorneygeneral.gov.au/Media-releases/Pages/2012/Second%20Quarter/6-June-2012---The-future-of-Native-Title.aspx (viewed 22 June 2012).

- clarify registration requirements (to deal with the effects of *QGC v Bygrave (No 2)* [2010] FCA 1019).[35]

I welcome processes that aim to increase the flexibility and improve the efficiency of registering ILUAs.

(ii) Good faith negotiations

I am pleased the Government has announced a commitment to outline the requirements for good faith negotiations in the Native Title Act.[36] The decision in *FMG Pilbara Pty Ltd v Cox*[37] – which found that the Native Title Act does not require parties to reach a certain stage in negotiations before a party can apply for a determination – demonstrates that the Native Title Act does not provide sufficient legal protection for native title parties.[38]

Amending the Native Title Act to include explicit criteria for good faith will strengthen the Act and prevent parties from waiting 'until an arbitrated outcome is available to them'.[39] The legislative amendments currently under consideration regarding good faith include:

- requiring negotiating parties to use all reasonable efforts to reach agreement (rather than requiring negotiating parties to negotiate with a view to reaching agreement)
- specifying requirements for good faith negotiations based on s 228 of the *Fair Work Act 2009* (Cth)
- extending the minimum negotiating period from six months to eight months
- giving the arbitral body the ability to intervene if negotiations break down, including the ability to:
    - issue negotiation orders specifying actions to ensure requirements for good faith are met[40]
    - make a material breach declaration if a negotiation order is breached with appropriate consequences for the party responsible[41]
    - make non-binding recommendations about the process which the negotiation parties should follow
- ensuring that the expedited procedure can only be utilised where the grantee party requests that it apply.[42]

As I have previously recommended that the criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth) and suggested legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith',[43] I welcome these amendments as a key legal safeguard for native title parties under the future act regime.

35 Attorney-General's Department, Draft Consultation Paper, Summary of proposed legislative reforms, July 2012, pp 4-5.
36 The Hon N Roxon MP, Attorney-General, *Echoes of Mabo: AIATSIS Native Title conference* (Speech delivered at National Native Title Conference, Townsville, 6 June 2012). At: http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx (viewed 22 June 2012).
37 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141. This decision was profiled in *Native Title Report 2009*, note 22, pp 31–35.
38 *Native Title Report 2009*, note 22, p 34.
39 Roxon, note 36.
40 See s 229 of the *Fair Work Act 2009* (Cth).
41 See s 235 of the *Fair Work Act 2009* (Cth).
42 Attorney-General's Department, note 35, p 2.
43 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Committee Native Title Amendment (Reform) Bill 2011*(12 August 2011). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20110812_ntab.html (5 October 2011).

(iii) Disregarding historical extinguishment

The Native Title Act currently includes provisions that require the historical extinguishment of native title to be disregarded in certain circumstances.

The proposal to enable parties to disregard historical extinguishment in parks and reserves includes the following elements:

- clarification that s 47C applies only if ss 47, 47A and 47B do not apply
- a new provision which allows parties to agree to disregard all or some of the extinguishment, and also considers allowing parties to agree upon which native title rights and interests revive and which do not
- an amendment to ensure one objective to preserve the natural environment although vesting or preservation of the land may have multiple purposes
- a requirement that a copy of the written agreement accompany applications, including amended claimant applications and revised determination applications.[44]

I note that the Attorney-General's Department (AGD) initially considered a broader proposal to allow for any historical extinguishment of native title. I regret that the Government did not take this opportunity to apply the broader context for disregarding historical extinguishment to the exposure draft legislation.

(iv) Tax implications for native title payments

The proposed changes to the tax legislation clarify that native title payments and other benefits are not subject to income tax including capital gains tax.[45] The Assistant Treasurer released exposure draft legislation and associated explanatory material on 27 July 2012. Subject to the passage of the legislation, these changes are expected to apply retrospectively to native title benefits received on or after 1 July 2008.[46]

While these changes are outside of the Reporting Period, I will briefly comment on the content and implications of the changes.

I support the introduction of a specific income tax exemption for all payments flowing from native title agreements. This is because native title payments, monetary and non-monetary, are a form of compensation and should not be subject to taxation.

However, it is my view that the tax-exempt status of native title payments should be supported by a specific entity or vehicle for accumulation or distribution of funds which enhances the governance measures associated with the entity and provides capacity building support.[47] I am aware the National Native Title Council (NNTC) and the Minerals Council of Australia (MCA) have held discussions with the Government regarding the implementation of an Indigenous Community Development Corporation (ICDC) to assist

44 Attorney-General's Department, note 35, p 3.

45 Attorney-General's Department, *Native title reform,* http://www.ag.gov.au/Indigenouslawandnativetitle/NativeTitle/Pages/Nativetitlereform.aspx#act (viewed 22 June 2012).

46 The Hon D Bradbury MP, Assistant Treasurer and Minister for Deregulation 'Release of Exposure Draft Materials to Provide Clarity on the Tax Treatment of Native Title Benefits' (Media Release 27 July 2012). At http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/079.htm&pageID=003&min=djba&Year=&DocType (27 September 2012).

47 Minerals Council of Australia & National Native Title Council, *Submission to Native Title, Indigenous Economic Development and Tax* and *Leading Practice Agreements: maximising outcome from native title benefits* (2010), p 17. At http://www.treasury.gov.au/ConsultationsandReviews/Submissions/2010/Native-Title-Indigenous-Economic-Development-and-Tax/Submissions (viewed 3 October 2012).

Indigenous enterprise development and broader regional economic outcomes.[48] I encourage the Government to continue discussions with the NNTC and the MCA to explore options such as the ICDC.

While these proposed native title reforms are a step in the right direction, further work is needed to address inequities for Aboriginal and Torres Strait Islander peoples in the native title system, especially the removal of the current onerous burden of proof provisions. I am encouraged that the Attorney-General has emphasised that the Government will be listening and meeting with Aboriginal and Torres Strait Islander peoples about these proposed native title reforms.[49] I look forward to working with the AGD in this reform process and will closely monitor the progress of these reforms.

(c) Native Title Respondent Funding Scheme

The Native Title Respondent Funding Scheme (NTRFS) under s 213A of the Native Title Act is designed to assist parties whose interests may be affected by recognition of native title. Native title claimants are not included in this scheme.

The Australian Government announced in the 2011-2012 Budget that the existing 26 commonwealth financial assistance schemes administered by the AGD will be consolidated into one scheme to provide financial assistance for disbursements.[50] Existing guidelines for the NTRFS will be revised and a new interest test for respondents will be developed.

The revised interest test introduces two tiers of eligibility: those eligible for disbursements only and those eligible for legal representation costs and disbursements.[51] Funding for legal representation costs will be limited to exceptional circumstances.

Given the length of time the native title system has been operating it is an appropriate time to reassess the way that respondent funding is provided in native title matters.[52] Currently the respondent funding guidelines have not been finalised and changes will commence on 1 January 2013. I will continue to monitor the impact of these changes to the NTRFS on the native title process.

(d) Native Title (Consultation and Reporting) Determination 2011

In December 2011, the Attorney-General released the draft *Native Title (Consultation and Reporting) Determination 2011* (draft Determination), which sets out the consultation and reporting requirements for a valid future act under s 24JAA of the Native Title Act. The new future act process under s 24JAA of the Native Title Act was created by the *Native Title Amendment Act (No 1) 2010* (Cth) (Amendment Act) and 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'.[53]

48 Minerals Council of Australia & National Native Title Council, above, p 14.
49 The Hon N Roxon MP, Attorney-General, *Echoes of Mabo: AIATSIS Native Title conference* (Speech delivered at National Native Title Conference, Townsville, 6 June 2012). At: http://www.attorneygeneral.gov.au/Speeches/Pages/2012/Second%20Quarter/6-June-2012---Echoes-of-Mabo---AIATSIS-Native-Title-Conference.aspx (viewed 22 June 2012).
50 Attorney-General's Department, Fact Sheet-Changes to Native Title Respondent Funding, p 1. At http://www.ag.gov.au/Legalaid/Pages/Nativetitlerespondentfunding(from1January2013).aspx (viewed 14 September 2012).
51 Attorney-General's Department, above, p 2.
52 Attorney-General's Department, above, p 1.
53 Explanatory Memorandum, Native Title Amendment Bill (No 1) 2010, p 2.

I reported on the Amendment Act in the *Native Title Report 2010*[54] and *Native Title Report 2011*[55] and outlined my view that the ILUA is an appropriate mechanism to seek agreement for the construction of public housing and infrastructure on Indigenous-held land.[56] However, I observed the new future act process may encourage governments to circumvent agreement-making processes, which would diminish the ability of Aboriginal and Torres Strait Islander peoples to exercise their rights as set out in the Declaration under Articles 3, 18 and 32(1).

I welcome the intent of the Determination 'to ensure genuine consultation between governments and native title parties' regarding a future act process under s 24JAA of the Native Title Act.[57] However, I am not satisfied that the requirements set out in the Determination conform to the key features of effective and meaningful consultation. The enabling provision, s 24JAA of the Native Title Act, restricts the consultation period to a maximum of four months from the notification day.[58]

In accordance with Articles 18 and 32(2) in the Declaration, Aboriginal and Torres Strait Islander peoples 'have the right to participate in decision-making in matters which would affect their rights'. I also encourage the Government to refer to the minimum standards for consultation that I outlined in the *Native Title Report 2010*.[59] The Attorney-General has informed me that the Determination will be implemented in late 2012.[60]

(e) Commonwealth Connection Policy Research Project

The Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) is working with the AGD to research the 'connection' test in native title consent determinations and alternative settlement processes.

The purpose of the project is to inform a consistent commonwealth policy position on native title connection.[61] Currently the burden is placed upon native title claimants and under-resourced Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) to produce connection materials. Introducing presumptions in favor of native title claimants would help alter the expectations of states and territories on connection materials that native title claimants must compile.[62]

State and territory governments independently determine the minimum requirements for connection evidence before negotiations between the claimant and the state can begin. I urge the commonwealth to introduce consistent requirements for connection materials across states and territories.

AIATSIS provided the AGD with the draft report in 2011. I understand the AGD and AIATSIS are currently working together to finalise the report.

54 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 44–52, 72–79. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 13 February 2012).
55 *Native Title Report 2011*, note 5, pp 36–38.
56 *Native Title Report 2011*, note 5, p 38.
57 Explanatory Statement, *Native Title (Consultation and Reporting) Determination 2011*, p 2 (Consultation Draft).
58 See s 24JAA(19) in the *Native Title Act 1993* (Cth).
59 *Native Title Report 2010*, note 54, p 60.
60 The Hon N Roxon MP, Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission (2012), p 4.
61 Roxon, note 60, p 4.
62 *Native Title Report 2009*, note 22, p 92.

(f) Land reforms in Western Australia

There are currently a number of land and heritage reform processes occurring in Western Australia, including the:

- *Guide to the Government Indigenous Land Use Agreement and Government Standard Heritage Agreement*
- proposal to amend the *Aboriginal Heritage Act 1972*
- 'Rangelands Reform Program' and proposed changes to the *Land Administration Act 1997*.

I briefly outline these reform processes below and then outline my concerns in relation to these reforms.

(i) Guide to the Government Indigenous Land Use Agreement and Government Standard Heritage Agreement

In January 2012, the Western Australian Government released the *Guide to the Government Indigenous Land Use Agreement and Government Standard Heritage Agreement.* The State has developed an ILUA to clarify how it will do business with native title holders following a determination of native title.[63]

A particular concern regarding this agreement is that the State has taken the opportunity to develop an ILUA that dilutes our rights in the name of broader settlements. However it doesn't appear to offer any substantial trade-off for lost rights or funding to support the negotiation of the loss of rights.

(ii) Aboriginal Heritage Act 1972

In April 2012, the Minister for Indigenous Affairs in Western Australia released a 'Review of the *Aboriginal Heritage Act 1972* Discussion Paper' (Discussion Paper) outlining 'Seven proposals to regulate and amend the *Aboriginal Heritage Act 1972* for improved clarity, compliance, effectiveness, efficiency and certainty'. A number of concerns around the process of the proposed changes have been raised with me including:

- consultation on the Discussion Paper did not directly include traditional owners, native title holders and native title claimants[64]
- the five week time frame to complete submissions was not sufficient for traditional owners to provide feedback to their representatives[65]
- information provided within the Department of Indigenous Affairs (DIA) Discussion Paper was inconsistent with advice presented by representatives of the DIA[66]
- the review process was not undertaken in a transparent manner.[67]

63 Government of Western Australia, Department of Premier and Cabinet, *Guide to the Government Indigenous Land Use Agreement and Standard Heritage Agreements,* (2012), p 2. At http://www.dpc.wa.gov.au/lantu/MediaPublications/Pages/Publications.aspx (viewed 12 October 2012).

64 For more information, see Central Desert Native Title Services, *Submission on the Proposals to Amend the Aboriginal Heritage Act (1972) WA,* (2012), p 1; Yamatji Marlpa Aboriginal Corporation, *YMAC Submission to the Review of the Aboriginal Heritage Act,* (2012), p 3.

65 Central Desert Native Title Services, *Submission on the Proposals to Amend the Aboriginal Heritage Act (1972) WA*, (2012), p 2.

66 Central Desert Native Title Services, above, pp 2–3.

67 Yamatji Marlpa Aboriginal Corporation, *YMAC Submission to the Review of the Aboriginal Heritage Act*, (2012), p 5.

(iii) The 'Rangelands Reform Program' and proposed changes to the Land Administration Act 1997

The Rangelands Reform Program announced in December 2010, is a three-year program developed to address issues of sustainability and diversification.

The Rangelands Reform Program aims 'to find ways to give pastoralists more flexibility and freedom in how they could earn a living, encouraging investment in the industry, and enhancing earning capacity and business expansion'.[68]

As part of the Rangelands Reform Program, the Western Australian Government is proposing changes to the *Land Administration Act 1997* (LAA) to:

- create a new 'rangelands lease'
- create a pastoral lease for a perpetual term
- provide a right for a lessee to have a pastoral lease renewed for the same term
- create a new separate permit provision for some of the broader 'primary production activities' specified in the Native Title Act
- facilitate conversion of variable term leases post-2015 to a standard 50-year pastoral lease
- allow the transfer of diversification permits to an incoming lessee.

I am concerned at the lack of appropriate consideration given to the consent of native title holders in the Rangelands Reform Program process. There is also a need for further policy development regarding 'primary production' future acts and appropriate recognition of the rights of Aboriginal people and compensation for native title holders.

(iv) Concerns about Land Reforms in Western Australia

A number of NTRBs and NTSPs have raised concerns with me about the lack of consultation and good faith by the Western Australian Government in relation to these proposed land reforms. In particular, these concerns relate to a view that the Government does not consider native title holders to be significant stakeholders in land and treats native title as an obstacle to these land reforms.

I am particularly concerned by the limited consultation processes undertaken by the State Government given the potential impact of these reforms on native title in Western Australia. I encourage the Western Australian Government to refer to the minimum standards for consultation set out in the *Native Title Report 2010* throughout its reform processes.[69]

I further note that Articles 19 and 32(2) in the Declaration outline the obligation for governments to consult and cooperate in good faith with Aboriginal and Torres Strait Islander peoples to obtain their free, prior and informed consent before adopting any legislative or administrative measures affecting their lands, territories or resources. Given the level of concern expressed by NTRBs and NTSPs, I will continue to closely monitor the progress of these reforms.

68 Government of Western Australia, note 63, p 3.
69 *Native Title Report 2010*, note 54, p 60.

1.4 Implemented reforms

(a) Native Title (Prescribed Bodies Corporate) Amendment Regulations

The Native Title (Prescribed Bodies Corporate) Amendment Regulations 2011 (No. 1) (Amendment Regulations) were registered on 14 December 2011.[70] The Amendment Regulations amend the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations).

A Prescribed Body Corporate (PBC) or a Registered Native Title Body Corporate (RNTBC) is an entity established to hold native title rights and interests on trust or as an agent for common law native title holders.[71] I discuss the governance of PBCs in Chapter 3.

(ii) The Amendment Regulations

The Amendment Regulations amend the existing regulations to improve the flexibility of the PBC governance regime by:

- enabling an existing PBC to be determined as a PBC for subsequent determinations of native title
- with the consent of the native title holders, removing the requirement that all members of a PBC must also be the native title holders
- clarifying that standing authorisations in relation to particular activities of a PBC need only be issued once
- subject to certain exceptions including native title holder consent, allowing PBCs to substitute their own consultation requirements in relation to native title decisions
- providing for the transfer of PBC functions in circumstances where there has been failure to nominate a PBC, where a liquidator is appointed, or where a PBC wishes this to occur
- enabling PBCs to charge a fee for costs incurred in providing certain services and setting out a procedure for review by the Registrar of Indigenous Corporations.[72]

Improvements to the flexibility of governance arrangements

The Amendment Regulations improve the flexibility of the PBCs governance regime by enabling a PBC to represent more than one native title group and to include people from outside the native title group as members. These changes allow native title groups to manage native title across regions and to avoid unnecessary duplication in corporate structures. Importantly, the consent of the affected native title group is required if the PBC is to include a broader membership base.[73]

70 For further information see Department of Families, Housing, Community Services and Indigenous Affairs, *Prescribed Bodies Corporate Amendment Regulations,* http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/land-native-title/prescribed-bodies-corporate-amendment-regulations (viewed 28 June 2012). The Government also registered the Native Title (Prescribed Bodies Corporate) Amendment Regulation 2012 (No. 1) on 14 March 2012, which amends the definition of native title decision in subregulation 3(1) of the PBC Regulations by omitting the word 'do' after the words 'agree to' in paragraph (b) of the definition. This correction recognises the fact that acts of governments may affect native title rights and interests, as well as acts done by the common law holders.

71 A Prescribed Body Corporate registered on the National Native Title Register may also be referred to as a Registered Native Title Body Corporate (RNTBC), as described in s 253 of the *Native Title Act 1993* (Cth).

72 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Newsletter, No. 6/2011 (November/December 2011), p 19. At http://www.aiatsis.gov.au/ntru/newsletter.html (viewed 5 October 2012).

73 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Newsletter, No. 1/2012 (January/February 2012), p 3. At http://www.aiatsis.gov.au/ntru/newsletter.html (viewed 5 October 2012).

While changes to the membership of a PBC must have the consent of the native title holders, governments have a responsibility to ensure members can make decisions on a fully informed basis. Appropriate training, education, and sufficient funding for legal advice should be made available to native title holders and PBCs. In this regard, I note that Article 39 of the Declaration affirms that Indigenous peoples have the right to financial and technical assistance from governments for the enjoyment of their rights.

Alternative consent and consultation processes

I support the ability of native title holders to determine their own consultation processes and the means by which their free, prior and informed consent on developments affecting their country may be obtained. The Amendment Regulations recognise that there may be some situations where consent is either not required, or required from only a limited number of individuals. With the consent of the native title group the PBC can recognise and support local decision-making processes and priorities by providing for alternate processes in its constitution, or in standing authorisations that apply to classes of native title decisions.[74]

However, native title holders need to be aware of their rights and the potential consequences of including alternative consultation processes in their constitutions. Again, the Government has a responsibility to ensure that PBCs are resourced to access appropriate advice when developing their constitutions.

(b) Indigenous Economic Development Strategy

The Australian Government released the Indigenous Economic Development Strategy 2011-2018 (the IEDS) in October 2011. The strategy outlines the Australian Government's policy framework that aims to strengthen Aboriginal and Torres Strait Islander economic participation.

The strategy acknowledges the practical economic benefits of the growing number of native title agreements.[75] It also recognises that Indigenous enterprises are in a unique position to capitalise on business opportunities arising from native title settlements and resource related royalty payments under native title agreements.[76] The strategy includes the following actions for 2013 relevant to native title:

- review the role and statutory functions of NTRBs and NTSPs to ensure they meet the changing needs of the native title system, particularly the needs of native title holders after claims have been resolved[77]
- continue to work with the Federal Court of Australia (Federal Court), state and territory governments, and other respondent parties, the National Native Title Tribunal (the Tribunal), NTRBs and NTSPs to help resolve outstanding native title claims in a more flexible and timely manner[78]
- promote and support high standards of corporate governance, financial management, transparency and accountability in Indigenous native title asset holding bodies[79]
- develop arrangements that ensure Indigenous-owned land can be better used as security for financing by working in partnership with traditional owners, the banking sector, the Indigenous Land Corporation, NTRBs, NTSPs and Land Councils.[80]

74 Australian Institute of Aboriginal and Torres Strait Islander Studies, above.
75 Australian Government, *Indigenous Economic Development Strategy 2011-2018*, (2011) p 17. At http://www.indigenous.gov.au/economic-participation/policy-programs/ieds/ (viewed 16 October 2012).
76 Australian Government, above, p 52.
77 Australian Government, above, p 31.
78 Australian Government, above, p 64.
79 Australian Government, above.
80 Australian Government, above.

The Government has committed to working in partnership on the progress of the IEDS with community organisations and in particular NTRBs and NTSPs.[81] I encourage the Government to use the Declaration to guide the future progress of the IEDS. In particular, Articles 20 and 23 of the Declaration provide for Aboriginal and Torres Strait Islander peoples to determine their own priorities and strategies for development.

(c) Stronger Futures in the Northern Territory

On 23 November 2011, the Government introduced the following bills which included a number of land reform measures:

- the Stronger Futures in the Northern Territory Bill 2011 (Cth)
- the Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth)
- the Social Security Legislation Amendment Bill 2011 (Cth).

The *Stronger Futures in the Northern Territory Act 2012* (Cth) (Stronger Futures Act) and related legislation set the parameters for the operation and modification of measures originally introduced in the *Northern Territory National Emergency Response Act 2007* (NTNER Act). The NTNER Act passed in 2007 and became known as the Northern Territory Emergency Response (NTER) or the Northern Territory Intervention.

As part of the original NTER in 2007, a number of measures were introduced that affected the rights of Aboriginal peoples to their lands, territories and resources, including the compulsory acquisition of leases for five years over prescribed areas.[82] This allowed the Australian Government to compulsorily acquire rights, titles and interests relating to town camps.[83] At the same time, the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) also allowed acquisition by the Australian or Northern Territory Governments or their authorities, of extensive statutory rights in relation to areas of Aboriginal land designated as construction areas.[84]

In 2010, the *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (2010 Welfare Reform Act) made only minor changes to the provisions of the NTNER Act concerning the compulsory acquisition of five-year leases.

The Commission has previously expressed concern about the lack of consultation that preceded the introduction of the land measures under the NTER and highlighted the discriminatory impact of some of the measures on Aboriginal people.[85]

81 Australian Government, above, p 19.

82 *Northern Territory National Emergency Response Act 2007* (Cth), ss 31(1), (2). For further information, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 188–196. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).; Native Title Report 2009, note 22, pp 151–155.; Australian Human Rights Commission, Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills (2010),10 February 2010, paras 137–150. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

83 *Native Title Report 2007*, above, pp 196–199.

84 By inserting Pt IIB into the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). For further information see *Native Title Report 2007*, note 82, pp 202–206. The amendments also provided that the future acts regime under the *Native Title Act* does not apply to acts done by, under, or in accordance with certain provisions of the *Northern Territory National Emergency Response Act 2007* (Cth), s 51.

85 *Native Title Report 2007*, note 82, pp 187–207.; *Native Title Report 2009*, note 22, pp 151–158.

(i) Repeal of five-year leases and statutory powers

The *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth) (Consequential and Transitional Provisions Act) repeals the NTNER Act, which contains the provisions relating to the acquisition of five-year leases.[86] This Act also repeals Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).[87] I strongly support the repeal of these provisions and I am encouraged by the Australian Government's commitment to transition to voluntary leasing arrangements in the Northern Territory.[88]

(ii) Leasing arrangements in town camps and community living areas

The Stronger Futures Act inserts a new power which allows the Australian Government to make regulations relating to leasing on town camp and community living area land in the Northern Territory.[89] The Stronger Futures Act does not make amendments to existing land laws in the Northern Territory.

The Government states this new power will remove barriers to leasing land and enable Aboriginal landholders to make use of their land for a broader range of purposes including economic development and private home ownership.[90] The Government intends this to be a 'special measure'. Section 33 of the Stronger Futures Act provides that the object of these provisions is to enable 'special measures' to:

- facilitate the granting of individual rights or interests in relation to land in town camps and community living areas
- promote economic development in town camps and community living areas.

Section 34 is a 'regulation-making power which allows Northern Territory laws to be modified to the extent that the law applies to a town camp'. This is to overcome restrictions and impediments relating to dealings, planning and infrastructure on town camp land.[91] Section 35(1) is also a regulation-making power which can modify Northern Territory laws in relation to the use of or dealings in land, and planning or infrastructure of a community living area.

The regulations may also modify the *Crown Lands Act 1992* (NT) (Crown Lands Act) or the *Special Purposes Leases Act 1953* (NT) (Special Purposes Leases Act) (or both) to provide that a lease granted under the Special Purposes Leases Act is taken to have been granted under the Crowns Lands Act.[92] In addition, the regulations may modify a lease granted under the Crown Lands Act or Special Purposes Leases Act by modifying the purposes for which the land may be used.[93]

The provisions outline certain consultation requirements to be met before the Minister makes any regulations. However, the provisions also allow the regulations to be valid if the consultation requirements are not met.[94]

The Consequential and Transitional Provisions Act requires Northern Territory Land Councils to provide negotiation assistance to owners of community living areas, such as negotiating new leases.[95] Amendments

86 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), schedule 1, item 1.
87 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), schedule 2, item 3.
88 Australian Government, Stronger Futures in the Northern Territory Policy Statement (2011), p 9. At http://www.indigenous.gov.au/stronger-futures/resources/next-steps/ (viewed 12 October 2012).
89 *Stronger Futures in the Northern Territory Act 2012* (Cth), Pt 3.
90 Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), p 22.
91 Explanatory Memorandum, Stronger Futures in the Northern Territory Bill 2011 (Cth), p 21.
92 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 34(4).
93 *Stronger Futures in the Northern Territory Act 2012* (Cth), s 34(6).
94 *Stronger Futures in the Northern Territory Act 2012* (Cth), ss 34(8), 34(9).
95 *Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Act 2012* (Cth), schedule 2, item 4.

made by the Senate mean that this is not at the expense of the Northern Territory Land Councils.[96]

(iii) Land reform and the Declaration

Under Article 32(1) of the Declaration, Aboriginal and Torres Strait Islander peoples 'have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources'. If enacted with the proposed effect, the changes could assist Indigenous landowners and residents to develop priorities and strategies for the development of their land.

Given the lack of detail provided concerning the proposed Regulations, I am unable to comment on whether the proposed Regulations, and therefore whether subsequent amendments to Northern Territory laws and leases, will be consistent with human rights obligations and the *Racial Discrimination Act 1975* (Cth).

The United Nations Special Rapporteur on the rights of indigenous peoples (Special Rapporteur) states that 'increasing indigenous peoples' control over their lands and resources, self-determination and self-government is an essential component of advancing economic development'.[97] Now the legislation has been passed, the Government should ensure that any Regulations and/or proposed amendments provide Aboriginal communities with options and control over their land rather than imposed changes which lack community support.

While I support the Australian Government's commitment to transition to voluntary leases, I have broader concerns about the Government's prioritisation of obtaining 'secure tenure'. As the Aboriginal Peak Organisations (Northern Territory) has noted:

> Problems arise, however, from seeking to address entrenched economic and social disadvantage experienced in remote communities simply as a matter of securing leases. No evidence exists that economic development or even home ownership will necessarily flow from secure leasing alone. Community cohesion, capacity to engage in wider society, issues of community control and decision-making have to be addressed in conjunction with a leasing policy.[98]

Issues such as remote locations, education, health, job opportunities, poor infrastructure and the failure of governments to respect and recognise Aboriginal and Torres Strait Islander forms of ownership are substantially more important. These issues have a greater impact on the economic development of communities than lack of secure tenure.[99] The Australian and Northern Territory Governments should ensure prioritisation of funding to address these factors in addition to formalising tenure arrangements. This will be consistent with the Declaration by allowing Aboriginal and Torres Strait Islander peoples to determine their own priorities and strategies for development.

I encourage any Regulations developed under ss 34 or 35 of the Stronger Futures Act to be developed in partnership with affected Aboriginal communities to ensure the exercise of their rights under the Declaration.

(d) Institutional reforms

As part of the 2012-2013 Budget on 8 May 2012, the Attorney-General announced native title institutional

96 Schedule of amendments made by the Senate, Stronger Futures in the Northern Territory (Consequential and Transitional Provisions) Bill 2011 (Cth), (1).

97 J Anaya, Special Rapporteur on the rights of indigenous peoples, *Report on the Situation of indigenous peoples in Australia*, UN Doc A/HRC/15/37/Add.4 (2010), para 40. Also see *Native Title Report 2009*, note 22, p 73.

98 Aboriginal Peak Organisations Northern Territory, *Response to Stronger Futures* (2011), pp 33–34. At http://www.amsant.org.au/index.php?option=com_content&view=article&id=154&Itemid=258 (viewed 10 October 2012).

99 *Native Title Report 2007*, note 82, p 125.

reforms. These reforms implement recommendations made by the *Strategic review of small and medium agencies in the Attorney-General's portfolio* (the Skehill Review) and commenced on 1 July 2012. While the implementation of these reforms falls outside the Reporting Period, I will highlight the key changes and potential implications of these reforms.

The reforms involve:

- the transfer of native title claims mediation functions and ILUA negotiation assistance related to claims from the Tribunal to the Federal Court
- the removal of the Tribunal's status under the *Financial Management and Accountability Act 1997* (FMA Act) as an FMA Act agency
- the transfer of the Tribunal's appropriation and staff to the Federal Court of Australia
- a review to determine whether the Tribunal's discretionary services should be reduced or discontinued.

The Tribunal's other statutory functions will remain and the roles of the President, Members and Registrar are continuing.[100]

I note that both the Tribunal and the Federal Court are working together to implement these reforms. The President of the Tribunal comments:

> The Tribunal, Federal Court and the Attorney-General's Department have worked (and are continuing to work) together closely through a joint Steering Committee and specialist working groups to implement the reforms with minimal impact to the operation of the native title system.[101]

And the Deputy Registrar of the Federal Court notes that:

> Following the Government's announcement, the Court commenced a review of all matters in mediation, either through scheduled review hearings or case management conferences in particular matters or for particular regions, to ensure that the progress of existing mediations is maintained and where possible increased. The outcomes of these reviews will be actively monitored by the Court.[102]

I will closely monitor the effect of these reforms over the coming year, particularly with regard to the following paragraph in the Preamble to the Native Title Act:

> A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.[103]

(e) Carbon Farming Initiative

On 15 September 2011, the *Carbon Credits (Carbon Farming Initiative) Act 2011* (CFI Act) received royal assent.[104]

100 Attorney General's Department, 'Current Native Title Reforms' http://www.ag.gov.au/Indigenouslawandnativetitle/NativeTitle/Pages/Nativetitlereform.aspx#Reforms (viewed 5 October 2012).
101 G Neate, President, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 22 August 2012.
102 L Anderson, Deputy Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 8 August 2012.
103 See Preamble to the *Native Title Act 1993* (Cth).
104 See Department of Climate Change and Energy Efficiency, *Carbon Farming Initiative,* http://www.climatechange.gov.au/cfi/ (viewed 28 June 2012).

As I outlined the key features and native title implications of the CFI Act in last year's Native Title Report,[105] I will only consider the following developments relating to the CFI Act and associated initiatives during the Reporting Period. This includes:

- *The Carbon Farming Initiative Consultation Paper – Enabling Indigenous participation: native title and land rights land issues* (Consultation Paper)
- key areas of the CFI Act.

(i) Carbon Farming Initiative Consultation Paper – Enabling Indigenous participation: native title and land rights land issues

The Consultation Paper released by the Department of Climate Change and Energy Efficiency (DCCEE) in July 2011 focused on the following native title issues:

- whether non-exclusive native title holders should have a right to directly benefit from sequestration projects
- the right to consent to sequestration projects for various parties
- flexibility for registered native title bodies corporate to deal with sequestration projects.

The Consultation Paper contends that registered native title claimants will not have a general right to consent to sequestration projects. However, the Government will regulate to ensure that native title holders have a right to consent to a sequestration project when a determination of native title has been made but before a native title body corporate has been registered. Registered claimants will also have a right to consent when a determination of native title is imminent.[106]

The Government will be making minor changes regarding consent to carbon maintenance obligations and has advised me that some of these consultation issues will be considered further when the CFI Act is reviewed in 2014.[107]

(ii) Key areas of the CFI Act

The CFI Act addressed key areas of concern in the Carbon Credits (Carbon Farming Initiative) Bill 2011 (Cth). While only exclusive possession native title holders and Aboriginal and Torres Strait Islander freehold owners will have clear pathways to undertake projects under the CFI Act, any native title holder and Aboriginal and Torres Strait Islander landholder with a registered interest will also have a right to consent in sequestration projects.[108]

As Aboriginal and Torres Strait Islander land is often held differently to other land, the CFI Act contains special provisions to ensure that Aboriginal and Torres Strait Islander landholders benefit from opportunities and can participate in CFI projects in the following two ways:

- as a project proponent (or project owner) where their land interest meets eligibility requirements
- by consenting to a sequestration project undertaken by others.

105 For further discussion see *Native Title Report 2011*, note 5, pp 22–30.
106 M Stuart-Fox, Assistant Secretary Carbon Farming Policy Branch, Department of Climate Change and Energy Efficiency, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 23 July 2012, p 1.
107 Stuart-Fox, above.
108 Stuart-Fox, above.

Project proponent – right to carry out the project

Native title holders can carry out the project in a number of ways:

- Holders of exclusive possession native title have an assumed right to carry out the project. Where the native title is not held exclusively, native title holders can hold a right to carry out CFI projects as part of their consent determination.[109]
- Holders of freehold land generally have the right to carry out the project and be a project proponent. Where the interest is less than freehold, for example a lease or a reserve, reference is made to the legislation and the land interest to ensure they are consistent with carrying out a CFI project.
- Alternatively, where Aboriginal and Torres Strait Islander peoples are not the landholders, they can carry out a project by agreement with the landholder. This could be implemented through a lease or another agreement which allows use of the land for the proposed project.[110]

Project Proponent – right to carbon sequestration

Sequestration projects store carbon in the land and must be maintained for 100 years. For access to benefits from sequestration, project proponents need to demonstrate they have carbon sequestration rights to ensure the right people benefit from the project.

Freehold owners and leaseholders can generally apply to register carbon rights under a state scheme except in the Northern Territory and the Australian Capital Territory. The CFI Act does not require registration of carbon rights in all situations.[111]

Consent to sequestration projects

Registered interest holders in land must consent to sequestration projects. The following Aboriginal and Torres Strait Islander landholders will have a right to consent to sequestration projects and negotiate their involvement:

- PBCs
- any Aboriginal and Torres Strait Islander landholder with a registered interest
- Aboriginal land councils where there has been a decision to grant land but a title has not been registered.[112]

Service to carbon farming projects

Aboriginal and Torres Strait Islander landholders may also participate in projects by providing services to other projects such as ranger groups with ready land management capacity to assist with project services.[113]

Implications of the CFI Act

Given the practical and legal complexity of how the CFI scheme interacts with native title, I am encouraged that the Government intends to undertake further consultation with a broad range of stakeholders before

109 Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth), ch 4, p 41.
110 Stuart-Fox, note 106, p 2.
111 Stuart-Fox, above, p 3.
112 Stuart-Fox, above.
113 Stuart-Fox, above.

deciding an approach to native title and eligible interests in amendments to the Bill.[114] I urge the Government to provide native title holders with appropriate future act procedural rights to any amendments of the CFI Act.

I also note that the Indigenous Carbon Farming Fund (ICFF) will provide support to Aboriginal and Torres Strait Islander peoples to participate in the CFI. This support will be delivered in two streams:

- the Indigenous Carbon Farming Fund Research and Development Stream
- the Capacity Building and Business Support Stream delivered by the Department of Sustainability, Environment, Water, Population and Communities.

I understand the ICFF is part of the Australian Government's Clean Energy Future Plan and will be on-going from July 2012.

(f) The First Peoples Water Engagement Council

The First Peoples Water Engagement Council (FPWEC) was created following a series of meetings in February 2009 for Aboriginal and Torres Strait Islander peoples to promote greater recognition of our rights to water.[115]

The FPWEC convened the First Peoples National Water Summit in March 2012. Following the summit the FPWEC provided formal advice to the National Water Commission. The advice was the key output from the FPWEC and recommended that:

- state and territory governments, together with their respective water-planning authorities, policy-makers, bureaucrats and technical specialists, implement the principles set out in the advice
- state and territory governments review existing legislation relating to the management of water resources and enshrine the principles set out in the advice in future legislation
- the Council of Australian Governments establish and implement a National Aboriginal Water Strategy
- an Aboriginal Economic Water Fund is established to facilitate the National Aboriginal Water Strategy
- the National Water Commission should extend the term of the First Peoples' Water Engagement Council.[116]

I note at the time of writing the Government had committed to establishing an Indigenous Water Advisory Committee. I strongly encourage the Government and water agencies to adopt the FPWEC advice to the National Water Commission and implement the recommendations.

(g) Legislation passed in the Reporting Period relevant to lands, territories and resources

Table 1.2 outlines the legislation passed in the Reporting Period relevant to lands, territories and resources.

114 Explanatory Memorandum, Carbon Credits (Carbon Farming Initiative) Act 2011(Cth), ch 4, p 9.
115 First Peoples' Water Engagement Council, *Policy Framework* (2012), p 3. At http://nwc.gov.au/planning/fpwec (viewed 3 October 2012).
116 First Peoples' Water Engagement Council, *Advice to the National Water Commission (2012),* p 6. At http://nwc.gov.au/planning/fpwec (viewed 12 October 2012).

Table 1.2:
Legislation passed relevant to lands, territories and resources

Jurisdiction	Legislation
Commonwealth	*Minerals Resources Rent Tax Act 2012* (Cth)
	Carbon Credits (Carbon Farming Initiative) Act 2011 (Cth)
	Carbon Credits (Carbon Farming Initiative) Regulations 2011 (Cth)
	Carbon Credits (Carbon Farming Initiative) Amendment Regulation 2012 (No.1) (Cth)
	Human Rights (Parliamentary Scrutiny) Act 2010 (Cth)
South Australia	*Arkaroola Protection Act 2011* (SA)
	Roxby Downs (indenture of ratification) (amendment of indenture) Amendment Act 2011 (SA)
	National Parks and Wildlife (Flinders Ranges National Park) Regulations 2011 (SA)
Queensland	*Aboriginal and Torres Strait Islander Land and Other Legislation Amendment Bill 2010* (Qld)
	Nature Conservation (Protected Areas) Amendment Regulation (No.1) 2012 (Qld)
Tasmania	*Aboriginal Lands Amendment Bill 2012* (Tas)
Northern Territory	*Northern Territory Aboriginal Sacred Sites Amendment Regulations 2011* (NT)
	Heritage Act 2011(NT)
	Kenbi Land Trust Act 2011 (NT)
	Associations Amendment Bill 2012 (NT)

1.5 Decisions under the Native Title Act

(a) De Rose Hill compensation application

As I outlined in the *Native Title Report 2011*, the native title holders for De Rose Hill in South Australia have made a compensation application for their native title rights which were held to be extinguished.[117] While the De Rose Hill compensation matter is currently the subject of confidential mediation between the Applicant and the South Australian Government, the general issues being discussed are whether the acts identified in the compensation application are compensable and what the 'just terms' are for the compensation of the 'loss, diminution, impairment or other effect' of such acts on native title rights and interests.[118]

A successful compensation claim in De Rose Hill will clarify the relevant legal principles for calculating compensation under the Native Title Act and set a positive example for potential future compensation litigants for native title. The parties participating in the mediation are hopeful of a timely resolution and I will continue to closely follow the claim.[119]

(b) Torres Strait Regional Sea Claim

Last year, I also reported on the Federal Court's decision in *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland* in which Justice Finn found in favour of the native title claimants in determining that the state and commonwealth legislative licencing regime did not extinguish the right to take fish or resources for trading or commercial purposes.[120]

On appeal, the Full Federal Court upheld the existence of native title rights over significant areas of waters of the Torres Strait but ruled that 'the native title right to take fish and other aquatic life for commercial purposes' had been extinguished by the existence of state and commonwealth legislation which prohibited commercial fishing in the area without a licence.[121]

In June 2012, a Special Leave Application was filed in the High Court of Australia by the Torres Strait Regional Seas Claim Group regarding the commercial fishing rights.[122] I will continue to monitor the progress and outcome of this application.

117 *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 2 October 2012).

118 K Thomas, CEO South Australian Native Title Services, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission (10 August 2012), p 9.

119 Thomas, above.

120 *Native Title Report 2011*, note 5, p 22.

121 *Commonwealth of Australia v Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group* [2012] FCAFC 25.

122 Torres Strait Regional Authority, *Native Title*, http://www.tsra.gov.au/the-tsra/native-title.aspx (viewed 4 October 2012).

1.6 Trends in agreement-making

Since the commencement of the Native Title Act there has been a continuing trend for parties to negotiate ILUAs. During the Reporting Period, 150 ILUAs were registered[123] and we witnessed the milestone of the 600th ILUA.[124] This reflects the trend of steadily increasing numbers of ILUA registrations over recent years.

The President of the Tribunal, Graeme Neate, attributes the growing use of ILUAs to the enhanced ability of governments, industry and other parties to 'negotiate land use and management with Indigenous Australians'.[125]

ILUAs often comprise part of a package of agreements which record the settlement of a native title application. This results in a formal determination by the Federal Court that native title exists being complemented by ILUAs that show how the various rights and interests will be exercised on the ground.[126]

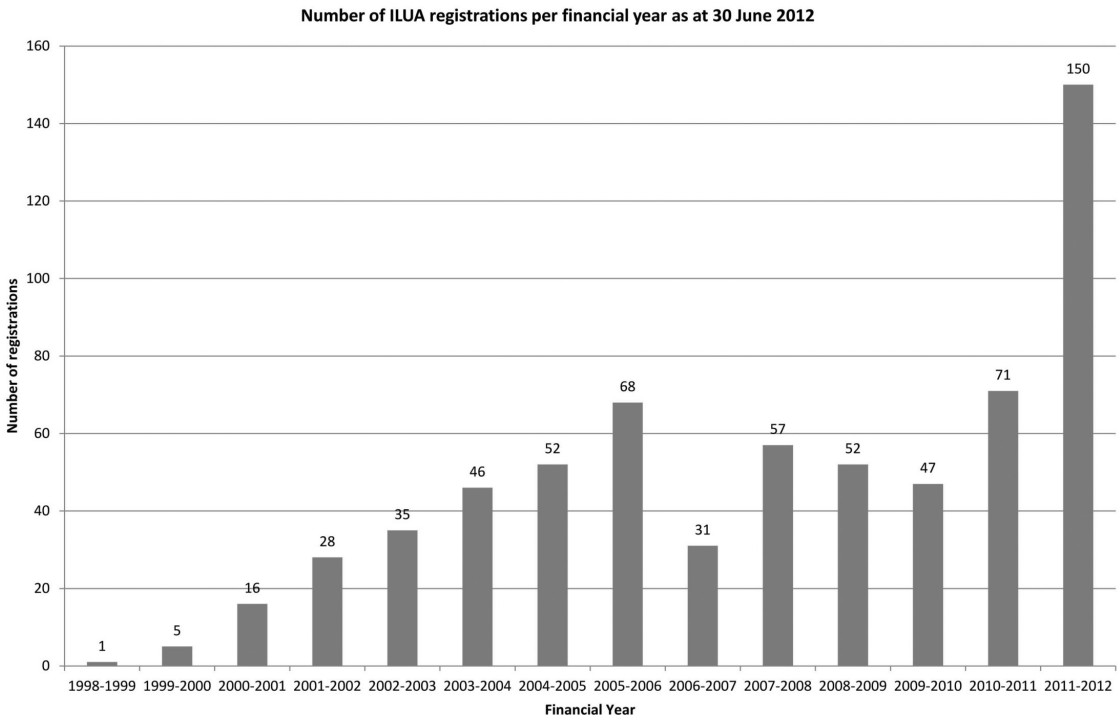
In addition, most future acts such as the proposed grants of exploration and mining tenements proceed by agreement with native title holders or native title claimants or by consent determinations made by the Tribunal, rather than arbitration.[127]

While I welcome the positive progress on the rate of settling native title claims by agreement, we must also ensure that Aboriginal and Torres Strait Islander peoples benefit from the recognition of their rights and interests.

Diagram 1.1 below shows the number of registered ILUAs in each financial year and Diagram 1.2 shows the total determinations of native title as at 30 June 2012.

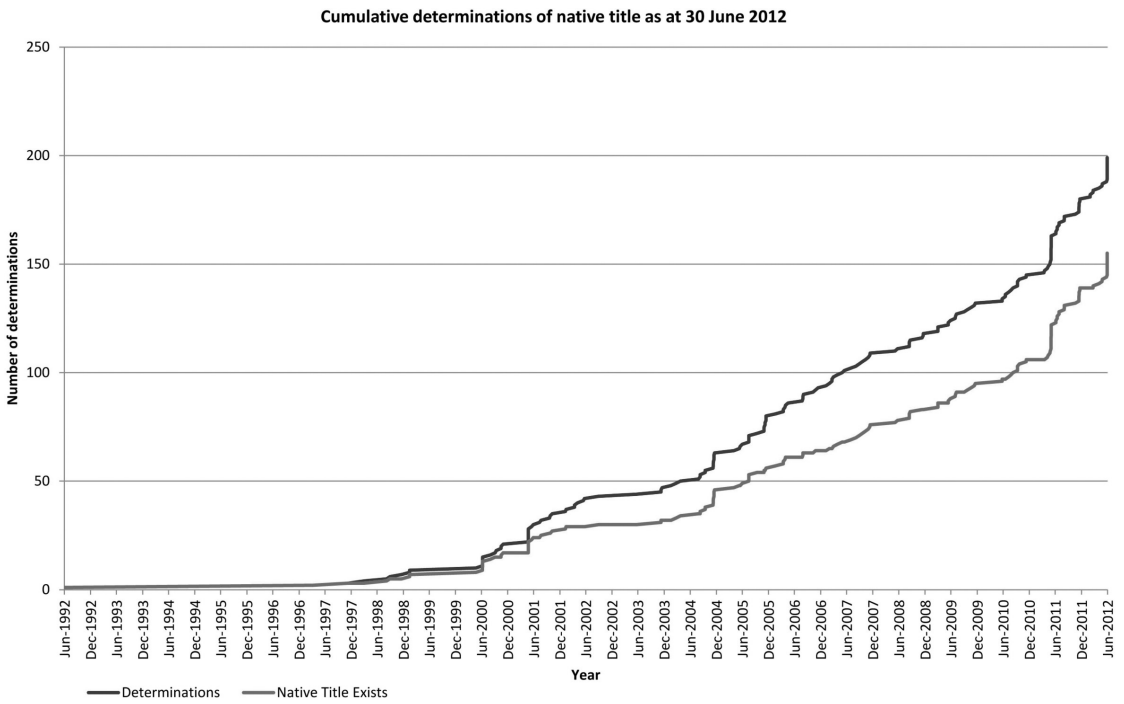
123 Neate, note 101.
124 National Native Title Tribunal, 'Indigenous Land Use Agreements surpasses 600th milestone' (Media Release 21 May 2012) http://www.nntt.gov.au/News-and-Communications/Pages/Indigenous_land_use_agreements_surpasses_the600thmilestone.aspx (viewed 2 October 2012).
125 National Native Title Tribunal, above.
126 Neate, note 101.
127 Neate, above.

Diagram 1.1:
Registered ILUAs per financial year[128]



128 Neate, above.

Diagram 1.2:
Total determinations of native title as at 30 June 2012[129]



(a) Concerns about native title consultants

The NNTC and several NTRBs and NTSPs have raised concerns with me that some consultants, including lawyers and anthropologists are acting in an unprofessional manner when seeking to represent native title parties in future act and other native title agreement negotiations. This undermines the governance of native title groups and has negative implications for the resolution of native title agreements.

I have been advised that these consultants are taking advantage of native title groups by promising quick and financially-rewarding future act negotiations with mining companies, and charging exorbitant fees for their services. It appears these individuals are also exacerbating lateral violence in our communities by assuming a 'divide and conquer' approach to native title groups. I am aware that the NNTC, on behalf of NTRBs and NTSPs, has raised these concerns with the Government. I encourage the Government to urgently work together with the NNTC, NTRBs and NTSPs to address and eliminate behaviour by consultants that is counterproductive to positive outcomes for all involved in resolving native title agreements.

129 Neate, above.

1.7 International mechanisms addressing Indigenous peoples human rights to lands, territories and resources

(a) Expert Mechanism on the Rights of Indigenous Peoples

The fourth session of the Expert Mechanism on the Rights of Indigenous Peoples (the Expert Mechanism) took place on 11–15 July 2011. 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.[130]

A delegation of Aboriginal and Torres Strait Islander representatives attended the fourth session of the Expert Mechanism. The key agenda items for the fourth session extended the discussion from the third session focusing on:

- the study on Indigenous peoples and the right to participate in decision-making
- implementing the Declaration
- a follow-up on the thematic studies and advice of the Expert Mechanism.

(i) Final report on Indigenous peoples and the right to participate in decision-making

At its fourth session, the Expert Mechanism adopted the 'Final Report on indigenous peoples and the right to participate in decision making', which provides extensive guidance on implementing and improving state based mechanisms for increasing Indigenous peoples participation in decision making.[131]

In particular, the Final Report emphasised the importance of:

- the recognition, integration and application of Indigenous determined decision-making practices into such mechanisms
- ensuring Indigenous peoples are given an active role in determining policy and desired outcomes
- consultations and negotiations with Indigenous peoples to comply with the human rights standards set out in the Declaration
- the role of National Human Rights Institutions (NHRIs) in facilitating a positive relationship between Indigenous peoples and governments.[132]

As Social Justice Commissioner, I provided a submission on the right of Indigenous peoples to participate in decision-making. In this submission, I emphasised the need for governments to change the way they integrate the principles of free, prior and informed consent and self-determination into the policies, legislation and programs that affect the participation of Indigenous peoples in decision-making.[133]

130 For further information about the Expert Mechanism, see the United Nations Human Rights Office of the High Commissioner for Human Rights, *The Expert Mechanism on the Rights of Indigenous Peoples*, at http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/EMRIPIndex.aspx.

131 *Report of the Expert Mechanism on the Rights of Indigenous Peoples*, Final Study on indigenous peoples and the right to participate in decision-making, UN Doc A/HRC/EMRIP/2011/2 (2011). At http://www.ohchr.org/EN/Issues/IPeoples/EMRIP/Pages/Session4.aspx (viewed 2 October 2012).

132 *Report of the Expert Mechanism on the Rights of Indigenous Peoples*, above.

133 M Gooda, Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 3 (Delivered at the fourth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 11-15 July 2011).

(b) Conference of the Parties to the United Nations Framework Convention on Climate Change

The Conference of the Parties to the United Nations Framework Convention on Climate Change (COP 17) was held on 28 November – 9 December 2011 in Durban, South Africa.

Since the United Nations Framework Convention on Climate Change (UNFCCC) in 1995, the Conference of the Parties (COP) to the UNFCCC has been meeting annually to assess progress in dealing with climate change. The COP adopts decisions and resolutions for practical and effective implementation of the convention. The following decisions adopted at COP 17 are relevant to Indigenous peoples' right to lands, territories and resources:

- to develop mechanisms to promote input and participation of Indigenous peoples in the design, development and implementation of the strategies and activities to be financed by the Green Climate Fund[134]
- action on adaptation of the Convention should be undertaken in a participatory and fully transparent approach, guided as appropriate by traditional and Indigenous knowledge[135]
- to include Indigenous and traditional knowledge for future technical workshops.[136]

As a result of COP 17, the Parties agreed to adopt a universal legal agreement on climate change as soon as possible and no later than 2015.

(c) United Nations Permanent Forum on Indigenous Issues

The 11th session of the United Nations Permanent Forum on Indigenous Issues (Permanent Forum) took place on 7–18 May 2012.

A delegation of Aboriginal and Torres Strait Islander peoples attended this session, with a majority of the delegation attending as part of the Indigenous Peoples Organisations (IPO) Network of Australia. The delegation made a number of statements and submissions on issues of native title and our rights to lands, territories and resources.

(i) The Doctrine of Discovery

The special theme for the 11th session of the Permanent Forum was the Doctrine of Discovery and its enduring impact on Indigenous peoples and their right to redress for past conquests in Articles 28 and 37 of the Declaration.

The IPO Network presented a statement on the Doctrine of Discovery and recommended all states enter into effective processes for redress under Article 28 of the Declaration.[137]

The Permanent Forum made the following recommendations under this agenda item relevant to lands, territories and resources:

134 *Report of the Conference of the Parties on its seventeenth session*, Addendum Part two: Action taken by the Conference of the Parties at its seventeenth session, UN Doc FCCC/CP/2011/9/Add.1 (2012), p 66.
135 *Report of the Conference of the Parties on its seventeenth session*, above, p 80.
136 *Report of the Conference of the Parties on its seventeenth session*, above, p 3.
137 B Wyatt, Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 3 (Submitted at the eleventh session of the Permanent Forum on Indigenous Issues, New York, 7-18 May 2012).

- that states rectify past wrongs caused by such doctrines through law and policy reform, restitution and other forms of redress for the violation of their land rights, as held in Articles 27 and 28 of the Declaration
- that a voluntary international mechanism is established to receive and consider communications from Indigenous peoples specifically concerning their claims to, or violations of, their rights to the lands, territories and resources.[138]

(ii) Half-day discussion on the rights of Indigenous peoples to food and food sovereignty

Indigenous peoples right to food and food sovereignty is inextricably linked with the collective recognition of rights to lands, territories and resources, culture, values and social organisation.[139]

The IPO Network submitted a statement on water, which highlighted water as a significant resource and focused on Indigenous interests in water rights. The IPO recommended that states effectively engage with Indigenous peoples in relation to water management to ensure their free, prior and informed consent in the development of priorities and strategies.[140]

Under the food security agenda item, the Permanent Forum made the following recommendations relevant to lands, territories and resources:

- that states are encouraged to take positive actions to strengthen traditional food systems by formally recognizing and demarcating Indigenous territories to enable Indigenous peoples to carry out productive food activities. This is in accordance with Article 8(2) (b) of the Declaration, which prohibits states from any action that has the aim or effect of dispossessing Indigenous peoples of their lands, territories or resources.[141]
- Articles 25 to 36 of the Declaration provides that states shall uphold the right to free, prior and informed consent of Indigenous peoples concerning disputes arising from extractive industries, large-scale water, energy and infrastructure projects, and agricultural investments regarding the lands, territories and resources of Indigenous peoples.[142]

(iii) Future work of the Permanent Forum

I note that Permanent Forum members, Dalee Sambo Dorough and Megan Davis, have been appointed to undertake a study on an optional protocol to the Declaration, which will focus on developing a potential voluntary mechanism to serve as a complaints body at the international level, in particular for claims and breaches of Indigenous peoples' rights to lands, territories and resources at the domestic level.[143]

(d) United Nations Conference on Sustainable Development

The United Nations Conference on Sustainable Development (Rio+20) was held on 20–22 June 2012 in Rio de

138 Economic and Social Council, Permanent Forum on Indigenous Issues Report on the eleventh session (7-18 May 2012), UN Doc E/2012/43-E/C.19/2012/13 (2012), p 4. At http://social.un.org/index/IndigenousPeoples/UNPFIISessions/Eleventh.aspx (viewed 2 October 2012).
139 Economic and Social Council, above, p 10.
140 B Wyatt, Joint Statement by the Indigenous Peoples Organisation Network of Australia on Agenda Item 6 (Delivered at the eleventh session of the United Nations Permanent Forum on Indigenous Issues, New York, 7-18 May 2012).
141 Economic and Social Council, note 138, p 1.
142 Economic and Social Council, above, p 11.
143 Economic and Social Council, above, p 18.

Janeiro, Brazil. It resulted in a focused outcome document 'The Future We Want', which contains clear and practical measures for implementing sustainable development.

This document highlights the importance of the participation of Indigenous peoples in the achievement of sustainable development. It also recognises the importance of the Declaration in the context of implementing sustainable development strategies at a global, regional, national and sub-national level.[144] During Rio+20, Indigenous Peoples from around the world met at the Indigenous Peoples International Conference on Sustainable Development and Self Determination. As a result the Rio+20 Indigenous Peoples Declaration on Sustainable Development was adopted.

At Rio+20, the Australian Government announced a global Indigenous Peoples and Local Communities Land and Sea Managers Network as part of the Indigenous Projects under the Caring for Country Initiative.[145] The development of the Network is due to start at an international conference in Darwin in May 2013. I encourage the Government to promote meaningful and effective consultation in this initiative. I also encourage the Government to uphold Article 29 of the Declaration that requires governments to provide assistance to Indigenous peoples for the protection of the environment and their land and resources.

144 *The Future We Want*, GA Resolution 66/288, UN Doc A/RES/66/288 (2012), para 49. At http://sustainabledevelopment.un.org/index.php?menu=1298 (viewed 5 October 2012).

145 The Hon J Gillard MP, Prime Minister of Australia, 'Australia announces global indigenous network' (Media Release 20 June 2012). At http://www.pm.gov.au/press-office/australia-announces-global-indigenous-network (viewed 2 October 2012).

1.8 Report Card for the Native Title Report 2011

In last year's Native Title Report, I initiated a process to review the Australian Government's progress in implementing the recommendations I made in my Native Title and Social Justice Reports. In this section, I assess the Government's progress in implementing the recommendations from the *Native Title Report 2011*.

The *Native Title Report 2011* examined developments in native title law and policy from 1 July 2010 to 30 June 2011 and started a conversation about how the native title system can provide a space for lateral violence to play out within our Aboriginal and Torres Strait Islander families, communities and organisations. I made 11 recommendations in relation to these issues in the Report.

In preparation for this year's Native Title Report, I wrote to the Attorney-General requesting a formal response on the Government's progress in implementing the recommendations from the *Native Title Report 2011*. Unfortunately, the Attorney-General did not provide a formal response to this request. While it is frustrating to make recommendations that are not provided with a formal response, I will continue to engage with the Attorney-General to progress these recommendations.

I have attached the recommendations for the *Native Title Report 2010* and the *Native Title Report 2011* at Appendix 2.

(a) Review of the Native Title Act

In Recommendation 1 of the *Native Title Report 2011,* I recommended that the Australian Government commission an independent inquiry to review the operation of the native title system to bring it in line with international human rights standards, in particular the Declaration.[146] I also recommended this in the *Native Title Report 2010*[147] and in a number of submissions.[148] The Government has failed to implement this recommendation.

(b) International human rights mechanisms

In Recommendation 2 of the *Native Title report 2011,* I recommended that the Australian Government take steps to formally respond to and implement recommendations made by international human rights mechanisms including:

- The Special Rapporteur on the rights of indigenous peoples
- The Expert Mechanism on the Rights of Indigenous Peoples
- The United Nations Permanent Forum on Indigenous Issues.[149]

The Government has failed to implement this recommendation.

(c) Statement or Charter of Engagement

In Recommendation 3 of the *Native Title Report 2011*, I recommended that the Australian Government develop

146 *Native Title Report 2011*, note 5, p 73.
147 *Native Title Report 2010*, note 54, p 55.
148 Australian Human Rights Commission, *Submission to the Senate Inquiry: Native Title Amendment (Reform) Bill 2011 (*2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/native_title_three/submissions.htm (viewed 11 October 2012).
149 *Native Title Report 2011*, note 5, p 73.

a 'Statement or Charter of Engagement' to complement *Engaging Today, Building Tomorrow: a framework for engaging with Aboriginal and Torres Strait Islander Australians,* to demonstrate the Government's commitment to be guided by the Declaration.[150] The Government has failed to implement this recommendation.

(d) Implementation of the recommendations from Native Title Reports

In recommendation four of *Native Title Report 2011,* I recommended that the Australian Government should implement outstanding recommendations from both the *Native Title Report 2010* and *Native Title Report 2011*. The Government has continued to ignore calls for a formal response on the implementation status of recommendations from the Native Title Report and the Social Justice Report. The Government has failed to implement this recommendation.

(e) Implementation of the Declaration

In both the *Native Title Report 2010* and the *Native Title Report 2011* I recommended 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 Declaration are given full effect.[151] Despite the Government adopting the Declaration in 2009, the Government has failed to implement this recommendation.

When the Government adopted the Declaration on 3 April 2009, the Minister for Families, Community Services and Indigenous Affars, Jenny Macklin stated:

> The Declaration needs to be considered in its totality – each provision as part of the whole. Through 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.[152]

However, since supporting the Declaration the Government has consistently argued they have no legal obligation to implement the Declaration. The Government has also decided to 'interpret the Declaration in accordance with Article 46 that clarifies it cannot be used to impair territorial integrity'. [153]

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

In starting the conversation about lateral violence in our communities, in Chapter 4 of the *Native Title Report 2011,* I recommended that the Australian Government should:

- support research to develop the evidence base and tools to address lateral violence as it relates to the native title system
- ensure strategies, policies and programs are designed, developed and implemented in accordance with the Declaration

150 *Native Title Report 2011*, above.
151 *Native Title Report 2011*, above.
152 The Hon J Macklin, Minister for Families, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous peoples,* 3 April 2009, at http://jennymacklin.fahcsia.gov.au/node/1719 (viewed 16 October 2012)
153 Australian Government, *Australian Government and Non-Government Organisations Forum on Human Rights*, Canberra 14-15 August 2012, pp 8-9.

- pursue legislative and policy reform that empowers Aboriginal and Torres Strait Islander peoples
- conduct an audit of cultural safety and security and develop strategies to increase cultural competence within their agencies and organisations
- conduct education and awareness raising sessions on lateral violence.[154]

The Government has failed to implement these recommendations.

154 *Native Title Report 2011,* note 5, pp 188-189.

1.9 Assessing the Reporting Period

The events of the Reporting Period continues a trend over recent years, which sees the Government provide an almost silent disregard for the fundamental inequalities in the native title system in favour of more efficient outcomes in the rush to finalise settlement of native title. Inevitably, this results in minor procedural amendments which fail to tackle the causes of discontent at the heart of native title: the discriminatory way in which native title rights and interests can be so easily extinguished by other interests, and the onerous task of requiring Aboriginal and Torres Strait Islander peoples to prove our connection to those who took our lands, territories and resources.

We cannot underestimate the continuing financial and emotional impact that the native title system imposes on our peoples. While I am not advocating against efficient outcomes to native title claims, I do question whether the end result will deliver has been promised: recognition, equality and a better future for our peoples.

While I acknowledge the Australian Government's proposed minor amendments to the Native Title Act are a step in the right direction, I reiterate the sentiment of the Brian Wyatt, Chief Executive Officer of the NNTC who observes that 'we are tired and weary of our old people dying before decisions are made on their native title'.[155]

Senator Siewert's Reform Bill provides an example of the legislative efforts needed to address some of the obstacles to fully exercise and enjoy our rights to lands, territories and resources. But we need more than legislative change, we need cultural change and the Declaration provides the means to achieve this.

My overarching priority is to give effect to the Declaration in Australian laws, policies and programs. I am committed to developing a national strategy to implement the Declaration and will progress this strategy in partnership with the National Congress of Australia's First Peoples.

I recommend 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. [Recommendation 2]

This year I launched a survey to gather the views of Aboriginal and Torres Strait Islander peoples about the Declaration. Of the 219 participants, when asked to what extent they feel the Australian Government respects the human rights of Aboriginal and Torres Strait Islander peoples out of a range of responses 19.6% said 'not at all', 39.7% answered 'only a little' and only 1.9% felt that the Government respects our human rights. This sends a clear message that the Government needs to develop a new approach to consulting and engaging with Aboriginal and Torres Strait Islander peoples.

In preparation for this Native Title Report I wrote to each of the state and territory governments asking how the Declaration was being used to guide their policies regarding lands, territories and resources. One response stated that the Declaration 'has not been ratified by the Federal government.'[156] This is despite the Australian Government adopting the Declaration in 2009.

Such responses clearly identify the need for further awareness around the Declaration and educating governments about human rights and their obligations. I remind the Government of their obligation under Articles 38 and 42 of the Declaration that highlights the responsibility of states to promote respect for, and apply the Declaration in consultation and cooperation with Indigenous peoples.

155 National Indigenous Radio Service, *National Native Title Conference 2012*, http://www.nirs.org.au/news/features/7296-national-native-title-conference-2012 (viewed 10 October 2012).

156 The Hon M Cripps MP, Minister for Natural resources and Mines Queensland Government, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 22 August 2012.

I also note the Minister for Families, Community Services and Indigenous Affairs did not provide a response to a letter dated 19 July 2012 in time to comprehensively inform this Report. Unfortunately this appears to reflect the lack of engagement at the national level in Australia on the implementation of our rights in the Declaration.

I will continue to advocate for 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, and for a native title system that allows us to fully realise our rights to lands, territories and resources.

1.10 Recommendations

I recommend that:

1. The Australian Government establish and resource a working group which includes members from Native Title Representative Bodies, Native Title Service Providers, Aboriginal and Torres Strait Islander peoples, Australian and state and territory governments and respondent stakeholders including mining and pastoralists to be tasked with developing proposals to amend the Native Title Act.
2. 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:
The Declaration on the Rights of Indigenous Peoples and Indigenous governance over lands, territories and resources

2.1 Introduction

The theme of governance in this year's Native Title and Social Justice Reports reflects the priorities I set out at the beginning of my term as Social Justice Commissioner in 2010. These are to advance the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and to promote the development of 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.[1]

Discussing the concept of governance also supports my native title priority to enhance the capacity of Aboriginal and Torres Strait Islander peoples to realise our social, cultural and economic development aspirations.[2]

In this year's Native Title Report, I address these priorities by setting out how governance can provide a foundation that enables us, as Aboriginal and Torres Strait Islander peoples, to achieve our aspirations.

In this Chapter, I examine how effective, culturally relevant and legitimate Indigenous governance over lands, territories and resources[3] needs to incorporate the following principles that are set out in the Declaration:

- self-determination
- participation in decision-making, good faith, and free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

(a) What is Indigenous governance?

Indigenous governance is about how we organise ourselves and make decisions about our lives in a culturally relevant way. The National Centre for First Nations Governance (NCFNG) in Canada describes governance for Indigenous peoples as:

> …the traditions (norms, values, culture, language) and institutions (formal structures, organisation, practices) that a community uses to make decisions and accomplish its goals. At the heart of the concept of governance is the creation of effective, accountable and legitimate systems and processes where citizens articulate their interests, exercise their rights and responsibilities and reconcile their differences.[4]

While discussions and research about contemporary Indigenous governance have been occurring for some time in Australia, I believe it is critical we recognise that governance has always been at the core of our Aboriginal and Torres Strait Islander cultures and our community life.

The distinction between our traditional or customary governance and contemporary Indigenous governance

1 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 6 March 2012).

2 *Native Title Report 2010*, above, p 3.

3 'Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*.

4 National Centre for First Nations Governance, *Governance Best Practices Report* (2009), p vii. At http://www.newrelationshiptrust.ca/downloads/governance-report.pdf (viewed 16 March 2012).

means that we must now adjust our customary ways of governing to meet the expectations and regulations of non-indigenous institutions. June Oscar, in her keynote speech to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) National Native Title Conference in June 2012, explained the importance of acknowledging:

> …the challenging and complex operating environment which we are all continuing to live in, seeking justice and trying to raise families, and holding onto the lived practices of our beliefs. We as Indigenous People live out our lives in two worlds according to our custom and tradition and the modern reality. Yet this acknowledgement has never ever been forthcoming. Because the western lens is applied to everything we encounter.[5]

The inherent tension between the 'two worlds' in which we live and to which we are forced to adapt is also recognised in the Indigenous Community Governance Project's description of Indigenous governance as:

> …relationships between and among Australian governments and Indigenous groups, and as contestation and negotiation over the appropriateness and application of policy, institutional and funding frameworks within Indigenous affairs.[6]

While I concede that contemporary Indigenous governance is most likely to require us to negotiate with the wider non-indigenous world, in this Chapter I want to explore how we can govern ourselves in ways that enables and empowers, rather than disables and disempowers.

(b) Why talk about Indigenous governance?

So, why do we need to talk about Indigenous governance? And why do we need to think about how we make decisions and what we make decisions about?

Firstly, governance and the ways that we, as Aboriginal and Torres Strait Islander peoples, organise ourselves and make decisions is central to our ability to influence the outcomes we want to achieve and how we want to achieve them.

I note that the governance of our lands, territories and resources – looking after our cultural heritage, dealing with our native title claims and processing our land rights claims – consumes a significant amount of time and resources for Aboriginal and Torres Strait Islander peoples.

There is substantial evidence that shows effective governance is fundamental to ensuring culturally relevant and sustainable outcomes for our peoples. This is recognised by the Council of Australian Governments (COAG) in its National Indigenous Reform Agreement (Closing the Gap), which acknowledges the importance of governance and leadership to support the reforms aimed at closing the gap for Indigenous peoples on health, education and employment targets.[7] A recent paper by the Closing the Gap Clearinghouse

5 J Oscar, 'Recognising and encouraging honour and determination' (keynote address presented at pre-workshop, AIATSIS Native Title Conference, Townsville, 4 June 2012). At http://www.aiatsis.gov.au/ntru/documents/JuneOscarSpeech_000.pdf (viewed 24 July 2012).

6 D Smith and J Hunt, 'Understanding Indigenous Australian governance – research, theory and representations' in *Contested Governance: culture, power and institutions in Indigenous Australia*, p 4. At http://epress.anu.edu.au/titles/centre-for-aboriginal-economic-policy-research-caepr/c29_citation/pdf-download (viewed 25 May 2012).

7 Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap),* (2007), pp 5 and 8. At http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/NIRA_closing_the_gap.pdf (viewed 31 May 2012).

8 K Tsey, J McCalman, R Bainbridge and C Brown, *Improving Indigenous community governance through strengthening Indigenous and government organizational capacity*. Resource Sheet No. 10. Produced for the Closing the Gap Clearinghouse. Canberra: Australian Institute of Health and Welfare and Melbourne: Australian Institute of Family Studies. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs10.pdf (viewed 23 March 2012).

also observes that long-term outcomes are achieved when there is 'community ownership of governance improvement with organisational change led by Indigenous people using existing community capacity'.[8]

Internationally, the Harvard Project on American Indian Economic Development (the Harvard Project) contends that Indigenous governance is the key to achieving sustained and self-determined social and economic development on American Indian reservations. I discuss the Harvard Project further in section 2.2 below.

Secondly, effective, legitimate and accountable governance systems can assist us to identify the problems within our communities, understand the reasons why the critical social and economic problems facing our communities are increasing, and develop responses appropriate to each situation.[9] In 2003, Mick Dodson and Diane Smith noted that:

> For several decades now Australian commentators (both Indigenous and non-Indigenous) have been asking a series of related questions about why so many Indigenous organisations and enterprises seem to fail; what are the most effective structures for running a community and delivering services; how community assets and resources can most effectively be managed; how Indigenous organisations and leaders can become more accountable to their members; how the different rights and interests of all residents in communities can be represented and protected; and whether different communities can work together for regional development objectives.
>
> These familiar questions share one important underlying thread–governance.[10]

Almost a decade later, these questions remain mostly unanswered and continue to pose challenges for our peoples and communities.

Thirdly, we need to consider how we can most effectively balance the inherent tension between our customary obligation to govern our traditional lands, territories and resources, and the governance requirements of government and external stakeholders.

Finally, governance is a mechanism that enables us to address lateral violence. As I discussed in last year's Social Justice and Native Title Reports, governance within our communities – in particular, the way we make decisions and the structures that operate within our communities – can affect the extent to which lateral violence plays out in our communities.[11] And just as importantly, the governance of governments and external stakeholders can either contribute to or minimise the effect of lateral violence in our Aboriginal and Torres Strait Islander communities.

(c) Indigenous governance and sovereignty over lands, territories and resources

This Chapter on Indigenous governance must be premised by acknowledging our colonised history and its impact on sovereignty over our traditional lands, territories and resources.

9 M Dodson and DE Smith, *Governance for Sustainable Development: strategic issues and principles for Indigenous Australian communities*, Centre for Aboriginal Economic Policy Research Discussion Paper 250/2003, p 2. At http://caepr.anu.edu.au/sites/default/files/Publications/DP/2003_DP250.pdf (viewed 23 March 2012).

10 Dodson and Smith, above, pp 2–3.

11 See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 July 2012) and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport11/index.html (viewed 10 July 2012).

It is our history of colonisation post-1788 that sanctions the Australian Government to assume sovereignty over our lands, territories and resources. Unlike the United States of America (USA), Canada and New Zealand, the British did not sign a treaty with our ancestors when they arrived on our lands. Indeed, until the Mabo High Court decision in 1992, the jurisprudence reflected the clearly-erroneous view that no one lived in Australia prior to 1788.

For many Aboriginal and Torres Strait Islander peoples, this absence of a treaty recognising our sovereignty over our lands, territories and resources remains unfinished business.

We have *never* ceded sovereignty over our lands, territories and resources, and our governance and control of our traditional lands, territories and resources was taken without our consent and without our agreement.

We must also separate the question of territorial sovereignty from cultural sovereignty. Our cultural sovereignty has always been and continues to be maintained by Aboriginal and Torres Strait Islander peoples. While some may find this statement contentious, it simply recognises what we all know – that Aboriginal and Torres Strait Islander peoples have lived in Australia for over 70 000 years and despite being subjected to a process of colonisation for more than 220 years, our culture continues to adapt, thrive and be the foundation for every aspect of our lives.

There are some legal frameworks that recognise our ability to engage and coexist with people who have come to this country since 1788. For example, the Native Title Act provides a framework for acknowledging our traditional rights and interests and the coexistence of these rights with other people's interests over our lands, territories and resources. The Declaration also sets out principles for our engagement with government and external stakeholders. The capacity for the Declaration to do this is reinforced in its Preamble, where the General Assembly of the United Nations says that:

> …this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.[12]

It is these legal frameworks – and in particular, the Declaration – that can provide a foundation for us to establish a common understanding about how our Indigenous governance can be effective, legitimate and culturally relevant.

12 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular paragraph 18.

2.2 Indigenous governance

While the literature on Indigenous governance largely focuses on identifying key characteristics of 'effective' or 'good' governance, human rights standards as expressed in international treaties and conventions ratified by the Australian Government highlight the principles that underpin culturally safe and legitimate governance for Indigenous peoples.

In this section, I outline some of the key themes in the international and Australian literature on Indigenous governance and set out international human rights standards in order to identify the critical factors that enable effective governance for Aboriginal and Torres Strait Islander peoples. A more detailed analysis and discussion of the literature on Indigenous governance is provided in the *Social Justice Report 2012*.

(a) The literature on Indigenous governance

Internationally, Indigenous governance has been extensively researched by the Harvard Project and the Native Nations Institute in the United States of America (USA) and the NCFNG in Canada.

While we need to be cautious about adopting overseas Indigenous governance successes without acknowledging and considering their different legal and constitutional frameworks,[13] these international projects can provide useful insights into what enables effective governance for Indigenous peoples.

(i) The Harvard Project on American Indian Economic Development

Since 1987, the Harvard Project has researched a 'nation building' approach to economic development on Indian reservations in the USA.[14] This approach focuses on the governance 'building blocks' that enable sustained social and economic development for Indigenous peoples: see Text Box 2.1.

Text Box 2.1:
The Harvard Project on American Indian Economic Development: the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations[15]

- **Sovereignty Matters.** When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.
- **Institutions Matter.** For development to take hold, assertions of sovereignty must be backed

13 Australian Institute of Aboriginal and Torres Strait Islander Studies and the Australian Collaboration, *Organising for Success: policy report, successful strategies in Indigenous organisations* (2007), p 2. At http://www.aiatsis.gov.au/research/success.html (viewed 11 May 2012).

14 S Cornell and JP Kalt, 'Sovereignty and Nation-Building: the development challenge in Indian country today' in *American Indian Culture and Research Journal* (2003), pp 187–214. At http://nni.arizona.edu/resources/inpp/2003_CORNELL.kalt_JOPNA_sovereignty.nation-building.pdf (viewed 10 July 2012).

15 The Harvard Project on American Indian Economic Development, 'Overview'. At http://hpaied.org/about-hpaied/overview (viewed 22 May 2012).

by capable institutions of governance. Nations do this as they adopt stable decision rules, establish fair and independent mechanisms for dispute resolution, and separate politics from day-to-day business and program management.

- **Culture Matters.** Successful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.
- **Leadership Matters.** Nation building requires leaders who introduce new knowledge and experiences, challenge assumptions, and propose change. Such leaders, whether elected, community, or spiritual, convince people that things can be different and inspire them to take action.

In summary, the Harvard Project argues that Indigenous peoples must be enabled to make our own decisions, supported by our institutions that are grounded in our cultures and guided by our leadership.

(ii) National Centre for First Nations Governance

In Canada, the NCFNG sets out a hierarchy of 17 principles focused on five components of governance:

- people
- land
- laws and jurisdictions
- institutions
- resources.[16]

The NCFNG explains the relationship between these five governance components as follows:

> Effective governance begins with the People. It is only through *the People* that we can begin to shape the strategic vision that serves as the signpost for the work that those communities and their organisations engage in. When the People have shared information, collectively made decisions and determined the strategic vision, their attention moves to where they sit – *to the Land*. Aboriginal title is an exclusive interest in the Land and the right to choose how that Land can be used. It is then through *Laws and Jurisdictions* that the rights of the Land are made clear. Following from and consistent with the Laws and Jurisdictions is the emergence of *Institutions* and the identification of the Resources required to realise and to ensure the continuity of effective governance [italics in original].[17]

This approach to Indigenous governance provides a comprehensive insight to the interaction of the components that affect governance for Indigenous peoples.

(iii) Australian research and literature

In Australia, the research on Indigenous governance has built upon the international empirical literature. In 2003, Mick Dodson and Diane Smith extracted principles of effective governance from the Harvard Project

16 National Centre for First Nations Governance, note 4, pp vii-viii.

17 National Centre for First Nations Governance, above.

and applied them to the domestic Australian context to determine principles of effective governance for Aboriginal and Torres Strait Islander peoples.[18]

As I discuss the Australian literature on Indigenous governance extensively in the *Social Justice Report 2012*, in this Chapter I only highlight some of the key findings from the Indigenous Community Governance Project that was undertaken by Reconciliation Australia and the Centre for Aboriginal Economic Policy Research (CAEPR) from 2004 to 2008: see Text Box 2.2.

Text Box 2.2:

The factors that enable effective governance for Aboriginal and Torres Strait Islander peoples identified by the Indigenous Community Governance Project[19]

- Indigenous relationships and systems of representation provide the basis for working out organisational structures and processes.
- Legislative, policy and funding frameworks need to adapt to different governance arrangements that are based on local realities. Equally, Indigenous communities need to consider what governance arrangements are likely to enable them to achieve their goals.
- Culturally legitimate representation and leadership requires governance structures to reflect contemporary values and conceptions about the organisation of authority and exercise of leadership.
- Building the capacity of institutions of governance (such as policies, rules and constitutions) increases the effectiveness and legitimacy of community governance arrangements.
- Effective leadership, which enables consensus-making within communities, is critical to developing strong community governance.
- Governance capacity is a fundamental factor to generate sustainable economic development and social outcomes.
- The wider federal, state, regional and community governance environment can either enable or disable the governance of Indigenous communities.
- The criteria for evaluating effective governance is different for Indigenous peoples and governments: Indigenous peoples value internal accountability and communication; governments emphasise 'upwards' accountability, financial micro-management and compliance reporting.

This research highlights the importance of recognising the unique arrangements that must be in place for our governance processes and structures to be effective. This includes the need to integrate our culture and traditional systems of governance, and recognise our limited capacity to deal with the wider governance environment of federal, state/territory and local governments and other external stakeholders.

18 Dodson and Smith, note 9, pp 13–19.

19 J Hunt and DE Smith, *Ten key messages from the preliminary findings of the Indigenous Community Governance Project* (2005). At http://caepr.anu.edu.au/sites/default/files/Publications/WP/10key.pdf (viewed 22 May 2012).

(b) A human rights approach to Indigenous governance

Human rights standards, as set out in international treaties and conventions ratified by the Australian Government, guide our understanding of the principles that support effective, culturally relevant and legitimate Indigenous governance. The following outlines Australia's human rights obligations as set out in the Australian Human Rights Framework and the Declaration, and then articulates a human rights approach to Indigenous governance.

(i) International human rights standards and the Australian Human Rights Framework

As a party to international human rights treaties, Australia's obligations under international law were reaffirmed by the Australian Human Rights Framework that is based on five key principles:

- reaffirming a commitment to our human rights obligations
- the importance of human rights education
- enhancing our domestic and international engagement on human rights issues
- improving human rights protections including greater parliamentary scrutiny
- achieving greater respect for human rights principles within the community.[20]

Australia's human rights obligations arise as a result of the ratification of seven core international human rights treaties: see Text Box 2.3.

Text Box 2.3:
International human rights treaties ratified by Australia

- International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- International Convention on the Elimination of all forms of Racial Discrimination (ICERD)
- Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)
- Convention on the Rights of the Child (CRC)
- Convention on the Rights of Persons with Disabilities (CRPD)
- Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT).

The ratification of these treaties requires the Australian Government to implement them domestically. However, as highlighted in the Australian Human Rights Framework, all members of the community have a responsibility to recognise and respect each other's human rights.

20 Australian Government, Attorney-General's Department, *Australian Human Rights Framework* (2010). At http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiashumanrightsframework/Pages/default.aspx (viewed 10 July 2012).

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration was adopted by the Australian Government in 2009. As the Declaration affirms in Article 1, it does not create new human rights but rather reflects existing rights as they apply to our peoples:

> Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 17(1) also establishes the relationship between our human rights and international and domestic law:

> Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

The Australian Government recently wrote that it will interpret the Declaration:

> …in accordance with Article 46 which clarifies that the Declaration cannot be used to impair territorial integrity or political unity, and that it is subject to the 'limitations as are determined by law and in accordance with international human rights obligations'. The Declaration is not legally binding in nature. There is no legal obligation upon States to implement the Declaration domestically, or to ensure that its laws and policies are consistent with the Declaration. [21]

However, I note that this statement is inconsistent with the Minister for Families, Community Services and Indigenous Affairs' speech when the Government adopted the Declaration on 3 April 2009. Minister Macklin stated:

> The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians. The Declaration recognises the legitimate entitlement of Indigenous people to all human rights – based on principles of equality, partnership, good faith and mutual benefit... Today Australia takes another important step to make sure that the flawed policies of the past will never be re-visited... Australia's existing obligations under international human rights treaties are mirrored in the Declaration's fundamental principles. The Declaration needs to be considered in its totality – each provision as part of the whole. Through the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully. [22]

It is also contrary to the view of the United Nations Special Rapporteur on the rights of indigenous peoples (Special Rapporteur), James Anaya, who states that the 'implementation of the Declaration should be regarded as a political, moral and, yes, legal imperative'.[23] In particular, he notes that:

> …even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal obligations that are related to the human rights provisions of the Charter of the United Nations, various multilateral human rights treaties and customary international law. The Declaration builds upon the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles

21 Australian Government, *Australian Government and Non-Government Organisations Forum on Human Rights: background paper*, Canberra (14 and 15 August 2012), p 8.

22 The Hon J Macklin MP, Minister for Families, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/node/1711 (viewed 13 August 2012).

23 United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011), para 70. At http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/449/42/PDF/N1144942.pdf?OpenElement (viewed 1 June 2012).

> of the Declaration can be seen to connect to a consistent pattern of international and State practice, and hence, to that extent, they reflect customary international law.[24]

Given that each of the articles in the Declaration is sourced in international law, I urge the Australian Government to accept its' obligations and to work with Aboriginal and Torres Strait Islander peoples to implement the Declaration.

In last year's Social Justice and Native Title Reports, I discussed how the Declaration incorporates four fundamental human rights principles that can be categorised as:

- self-determination
- participation in decision-making and free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

These principles are inextricably linked and indivisible, and our Indigenous governance must be underpinned by all of these principles if we are to realise our human rights. However, as each of these human rights principles has different implications for Indigenous governance, I consider them separately below.

Self-determination

Self-determination is about us deciding our own economic, social, cultural and political futures. At its core, 'self-determination is concerned with the fundamental right of people to shape their own lives.'[25]

The right of self-determination is protected in Article 1 of the ICCPR, which states:

> (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
>
> (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources…In no case may a people be deprived of its own means of subsistence.

Our right to self-determination is also enshrined in the Declaration. Articles 3 and 4 explain that our right to self-determination includes our right to freely determine our political status and economic, social and cultural development, and our right to autonomy or self-government in matters relating to our internal and local affairs.

Article 5 considers how our governance within our own institutions co-exists with our participation in the governance of governments. This involves our right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions while retaining our right to participate fully in the political, economic, social and cultural life of the state. In the words of the Special Rapporteur, this:

> …reflects the common understanding that indigenous peoples' self-determination ordinarily involves not only the exercise of autonomy but also a participatory engagement and interaction with the larger societal structures in the countries in which indigenous peoples live.[26]

Therefore, Indigenous governance structures and processes should enable self-determination and must reflect that we are 'equally entitled' to be in control of our own destinies and to participate in the activities

24 United Nations General Assembly, above, para 68.

25 C Fletcher (ed), *Aboriginal Self-Determination in Australia*, Aboriginal Studies Press, Canberra (1994), p xi.

26 United Nations General Assembly, note 23, para 65.

of our governing institutions.[27] In practice, this could occur through a range of governance mechanisms for Aboriginal and Torres Strait Islander peoples including:

- creating our own representative bodies
- creating our own schools, justice systems, health systems
- having control over our lives
- being able to participate in decisions that affect us
- being subject to our own laws
- establishing our own government
- establishing our own sovereign state.

These options were set out in the *UN Declaration on the Rights of Indigenous Peoples Commission Network Survey* undertaken by the Australian Human Rights Commission in June–July 2012.

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

As with the principle of self-determination, our participation in decision-making, good faith, and free, prior and informed consent reinforces each of our rights contained in the Declaration. This has been affirmed by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP):

> The right to full and effective participation in external decision-making is of fundamental importance to indigenous peoples' enjoyment of other human rights. For instance, the right of indigenous peoples to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services is crucial for their enjoyment of the right to education.[28]

The Declaration establishes the rights of Indigenous peoples to participate in decision-making in matters that affect us, and to develop and maintain our own decision-making systems and institutions (see Articles 18, 20 and 23).

Indigenous participation in decision-making has two distinct parts, internal participation and external participation:

- Internal participation includes Indigenous governance, legal systems, institutions and internal decision-making structures and processes.[29]

27 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: the United Nations Declaration in the Rights of Indigenous Peoples,* (2009), p 187.

28 Office of the High Commissioner for Human Rights, *Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making* (2011), para 13. At http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf (viewed 28 November 2011).

29 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*, UN Doc A/HRC/18/42, paras 42–66. At http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/18/42 (viewed 10 August 2012).

- External participation includes participation in electoral politics, participation in parliamentary processes, and direct participation in governance amongst others.[30]

It is essential that external decision-making processes and institutions both recognise and support the internal participation in decision-making of our peoples.

There are three key elements that enable our effective participation in decision-making. These are:

- a duty to consult
- good faith
- free, prior and informed consent.

The obligation for governments to uphold each of these elements is outlined in Article 19 of the Declaration, which requires governments to consult in good faith with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

A duty to consult

The Special Rapporteur has outlined that governments have a duty to consult with Indigenous peoples 'whenever a State decision may affect indigenous people in ways not felt by others in society', even if their rights have not been recognised in domestic law.[31] Furthermore, the objective of consultations 'should be to obtain the consent of the indigenous peoples concerned'.[32]

In practice, a duty to consult requires that:

- consultation processes should 'make every effort to build consensus on the part of all concerned'[33]
- traditional and contemporary forms of Indigenous peoples' governance – including collective decision-making structures and practices – should be promoted and respected
- Indigenous peoples' right to participate in all levels of decision-making – including external decision-making – should be promoted and respected.[34]

This means that Indigenous peoples must be recognised and treated as substantive stakeholders in the development, design, implementation, monitoring and evaluation of all policies and legislation that impact on our well-being.

Good faith

There are two aspects of good faith; cooperation and fairness:

30 Human Rights Council, *Progress report 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 67–101. At http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/134/39/PDF/G1013439.pdf?OpenElement (viewed 10 August 2012).

31 J Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Report to the Human Rights Council*, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement (viewed 16 August 2012).

32 Anaya, above, para 65.

33 Anaya, above, para 48.

34 Human Rights Council, note 29, annex paras 29–30.

> Good faith as cooperation requires cooperation from contracting parties in order to facilitate successful performance of the contract. Good faith as fairness qualifies the decision of a party to exercise her or his contractual powers in order to ensure some level of consideration for the interests of the other party to the contract.[35]

The EMRIP suggests that consultations incorporating good faith require that:

> …consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus.[36]

Thus, good faith ensures that decision-making processes are fair, cooperative and consistent with our cultural practices. This means that all parties – Indigenous and non-indigenous – involved in the decision-making need to be respectful of each other's needs and priorities, and be prepared to engage with the intent of reaching an agreed outcome.

Free, prior and informed consent

Our participation in decision-making must be underpinned by the principle of free, prior and informed consent. Free, prior and informed consent is explained as:

- *Free* means there must be no force, intimidation, manipulation, coercion or pressure by any government or company.
- *Prior* means we must be given enough time to consider all the information and make a decision.
- *Informed* means we must be given all the relevant information to make a decision. This information must be in a language that people can easily understand. We must also have access to independent information and experts on law and technical issues.
- *Consent* means that we must be allowed to say 'yes' or 'no' according to our own decision-making process.[37]

The issue of consent and whether this includes allowing Indigenous people to say 'no' has been contentious for a number of countries including Australia. This concern reflects the view that saying 'no' could amount to a right of veto for Indigenous peoples, which could threaten the 'territorial integrity' of the Australian Government.[38]

Kenneth Deer explains that the right to free, prior and informed consent is:

> …not automatically a veto, since our human rights exist relative to the rights of other. 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.[39]

The Special Rapporteur asserts that a:

35 J Paterson, A Robertson and P Heffey (eds), *Principles of Contract Law* (2nd edition), p 305.

36 Human Rights Council, note 29, annex para 9.

37 Adapted from C Hill, S Lillywhite and M Simon, *Guide to Free, Prior and Informed Consent,* Oxfam Australia (2010), p 9. At http://www.culturalsurvival.org/files/guidetofreepriorinformedconsent_0.pdf (viewed 10 August 2012).

38 See Article 46 of the *United Nations Declaration on the Rights of Indigenous Peoples* and the Australian Government, note 21, p 8.

39 K Deer, 'Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples' in J Hartley, P Joffe and J Preston (eds) *Realising the UN Declaration on the Rights of Indigenous Peoples: triumph, hope and action*, Purich Publishing Canada, (2010), p 27.

> …significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.[40]

The International Law Association clarifies that the principle of free, prior and informed consent must be examined within the context of the object and purpose of the Declaration:

> …although States are not obliged to obtain the consent of indigenous peoples before engaging in *whatever kind* of activities which may affect them – this obligation exists any time that the lack of such a consent would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect [italics in original].[41]

So, how are the elements of a duty to consult, good faith, and free, prior and informed consent reflected in Indigenous governance? And what does participation in decision-making look like in practice?

For us to exercise our right to free, prior and informed consent and participate in decision-making regarding the terms of projects, policies and laws that affect us, governments and external stakeholders need to:

- respect and support our representative and decision-making processes and structures
- provide us with complete access to all relevant information in a culturally appropriate manner, including our own languages
- engage with our peoples and our representative organisations in a cooperative and fair manner that is respective of our needs and priorities
- provide us with adequate timeframes to make a decision
- allow us to say no.

Respect for and protection of culture

Culture incorporates our ways of being, knowing and doing – it is the foundation of our individual and collective identity. 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 including collectively held norms, values, attitudes, beliefs…while cultural practices are evidenced in the language, law and kin relationship practices of a society.[42]

In Australia, we must recognise that we have hundreds of nations of Aboriginal and Torres Strait Islander peoples, each of which has its own distinct cultural norms, law, language and identity.

While our culture can manifest in many forms, the survival of our culture is passed on to our future generations through our art, dance, song, language and knowledge. We maintain our culture by asserting and reinforcing:

- our physical and spiritual relationships to each other, and to our lands, territories and natural resources
- our distinct identities, languages and laws

40 Anaya, note 31, para 47.

41 International Law Association, Sofia Conference: *Rights of Indigenous Peoples Final Report* (2012), p 7. At http://www.ila-hq.org/en/committees/index.cfm/cid/1024 (viewed 16 August 2012).

42 M J Hallaran, '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.murdoch.edu.au/elaw/issues/v11n4/halloran114.html (viewed 8 August 2012).

- our knowledge
- our common responsibilities to promote, maintain and protect each of these elements, now and into the future.

The imperative for us to protect our culture and the wisdom we have inherited from our ancestors has been described by Mick Dodson:

> We cannot survive as distinct peoples, nor can we exercise our fundamental rights as peoples unless we are able to conserve, revive, develop and teach that wisdom. Without the connection with our cultural heart, the enjoyment of all other rights is a superficial shell.[43]

Respecting and protecting our culture also impacts on other human rights principles in the Declaration. David Cooper from the Aboriginal Medical Services Alliance in the Northern Territory (AMSANT) describes how culture can ameliorate the impact of racism and discrimination:

> Culture and language, and occupation and customary use of traditional lands (and its individual and community manifestation as cultural identity) provide powerful moderating effects on the impacts of racism and discrimination, and can provide a foundation for stronger communities and healthier lives.[44]

The Declaration articulates our right to culture in Articles 8(1), 11(1), 15(1) and 31(1), and includes our right to maintain, protect and practice our cultural traditions and cultural heritage.

The responsibility of governments to respect and protect our culture is also set out in Articles 8(2)(a), 11(2) and 14(3) of the Declaration. This includes the requirement to provide effective mechanisms to protect:

- our integrity as distinct peoples
- our cultural values
- our cultural, intellectual, religious and spiritual property
- our children's access to an education in our own language.

Importantly, governments must provide redress if this protection is violated.

These articles in the Declaration reinforce our rights to have governance structures and processes that are compatible with respecting and protecting our culture. Culture within the context of our Indigenous governance is about enabling us, as Aboriginal and Torres Strait Islander peoples, to continue our customary and historical – as well as our contemporary – ways of organising ourselves and making decisions about matters that affect us.

The respect for and protection of our culture also underpins and informs the requirement for governments to increase their cultural competency and engage with Aboriginal and Torres Strait Islander peoples in a culturally safe and culturally secure manner.

Non-discrimination and equality

Our right to non-discrimination and equality is outlined in Articles 2 and 9 of the Declaration, which articulates the right for us to be 'free and equal to all others' and to be 'free from any kind of discrimination'. The

43 M Dodson, *Cultural Rights and Educational Responsibilities* (The Frank Archibald Memorial Lecture, 5 September 1994). At http://www.humanrights.gov.au/about/media/speeches/social_justice/educational_responsibilities.html (viewed 9 August 2012).

44 D Cooper, *Closing the Gap in Cultural Understanding: social determinants of health in Indigenous policy in Australia*, Aboriginal Medical Services Alliance, Darwin (2011), p 13. At http://www.amsant.org.au/documents/article/61/2011-Closing%20the%20Gap%20and%20Indigenous%20social%20determinants-Final.pdf (viewed 11 July 2012).

principles of discrimination and equality are also set out in Article 26 of the ICCPR, which reads:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Racial discrimination is defined in Article 1(1) of the ICERD as:

> …any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Equality as a human rights principle affirms that:

- all human beings are born free and equal
- all individuals have the same rights and deserve the same level of respect
- all people have the right to be treated equally.

These characteristics are based on two models of equality; namely, formal and substantive equality:

- Formal equality relies on the concept that all people should be treated identically regardless of difference.
- Substantive equality acknowledges that rights, opportunities and access are not equally distributed throughout society and a 'one size fits all' approach will not achieve equality.

The Human Rights Committee, which oversees the implementation of the ICCPR, has adopted a substantive equality approach and indicated that equality 'does not mean identical treatment in every instance'.[45] Substantive equality can be created by policies that provide redress for racially specific aspects of discrimination such as cultural difference, historical subordination and socio-economic disadvantage.

Governments have a responsibility to protect our right to non-discrimination and equality. Articles 8(2)(e), 15(2) and 22(2) of the Declaration outline the obligation of governments to take effective measures to prevent racial discrimination, and promote tolerance and good relations among Indigenous peoples and other segments of society.

Broadly, the principles of non-discrimination and equality mean that we should be able to govern ourselves without discrimination from individuals, governments and/or external stakeholders, while acknowledging that a substantive equality approach may be required. These principles need to be enshrined in our Indigenous governance institutions, constitutions and laws/rules *and* in the legislation and policy frameworks of governments and external stakeholders that engage with our communities.

Are these human right principles reflected in governance for Aboriginal and Torres Strait Islander peoples in Australia?

There are consistent themes in the literature and international human rights standards that identify the factors that enable effective, legitimate and culturally safe governance for Indigenous peoples. For example, the

45 Human Rights Committee, *General Comment XVIII, Non-discrimination* (1989), paras 8, 9 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/ Rev. 1, p 26.

Indigenous Community Governance Project and its' associated Indigenous Governance Toolkit[46], the Harvard Project and the NCFNG acknowledge the essential roles of self-determination and culture in our governance.

However, despite the substantial empirical research that shows strengthening the governance of our Indigenous organisations and governments is critical to improving the well-being of our Aboriginal and Torres Strait Islander peoples,[47] there have been few changes 'on the ground' for our peoples and communities. While we may have legislative frameworks that establish governance mechanisms for our communities, our ability to be in control of our lives is often regulated by government 'red-tape'.

I am extremely concerned that there continues to be significant disparity between human rights standards which are supported in government rhetoric and the impact of government policies and legislation that continue to disempower our Aboriginal and Torres Strait Islander peoples and communities. I discuss this in detail in the *Social Justice Report 2012.*

46 See Reconciliation Australia, *Indigenous Governance Toolkit*. At http://www.reconciliation.org.au/governance/home (viewed 10 August 2012).

47 Tsey et al, note 8.

2.3 What enables effective Indigenous governance?

It is my view that effective governance for Aboriginal and Torres Strait Islander peoples needs to start with us – with our peoples and with our communities.

We must draw on our unique history of traditions, law, knowledge and wisdom to guide how we make decisions about our lives in a way that is relevant for us. But we also need to be given the space to decide how we organise ourselves and make decisions, and we need to acknowledge that this will differ between our communities. This underpins our fundamental human right of self-determination.

If we want to achieve effective Indigenous governance that enables us to realise our aspirations, we must embrace the principles in the Declaration and acknowledge that our governance is an interrelationship between our peoples and communities, our organisations and governments.

Enabling effective Indigenous governance must consider:

- how we make decisions
- how we resolve disputes
- how we negotiate with governments and external stakeholders
- how we exercise our authority and rights
- how we design our governing institutions
- what we need to do to look after our peoples and our lands, territories and resources.[48]

In last year's Social Justice Report, I explained the concepts of cultural safety and cultural security, and made the following recommendations:

- that governments, working with Aboriginal and Torres Strait Islander peoples, conduct an audit of cultural safety and security in relation to their policies and programs that impact on Aboriginal and Torres Strait Islander communities
- that all governments, working with Aboriginal and Torres Strait Islander peoples, based on the audit of cultural safety and security, develop action plans to increase cultural competence across their government.[49]

I reaffirm it is essential that governments implement these recommendations if our governance is to be effective, culturally safe and legitimate.

Roadblocks to Indigenous governance

The Australian Government has invested in improving 'corporate' governance for our communities by providing training on how to run meetings, set up management boards and establish transparent financial management systems.

But while I believe that it is essential that our organisations are transparent and accountable to their members and their funders, government agencies focusing *solely* on the administration of our organisations and creating 'checklists' for management structures and systems does not assist us to achieve our social, economic, cultural and political aspirations. Rather, these attitudes have the opposite effect of reinforcing outside

48 S Cornell, Co-Director of the Harvard Project on American Economic Development, Email to L Gunn Senior Policy Officer in the Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 23 July 2012.

49 See *Social Justice Report 2011*, note 11, p 167.

influence and control.

Talking with Aboriginal and Torres Strait Islander peoples across the country, I regularly hear stories of governments acting as a 'roadblock' to our communities. If we are to address the critical issues in our communities, governments need to create *less* bureaucratic burden for our communities and do *more* to enable Aboriginal and Torres Strait Islander peoples to realise their unique aspirations.

The current focus of the Government on the administration of our organisations addresses only the organisational governance for our peoples. It does not accurately reflect the principles in the Declaration nor recognise the interrelationship between our community's governance, the requirements of our organisations and institutions to comply with government regulations/legislation, and the ways in which governments govern with respect to Aboriginal and Torres Strait Islander peoples.

(a) Indigenous governance framework

Our contemporary models of Indigenous governance are required to exist within the policies and legislation of governments. This means there are requirements for our organisations to meet particular conditions of government and obligations to our peoples.

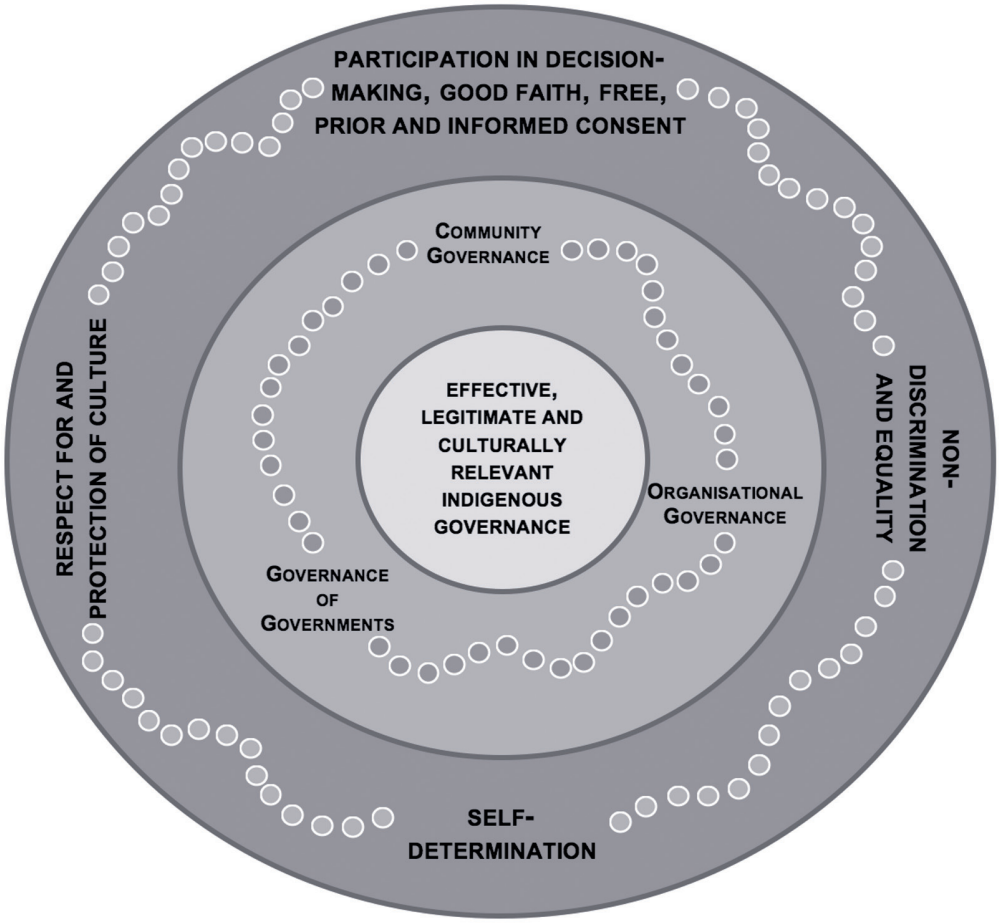
To illustrate these concepts, I have set out a framework that has three components of Indigenous governance:

- community governance
- organisational governance
- the governance of governments.

The interrelationship between these three components of Indigenous governance is shown in Diagram 2.1.[50] Each of these components must be grounded in the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality.

50 I acknowledge that diagrams in the 'Different Models of Indigenous Governance' in the *Indigenous Governance Toolkit* at http://www.reconciliation.org.au/getfile?id=996&file=Resource+1.4+Different+models+of+Indigenous+governance.pdf (viewed 6 September 2012) and models in the *National Indigenous Governance and Leadership Framework / Discussion Paper* (21 October 2011) that was provided to me on a draft and without prejudice basis contributed to this diagrammatic view of Indigenous governance.

Diagram 2.1:
Facilitating effective, legitimate and culturally relevant Indigenous governance[51]



51 This diagram illustrates how the human rights principles in the Declaration underpin our Indigenous governance. The dots represent the storylines and interconnected relationships between these principles and between the three components of community governance, organisational governance and the governance of governments.

The guiding standards for each of these components of Indigenous governance are outlined below.

(i) Community governance

Community governance should be grounded in our right to self-determination which addresses 'who we are', 'who we represent', 'what we speak for' and 'how we make decisions'. Effective community governance must:

- be the foundation for organisational governance and provide guidance to governments
- begin with and be underpinned by respect for and protection of our culture
- determine what constitutes legitimacy for us (that is, who can speak when, for whom, to whom and regarding what)
- ensure our participation (particularly of those who are the most vulnerable in our communities) in decision-making through complete access to all relevant information and appropriate timeframes
- enable us to identify our short-term priorities and long-term economic, social, political and cultural aspirations.

(ii) Organisational governance

Organisational governance is reflected in our institutions, our processes and the resources we can access. Effective organisational governance:

- aligns with our community governance and is consistent with effective inter-governmental relations
- enables our participation in decision-making in matters that affect us based on our right to give or not to give our free, prior and informed consent
- ensures our participation in decision-making in a cooperative and fair manner
- incorporates respect for and protection of our culture, including culturally legitimate representation and leadership
- supports the principles of non-discrimination and equality
- ensures transparency and fairness for all members of our communities
- ensures accountability to the community governance structures.

These values can be enshrined in our organisations':

- rules, laws and/or constitution
- dispute resolution mechanisms
- limitation and separation of powers
- human resource management, information management and financial management systems, including performance evaluation, accountability and reporting systems.

(iii) Governance of governments

The role of governments is to enable governance by our peoples and within our communities and to enhance our economic and social development by:

- ensuring that government policies, legislation and structures facilitate strong community governance and organisational governance
- coordinating and reconciling different legislative, policy, programs and administrative arrangements within and between governments
- respecting and supporting our representative and decision-making processes and structures
- reforming funding and reporting processes so that they are proportionate to the amount granted and provide our organisations with long-term funding certainty
- investing in our institutional capacity building[52]
- providing us with complete access to all relevant information in a culturally appropriate manner, including our own languages
- ensuring appropriate levels of cultural competency and skills in all staff working with our communities
- providing us with adequate timeframes to make a decision.

These standards must be met if we are to achieve effective governance for our peoples.

A broader framework of Indigenous governance is set out in the *Social Justice Report 2012.*

52 S Cornell, C Curtis and M Jorgensen, *The Concept of Governance and its Implications for First Nations*, Joint Occasional Papers on Native Affairs No 2004-02 (2004), pp 23– 28.

2.4 Governing our lands, territories and resources

This section builds on and applies the three components of Indigenous governance – community governance, organisational governance and the governance of governments – to our governance over lands, territories and resources. I firstly consider our Indigenous rights to our lands, territories and resources as established in the Declaration; and secondly, address how we can facilitate effective Indigenous governance in relation to our lands, territories and resources.

For Indigenous peoples throughout the world, 'land is not only a means of production and survival but is central to how they define their identity'.[53] Consequently, effective Indigenous governance over our lands, territories and resources is fundamental to achieving our social, economic, political and cultural aspirations.

(a) Indigenous rights to lands, territories and resources

Our rights to lands, territories and resources are described in Articles 25–32 of the Declaration: see Text Box 2.4.

Text Box 2.4:
Indigenous rights to lands, territories and resources articulated in the Declaration

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

(1) Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

(2) Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

(3) States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous

53 CK Roy, 'Indigenous Peoples in Asia: rights and development challenges' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous People* (2009), p 226.

peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

(1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

(2) Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources.

Article 29

(1) Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.

(2) States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

(3) States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

(1) Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.

(2) States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

(1) Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

(2) In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

(1) Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

(2) States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

(3) States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

The Declaration acknowledges 'the spiritual relationship that indigenous peoples have with their lands, territories and resources, along with their right to own, use, develop and manage them by means of their own laws and land tenure systems'.[54]

Our governance over our traditional lands, territories and resources is framed by the Declaration. For example:

- our right to self-determination and participation in decision-making that is established in Article 32(1), which sets out our right to 'determine and develop priorities and strategies for the development or use of' our lands, territories and resources
- our right to free, prior and informed consent over projects on our lands, territories and resources that is articulated in Article 32(2)
- our right to maintain and protect our cultural heritage on and traditional knowledge about our lands, territories and resources that is expressed in Article 31(1)
- our right to conserve and protect the environment of our lands, territories and resources without discrimination that is acknowledged in Article 29(1).

The obligations of governments to support our governance over our lands, territories and resources are also set out in the Declaration. These include the requirement to:

- recognise our right to self-determination (see Articles 3 and 4)
- recognise and protect our lands, territories and resources (see Article 26(3))
- in conjunction with us, establish a process to recognise and adjudicate our rights pertaining to our traditionally owned and occupied lands, territories and resources (see Article 27)
- seek our free, prior and informed consent for projects on our lands, territories and resources (see Article 32(2))

54 A Montes and G Cisneros, 'The United Nations Declaration on the Rights of Indigenous People: the foundation of a new relationship between indigenous peoples, states and societies' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous People* (2009), p 152.

- provide effective redress to mitigate adverse impacts on our lands, territories and resources (see Article 32(3)).

(i) Substantive and procedural rights to lands, territories and resources

As Indigenous peoples, our unique relationships with and responsibilities to our lands, territories and resources also give rise to primary substantive rights. These rights include:

> …rights to property, culture, religion, and non-discrimination in relation to lands, territories and resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development…as part of their fundamental right to self-determination.[55]

Decisions that we make about developments such as extractive industries occurring on or near our lands, territories and resources should consider the impact of these projects on our substantive rights.

The Human Rights Council notes that when we participate in decisions about our lands, 'indigenous peoples' procedural rights must not have priority over indigenous peoples' substantive rights'.[56] This is because 'the procedural aspects of the right (such as consultation) exist to promote the substantive right' such as the right to our lands and our culture.[57]

(b) The effect of territorial sovereignty on our rights to and governance over lands, territories and resources

I discussed briefly in section 2.1 how the history of our colonisation has sanctioned the Australian Government to assume territorial sovereignty over our traditional lands, territories and resources.

This history of colonisation creates an inherent tension for Aboriginal and Torres Strait Islander peoples and the Australian Government in relation to Article 26 of the Declaration. This is because Article 26 affirms our rights to lands, territories and resources that we have traditionally owned and occupied, and requires governments to give recognition and protection of this right. While much of this tension originates from the British asserting their territorial sovereignty over our lands and territories without our agreement, the tension is exacerbated by current legislation that seeks to accommodate our substantive property rights in relation to native title, land rights and cultural heritage in fragmented processes across the country.

In last year's Native Title Report, I outlined 36 Acts legislated by the Commonwealth, state and territory governments that establish our rights to our lands, territories and resources.[58] This body of legislation is characterised by its sheer volume and the different mechanisms set out in various states and territories to recognise some aspects of our rights to our lands, territories and resources. Further, because legislation is usually drafted without the involvement of Aboriginal and Torres Strait Islander peoples and is agreed to by non-indigenous institutions, it does not reflect our traditional mechanisms for inheriting, holding and looking

55 J Anaya, Report of the Special Rapporteur on the rights of indigenous people, *Report to the Human Rights Council,* 21st session, UN Doc A/HRC/21/47 (2012), para 50. At http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47-Add2_en.pdf (viewed 31 August 2012).

56 Human Rights Council, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UN Doc A/HRC/21/55 (2012), para 36. At http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf (viewed 3 September 2012).

57 Human Rights Council, above.

58 Native Title Report 2011, note 11, pp 103–104.

after our lands, territories and resources.[59] This creates 'highly variable'[60] and inconsistent outcomes for the recognition of our rights to our lands and territories, which in turn have implications for our governance over our traditional lands, territories and resources.

I believe that it is the duty of governments – as part of their support of Indigenous governance of our lands, territories and resources – to reconcile this maze of legislation so that these variable and inconsistent outcomes are minimised. I cover this in further detail in the following section when I discuss the governance of governments.

It is within these legislative frameworks that we are required to negotiate with governments and external stakeholders over the use of our traditional lands, territories and natural resources. In Chapter 3, I discuss this further in relation to the Native Title Act.

(c) Facilitating effective Indigenous governance over lands, territories and resources

I now consider how the standards of effective community governance, organisational governance and the governance of governments can provide a framework for our negotiations with governments and external stakeholders in relation to developing and using our traditional lands, territories and resources.

As with the framework of effective Indigenous governance outlined in section 2.3, each of these components of governance must be underpinned by the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality.

I particularly highlight our right to free, prior and informed consent in relation to projects occurring on our lands, territories and resources. Article 32(2) and (3) of the Declaration states that the use and enjoyment of lands, territories and resources by third parties requires the free, prior and informed consent of Indigenous peoples and, if this is not forthcoming, must be accompanied by redress.[61]

The International Law Association remarks that when 'the essence of their cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory'.[62] In particular, it notes the Declaration highlights four situations where our consent is required. These are:

- where Indigenous peoples might be relocated from their lands or territories (see Article 10)
- when taking Indigenous peoples' cultural, intellectual, religious and spiritual property (see Article 11(2))
- when confiscating, taking, occupying, using or damaging lands, territories and resources that are traditionally owned or otherwise occupied or used by Indigenous peoples (see Article 28(1))

59 Arguably, sections of the Native Title Act and associated case law acknowledges – and requires us to prove – our continuing traditional connection to our lands, territories and resources.

60 Dodson and Smith, note 9, p 6.

61 A Montes and G Cisneros, note 54, p 152.

62 International Law Association, note 41.

- when storing or disposing of hazardous material on the lands or territories of Indigenous peoples (see Article 29(2)).[63]

This suggests that the principle of free, prior and informed consent provides for us to say 'yes' or 'no' – with or without conditions – when making decisions in relation to these matters occurring on our lands, territories and resources.

(i) Community governance

Our community governance over lands, territories and resources must ensure that:

- we have territorial integrity over our lands, territories and resources
- we can participate in decisions about our lands, territories and resources
- we can determine the development and use of our lands, territories and resources.

Territorial integrity

Our community governance over lands, territories and resources must clearly articulate 'who we are', 'where we are from' and 'what we speak for'.

The NCFNG outlines the concept of 'territorial integrity' in the land component of its Indigenous governance model. Territorial integrity:

- recognises the 'irrevocable link' between our connection to land and governance
- acknowledges the significant challenge resulting from land alienation and destruction
- realises the process of asserting rights over land that 'must be supported by land use mapping and stewardship planning that permit the reclamation of responsibility for decision-making'.[64]

That is, territorial integrity acknowledges the effect of colonisation on our territorial sovereignty, but also provides a mechanism to address this impact and outlines a process to enable our decision-making over lands, territories and resources.

Participating in decisions about our lands, territories and resources

The Human Rights Council states that Indigenous peoples need to participate in decision-making in relation to the following activities occurring on their lands, territories and resources:

> (a) oil and gas, (b) forestry, (c) hydro development, (d) mining, (e) other forms of energy development (for example, oil palm and soya plantations), (f) bitumen (heavy oil), and (g) pipeline developments.[65]

The rationale for our participation in decision-making about these activities:

> …is sourced not only in human rights and pragmatism. It is also derived from an historical understanding of indigenous peoples' experiences of oppression and colonization including, in many cases, forced assimilation, theft of their lands, territories and resources, profound discrimination and illegitimate, often including force, assertions of political control over them. The potential for extractive activities to continue to exacerbate those historical disadvantages is very real given the often very significant power imbalances, such as in financial resources, as has been borne out by indigenous peoples' sometimes negative

63 International Law Association, above.

64 National Centre for First Nations Governance, note 4, p 11.

65 Human Rights Council, note 56, para 40.

> experience of extractive activities. The human rights risks associated with extractive activities in or near indigenous peoples' territories are aggravated by the ongoing marginalization of indigenous peoples in many States.[66]

While I agree that it is critical that we participate in decisions about major projects and extractive industries occurring on and in relation to our lands, territories and resources, it is my view that we need to be able to participate in decisions about *all* activities occurring on our lands and territories, whether it is exploring for minerals, building a bridge or constructing a public building.

To effectively participate in decisions about our lands, territories and resources, we need to:

- make customary decision-making processes integral to our internal community governance (where this is possible)
- have complete access to all relevant information
- be given appropriate timeframes to understand the information and participate in decisions
- ensure governments and external stakeholders engage with our representative bodies for lands, territories and resources, including land councils, Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs)[67] and Prescribed Bodies Corporate (PBCs).

Determining the development and use of our lands, territories and resources

Our community governance must be able to determine how we want to develop and use our lands, territories and resources. This requires us to:

- be given the time and space to identify our priorities and long-term aspirations about how we want to develop and use our lands, territories and resources
- participate in decision-making and fair and cooperative consultation processes to provide or not to provide our consent to projects
- have complete information about the project in a culturally appropriate way and be given adequate timeframes to make decisions.

(ii) Organisational governance

Indigenous peoples' right to 'promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices…and juridical systems or customs' is set out in Article 34 of the Declaration. This means that our organisational governance needs to be consistent with our cultural practices, and our institutions and decision-making processes must incorporate culturally legitimate representation, leadership and accountability.

Our organisational governance structures for our lands, territories and resources can realise these objectives by:

- aligning with and facilitating our community governance
- enabling communities to:

66 Human Rights Council, note 56, para 29.

67 NTRBs are funded by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to undertake particular functions and powers that are set out in Division 3, section 203B of the Native Title Act. Where there is no NTRB for a region, NTSPs may be funded by FaHCSIA to perform these functions.

- make considered decisions about lands, territories and resources
- undertake culturally safe negotiations with governments and external stakeholders

- enshrining rules about:
  - dispute resolution
  - conflicts of interests
  - non-discrimination
  - equality and fairness
  - financial transparency and accountability
  - the limitation and separation of powers
- being adequately resourced.

I am aware that in some areas of Australia, it may be difficult to distinguish between community governance and organisational governance in relation to lands, territories and resources. For example, community governance may overlap with (or indeed comprise) our organisational governance in situations where a PBC represents a native title group, an Aboriginal Association represents the traditional owners of a land claim, or a Land Trust represent the interests of Aboriginal and Torres Strait Islander peoples in accordance with other state legislation. I discuss this further in Chapter 3.

I also note that there may be times when our community governance is inconsistent with our organisational governance because of different priorities or responsibilities, such as protection of cultural heritage versus service delivery. This potential for inconsistency highlights the need for strong conflict resolution mechanisms.

(iii) Governance of governments

While our ability to realise our Indigenous rights to lands, territories and resources relies on Aboriginal and Torres Strait Islander peoples asserting these rights, governments also play a critical role in supporting, facilitating and enabling our capacity to assert these rights.

Governments need to acknowledge the inherent imbalance of power that exists between Indigenous peoples and governments/external stakeholders in relation to our lands, territories and resources. This is in part because governments and external stakeholders have access to resources, expertise and information that are not available to our peoples, but also because access to and enjoyment of our substantive rights to our lands, territories and resources are controlled by government legislation and policy.

Governments must therefore prioritise:

- building the capacity of our communities and organisations to make decisions through providing adequate resources, relevant expertise and appropriate information
- ensuring that government policies, legislation and structures facilitate and enable our communities and organisations to make decisions about the development and use of our lands, territories and resources.

The *Guiding Principles on Business and Human Rights*, which was endorsed by the Human Rights Council in 2011, establishes principles for governments and external stakeholders in relation to undertaking developments on our lands, territories and resources: see Text Box 2.5. (The complete *Guiding Principles on Business and Human Rights* is set out in Appendix 3.)

Text Box 2.5:
Extracts from Guiding Principles on Business and Human Rights[68]

The State duty to protect human rights

- States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
- States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The corporate responsibility to respect human rights

- Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.
- The responsibility to respect human rights requires that business enterprises:
    a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
    b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.
- In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
    a. A policy commitment to meet their responsibility to respect human rights;
    b. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

68 J Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, UN Doc A/HRC/17/31, (2011). At http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (viewed 31 August 2012).

c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Access to remedy

- As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

There are four critical actions that the Australian federal, state and territory governments and external stakeholders can undertake that will facilitate Aboriginal and Torres Strait Islander peoples' participation in decisions over our lands, territories and resources.

First, governments must reduce the substantial legislative and administrative burden that is constantly placed on our Aboriginal and Torres Strait Islander communities and organisations.

Second, federal, state and territory, and local governments need to assess the development of legislation and policies affecting our rights to our lands, territories and resources against our human rights set out in the Declaration.

Third, as I note in section 2.3, it is crucial that governments and external stakeholders engage with our communities in a culturally safe and culturally secure manner. This requires governments and external stakeholders to incorporate the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality when engaging with Aboriginal and Torres Strait Islander peoples, communities and organisations.

And finally, governments need to coordinate their legislation, policies, programs and administrative processes to reduce the administrative burden of 'red-tape' on our communities and organisations, particularly in relation to looking after our lands, territories and resources.

2.5 Conclusion

Indigenous governance is an essential ingredient for Aboriginal and Torres Strait Islander peoples' empowerment to address the challenges currently confronting us. The three components of community governance, organisational governance and government governance each play a role and need to work together if this empowerment is to be effective.

Governments should recognise our right to self-determination and work in ways that operationalize the principles of the Declaration. Sometimes this simply means getting out of the way, removing the swathes of 'red-tape' and giving our communities the time and space to take stock, make decisions and take control. Sometimes it means providing support and building capacity.

Our organisations need to be transparent, accountable and robust in their support of the community. In the words of the Harvard Project, we need 'capable institutions of self-governance…that keep politics in its place, deliver on promises, administer programs and manage resources efficiently'.[69]

Finally, community governance is where self-determination is exercised. While governments and our organisations should support this, as I say in section 2.3: 'effective governance for Aboriginal and Torres Strait Islander peoples needs to start with us – with our peoples and with our communities'.

I believe that to exercise true self-determination we need to apply the principles of the Declaration internally in our own decision-making. For instance, the right to participation in decisions that affect us applies as much, if not more, to us to ensure all voices in our communities are heard. To quote Marcia Langton, '*big bunga* politics'[70] must be confronted and challenged whenever it arises.

For me, real self-determination means that we take control of the issues confronting our communities and do not wait for the Government to take action. For our lands, territories and resources, we can achieve self-determination in relation to our native title through our PBCs. I discuss this further in Chapter 3.

69 S Cornell, M Jorgensen, J Kalt and K Spilde, *Seizing the Future: why some Native nations do and others don't*, Joint Occasional Papers Papers on Native Affairs No 2005-01 (2005), pp 4-5.

70 M Langton, 'The end of "big men" politics' (2008) 22 *Griffith Review* 11, p 1. At https://griffithreview.com/images/stories/edition_articles/ed22_pdfs/langton_ed22.pdf (viewed 2 October 2012).

Chapter 3: Prescribed Bodies Corporate – an example of effective Indigenous governance over lands, territories and resources?

3.1 Introduction

This Chapter examines Indigenous governance within the Native Title Act, focusing on our governance following a native title determination.[1] As such, I consider whether Prescribed Bodies Corporate (PBCs)[2] set up to hold and manage our determined native title rights and interests can meet the standards of effective, legitimate and culturally relevant Indigenous governance over our lands, territories and resources[3] outlined in Chapter 2.

As I report in Chapter 1, an increasing number of native title applications are being successfully determined across Australia. It is therefore timely to discuss how PBCs can establish a structure that intersects both our community governance and our organisational governance, and provide a unique opportunity for us to realise our human rights principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

In this Chapter, I briefly outline the legislative and organisational frameworks that affect the governance of PBCs, and then address the factors that enable PBCs to effectively govern their native title rights and interests in their lands, territories and resources. I also consider changes that can be made to assist PBCs to achieve the social, cultural and economic aspirations of native title holders in relation to these lands, territories and resources.

1 A native title determination in accordance with the *Native Title Act 1993* (Cth) specifies particular rights and interests in lands and waters that are held by native title holders in accordance with their traditional laws and customs. In contrast to some state/territory land rights legislation, a native title determination does not provide tenure-based rights to lands, territories and resources.

2 A Prescribed Body Corporate may also be referred to as a Registered Native Title Body Corporate (RNTBC), which is described in s 253 of the *Native Title Act 1993*(Cth).

3 'Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples.*

3.2 Legislative and organisational frameworks affecting the governance of PBCs

PBCs do not operate in a legislative and organisational vacuum. Rather, PBCs:

- are established in accordance with the *Native Title Act 1993* (Native Title Act)
- have set functions under the *Native Title* (*Prescribed Bodies Corporate*) *Regulations 1999* (PBC Regulations)
- undertake corporate responsibilities that are set out in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

As the organisation that holds and manages determined native title rights and interests, PBCs are also required to engage with and rely on a number of other organisations and external stakeholders.

To explain the legislative and organisational frameworks within which PBCs function, I briefly set out the legislation that establishes and oversees PBCs, and list the organisations that operate in the native title environment.

(a) The legislative framework

(i) The Native Title Act 1993

Following a positive determination of native title by the Federal Court of Australia (Federal Court), the Native Title Act requires a PBC to be established that represents the whole native title group and holds (as their trustee) or manages (as their agent) their native title rights and interests.[4]

While the Native Title Act itself does not set out a framework for governance to manage the outcomes of a determination, it outlines the prescribed functions of PBCs to:

- hold, protect and manage determined native title in accordance with the objectives of the native title holding group
- ensure certainty for governments and other parties interested in accessing or regulating native title lands and waters by providing a legal entity to manage and conduct the affairs of the native title holders.

This means that PBCs can be involved in a range of activities including:

- mining and resource sector agreements
- land and water conservation partnerships
- pastoral, agricultural and farming activities
- research partnerships
- return to country programs
- recording and archiving cultural information
- cultural tourism
- education and employment

4 See Part 2, Division 6 of the *Native Title Act 1993* (Cth).

- heritage and conservation programs
- economic and business development.[5]

(ii) Native Title (Prescribed Bodies Corporate) Regulations 1999

Further to the Native Title Act, the PBC Regulations[6] set out their statutory functions, which include:

- managing or holding the native title rights and interests of the native title holders
- holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
- investing or otherwise applying money held in trust as directed by the native title holders
- consulting with the native title holders regarding particular decisions[7]
- performing any other function relating to the native title rights and interests as directed by the native title holders.

In order to perform these functions, the PBC may:

- consult with other persons or organisations
- enter into agreements
- exercise procedural rights
- accept notices required by law to be given to the native title holders.

(iii) Corporations (Aboriginal and Torres Strait Islander) Act 2006

In addition to the functions outlined in the Native Title Act and the PBC Regulations, a PBC is required to fulfil corporate governance obligations in accordance with the CATSI Act. This is because all PBCs holding or managing native title under the Native Title Act and the PBC Regulations must be incorporated under the CATSI Act.[8]

The CATSI Act has particular governance requirements including that a majority of PBC members and directors need to be Indigenous, and the PBC's constitution must meet minimum standards of governance. Under the CATSI Act, the Office of the Registrar for Indigenous Corporations (ORIC) can provide assistance to corporations about matters relating to registration, rules of a corporation, dispute resolution, and undertaking research and policy proposals.[9]

5 Australian Institute of Aboriginal and Torres Strait Islander Affairs (Native Title Research Unit), *Native Title Bodies Corporate*. At http://nativetitle.org.au/what_do_we_do.html (viewed 18 September 2012).

6 See Part 2 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999.*

7 Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* requires the PBC to consult with and seek the consent of native title holders in relation to decisions about native title, entering into an Indigenous Land Use Agreement, allowing a person who is not a native title holder to become a member of the PBC, and consenting to consultation processes in the PBC constitution.

8 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 8 October 2012).

9 Office of the Registrar of Indigenous Corporations, above.

PBCs registered under the CATSI Act may also have the following governance 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
- the Registrar may sometimes exempt corporations from lodging annual reports
- profits of the corporation can be distributed to members if the rules allow
- Aboriginal and Torres Strait Islander corporations can get assistance and support from ORIC.[10]

The statutory differences between PBCs established under the Native Title Act and administered in accordance with the CATSI Act, and other corporations established under alternative legislation are set out in Text Box 3.1.

Text Box 3.1:
Statutory differences between PBCs and other corporations[11]

- PBCs are special types of Aboriginal and Torres Strait Islander corporations because they are created especially for native title holders to hold or manage native title.
- PBCs must have the words 'registered native title body corporate' or 'RNTBC' in their name to signify this and must be registered with ORIC as required by the Native Title Act, whilst other Aboriginal and Torres Strait Islander corporations can choose to register under other state or territory associations law or under the *Corporations Act 2001* (Cth).
- PBCs have obligations under the Native Title Act, such as the requirement to consult with and obtain consent from native title holders in relation to any decisions which surrender or affect native title rights and interests.
- If an Aboriginal and Torres Strait Islander corporation becomes or ceases to be a PBC, it must notify ORIC within 28 days.
- PBC directors and officers are protected from a range of criminal and civil penalties for breach of duties as long as they have acted in good faith in complying with obligations under native title legislation (not including the duty to trade while insolvent).
- PBCs are not required to value their native title rights and interests as part of their assets, for the purpose of determining their size classification under the CATSI Act.
- PBCs must ensure that their constitution is consistent with native title legislation.
- ORIC must not change the PBC's constitution on the basis of an act done in good faith and with the belief that the corporation or its officers are complying with native title legislation.
- ORIC is not able to de-register a PBC as long as it remains a PBC and manages or holds native title interests.

10 Office of the Registrar of Indigenous Corporations, above, p 4.
11 Australian Institute of Aboriginal and Torres Strait Islander Affairs (Native Title Research Unit), note 5.

(b) The organisational framework

There are a number of organisations operating in the native title environment that PBCs may engage with and rely on in terms of how they are organised and make decisions. These include:

- Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), funded to undertake particular functions in accordance with the Native Title Act.[12]
- The National Native Title Tribunal (the Tribunal) and the Federal Court, funded to undertake statutory functions in accordance with the Native Title Act.[13]
- ORIC, which was established to administer the CATSI Act.
- Federal and state/territory governments including:
    - the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
    - the Attorney-General's Department (AGD)
    - state/territory and local governments and associated agencies.
- External stakeholders wanting to undertake activities that may affect the determined native title rights and interests (for example, mining and resource companies).

In performing their functions, PBCs may be required to engage with any or all of these organisations.

(i) Changes to the organisational framework

I am aware that recently there has been and will continue to be changes in organisations operating in the native title environment. As I report in Chapter 1, since July 2012 there have been institutional reforms regarding the roles of the Tribunal and the Federal Court.

I also note the Australian Charities and Not-For-Profits Commission (ACNC) has been recently established to regulate the not-for-profit sector. I am aware that there is currently some uncertainty about how the ACNC will interact with ORIC in relation to monitoring the compliance of PBCs under the CATSI Act, which I note further in section 3.4 below.

The Minister for Families, Community Services and Indigenous Affairs has also initiated a review of the role and functions of native title organisations, particularly the functions and role of NTRBs and NTSPs. I welcome this review given that it will also address the capacity of PBCs 'to complete corporate compliance, perform future act related activities and pursue economic, social and cultural development'.[14]

These reviews and changes to the organisational framework are on-going and I premise the discussion in section 3.4 by noting the potential impacts of these changes on the governance of PBCs are still to be seen.

12 See Part 11, Division 3 of the *Native Title Act 1993* (Cth). I note that NTRBs are funded by FaHCSIA to undertake particular functions and powers that are set out in s 203B of the *Native Title Act 1993*. Where there is no NTRB for a region, NTSPs may be funded by FaHCSIA to perform these functions.

13 For example, see Parts 4 and 6 of the *Native Title Act 1993* (Cth).

14 Department of Families, Housing, Community Services and Indigenous Affairs, *Native Title Organisations Review*. At http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/native-title-organisations-review (viewed 19 September 2012).

3.3 The governance of PBCs in accordance with the Declaration on the Rights of Indigenous Peoples

In the Preamble to the Declaration, the General Assembly of the United Nations says that it is:

> Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples…[15]

For me this paragraph captures the essence of the Declaration, that is, to enhance the relationship between governments and Aboriginal and Torres Strait Islander peoples.

I am similarly convinced that the Declaration can be used to enhance and strengthen the relationships within Aboriginal and Torres Strait Islander communities and within our organisations.

This view is gaining momentum at the international level. At the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) held in Geneva in July 2012, I recommended that the Expert Mechanism conduct a 'study with Indigenous peoples with regard to their approaches to implementing the Declaration within their communities'.[16]

With PBCs now emerging as a critical player in the landscape of Aboriginal and Torres Strait Islander affairs, we have an opportunity to embed the Declaration in the governance of our lands, territories and resources.

As I discuss in Chapter 2, PBCs may intersect our community governance and our organisational governance because they may both comprise and represent the native title group. The role of PBCs to 'hold, protect and manage determined native title rights in accordance with the objectives of the native title holders' therefore provides a mechanism to potentially realise our self-determination, and to respect and protect our culture in relation to our lands, territories and resources.

We need to ensure PBCs can effectively govern their traditional lands, territories and resources in a way that is consistent with the principles set out in the Declaration. In Chapter 2, I note that this includes:

- our right to self-determination and participation in decision-making (see Article 32(1))
- our right to free, prior and informed consent over projects on our lands, territories and resources (see Article 32(2))
- our right to maintain and protect our cultural heritage on and traditional knowledge about our lands, territories and resources (see Article 31(1))
- our right to conserve and protect the environment of our lands, territories and resources without discrimination (see Article 29(1)).

Likewise, the Declaration provides guidance on the obligations of governments to support our governance over our lands, territories and resources, which include the requirements to:

- recognise our right to self-determination (see Articles 3 and 4)
- recognise and protect our lands, territories and resources (see Article 26(3))
- in conjunction with us, establish a process to recognise and adjudicate our rights pertaining to our traditionally owned and occupied lands, territories and resources (see Article 27)

15 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular paragraph 18.

16 M Gooda, Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner on Agenda Item 6 (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9-13 July 2012).

- seek our free, prior and informed consent for projects on our lands, territories and resources (see Article 32(2))
- provide effective redress to mitigate adverse impacts on our lands, territories and resources (see Article 32(3)).

The potential for PBCs to realise some of these principles, such as:

- self-determination over our lands, territories and resources
- recognition and protection of our lands, territories and resources
- maintenance and protection of cultural heritage and traditional knowledge
- consultation and participation in decision-making about projects occurring on our lands, territories and resources,

is available to native title holders in the legislative framework that I outline in section 3.2 above. However, I note that the principle of free, prior and informed consent as required by Article 32(2) of the Declaration is not currently acknowledged or protected in legislation. It is also arguable whether any mechanism exists to provide effective redress to mitigate adverse impacts on our lands, territories and resources as articulated in Article 32(3) of the Declaration.

I therefore recommend the Government strengthens the legislative framework within which PBCs are established and operate by ensuring the Native Title Act, the PBC Regulations and the CATSI Act are consistent with the Declaration. I also recommend the Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the Declaration.[17]

I recommend that:

- **The Australian Government reviews the *Native Title Act 1993* (Cth), *the Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. [Recommendation 3]**
- **The Australian Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*. [Recommendation 4]**

17 K Smith, 'Indigenous peoples' access to remedies', (Speech delivered at First Peoples and Extractive Industries: Good Practices Roundtable, Melbourne, 21 August 2012).

3.4 The factors that enable PBCs to effectively govern lands, territories and resources

In considering the factors that enable effective Indigenous governance in relation to native title rights and interests in our lands, territories and resources, I wrote to many organisations operating in the native title environment to seek their response to the following questions:

- What are the factors that enable native title groups and/or Aboriginal and Torres Strait Islander organisations to achieve effective governance?
- What are the factors that impede native title groups from achieving the outcomes they want from their native title rights and interests (e.g. economic development, exercising their native title rights and interests)?
- Do alternative land/resource management and cultural heritage governance processes affect the governance of native title groups? If yes, in what way?
- What could be changed in the native title system to enable the effective governance of native title groups and/or Prescribed Bodies Corporate?

The following discussion is informed by the responses I received from nine NTRBs and NTSPs, the National Native Title Council (NNTC), seven state/territory departments, the Minerals Council of Australia (MCA), ORIC, the Attorney-General and FaHCSIA. I thank all of these organisations for their contributions.

I also acknowledge the Kalkadoon Community Pty Ltd, the Kimberley Institute, Nyamba Buru Yawuru PBC, the Lingiari Foundation, the MCA, the NNTC, Cape York Natural Resource Management, the Oyala Thumotang Land Trust and the Chuulangun Aboriginal Corporation for providing information for the case studies and thank them for agreeing to share their stories with us in this Report.

The case studies demonstrate some of the innovative governance frameworks being established to enable our peoples and organisations to achieve their aspirations, and meet their cultural obligations in relation to their lands, territories and resources while addressing the statutory requirements of governments. My hope is that these case studies will provide a practical resource for Aboriginal and Torres Strait Islander peoples to potentially use or adapt when developing their own contemporary governance frameworks for their lands, territories and resources.

In the following section, I consider what factors enable PBCs to effectively govern their native title rights and interests in lands, territories and resources. I also make recommendations that I believe will assist PBCs to govern their determined native title rights and interests in an effective, legitimate and culturally relevant way.

(a) Aligning community governance and PBC organisational governance

Because PBCs intersect our community governance and our organisational governance, it is critical that the organisational governance of PBCs align with, reflect and support the governance of the native title group.

As I discuss below, aligning the PBC organisational governance and community governance requires that:

- organisational governance standards reflect the unique circumstances of PBCs
- communication of information and decision-making processes is culturally appropriate
- PBCs are accountable to community leadership and native title holders
- PBCs identify and pursue the aspirations of native title holders.

(i) Organisational governance standards reflect the unique circumstances of PBCs

Organisational governance standards need to align with the unique circumstances of PBCs and have the flexibility to tailor their arrangements to suit their circumstances.[18] These include:

> …situations where community members live in remote and isolated locations with limited access to telephone, internet, email or fax… Instances where native title members have English as a second or third language, which in turn creates further difficulties particularly where consultation with external parties is required… Differences in cultural understandings, values and protocols that native title groups need to often 'negotiate' in communicating with external parties.[19]

The Goldfields Land and Sea Council (GLSC) observes that PBC governance structures and processes need to match traditional values and practices to ensure legitimacy and secure the mandate of community members.[20]

While the incorporation of PBCs in accordance with the CATSI Act provides the potential for 'incorporation models that meet the specific cultural needs of a group and community',[21] several NTRBs and NTSPs raise concerns about how this occurs in practice. For example, the South West Aboriginal Land and Sea Council (SWALSC) comments that the CATSI Act is not 'particularly well designed to manage conflicting interests between groups', which is a particular issue for PBCs with a large membership.[22] The Central Desert Native Title Services (CDNTS) also raises concerns that 'the processes imposed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* can be incompatible with traditional decision-making and governance processes.'[23]

The case study on Indigenous governance over lands, territories and resources in Cape York outlined later in this section illustrates the complexity of issues that PBCs may need to negotiate to ensure their governance structures meet both traditional decision-making obligations and statutory requirements.

(ii) Communication of information and decision-making processes is culturally appropriate

Communication of information, both within the native title group *and* between native title holders and governments/external stakeholders, needs to be culturally appropriate and assist the PBC to make informed decisions. Again, this provides an opportunity to embed the Declaration in this process by ensuring the way PBCs communicate information gives full effect to the right to participate in decision-making underpinned by the right to give or not to give our free, prior and informed consent. CDNTS states that:

> …effective governance is achieved by ensuring that structures established, implemented or utilised allow native title groups and Aboriginal organisations to adhere to decision-making processes that are based on traditional law and custom. Effective governance is achieved through supporting and implementing culturally appropriate governance structures.[24]

18 H Bokelund, Chief Executive Officer, Goldfields Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 20 July 2012.
19 K Thomas, Chief Executive Officer, South Australian Native Title Services, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 August 2012.
20 Bokelund, note 18.
21 Registrar of Indigenous Corporations, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 6 September 2012.
22 M Firth, Corporate Services Manager, South West Aboriginal Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 July 2012.
23 I Rawlings, Chief Executive Officer, Central Desert Native Title Services, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 July 2012.
24 Rawlings, above.

South Australian Native Title Services (SANTS) explains:

> Given the dynamic nature of native title business, native title groups will often interact with external stakeholders such as local governments and mining companies. The development of this relationship and the capacity of native title groups to communicate effectively with third parties are fundamental in demonstrating accountability from an external perspective. Similarly, internal communication within the native title group itself is also paramount in ensuring the continued transparency and validity of the group from a community perspective. Importantly, this includes communication across the Board members in addition to the membership in general.[25]

In order for a PBC to make decisions on behalf of the native title holders, Yamatji Marlpa Aboriginal Corporation (YMAC) observes that:

- Adequate time and resources are required to properly inform community members and build consensus before major decisions need to be made.
- Appropriate decision-making processes need to take into account intra-group dynamics and allow all voices to be heard and properly represented. This is particularly important in regards to steering committees and other advisory groups that are established to liaise between land developers (including government) and the broader community.[26]

(iii) PBCs are accountable to community leadership and native title holders

PBCs need to be accountable to and reflect the interests of their native title group; to do this effectively there needs to be positive engagement between native title holders and their PBC. This is particularly relevant given that native title rights and interests are held collectively rather than by individuals.[27]

SANTS contends that:

> …where there is a willingness to engage in native title business in addition to strong leadership, [PBCs] are more likely to steer their respective native title group and in turn hold it to account. Importantly, these attributes will be far more effective where there is open and clear communication throughout the native title group, and similarly, financial and administrative capacity to support this.[28]

Effective accountability mechanisms also assist to remove representational politics out of the roles of directors and board members, and minimise the potential for community disputes.[29] CDNTS suggests that there:

> …needs to be a process whereby members of PBCs can properly hold PBCs to account for breaches of the NTA [Native Title Act] and PBC Regulations. At the moment, if a PBC does not comply with its obligations, the only remedy is for members to take legal action against the PBC. This course of action is often outside the capacity and resources of affected members. The result is that native title rights and interests can be severely impacted upon and affected through the actions of a PBC without the mandate of the common law [native title] holders and the common law [native title] holders have little or no recourse to easily accessible legal advice or other relevant assistance.[30]

25 Thomas, note 19.
26 S Hawkins, Chief Executive Officer, Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 13 August 2012.
27 Hawkins, above.
28 Thomas, note 19.
29 Firth, note 22 and Thomas, note 19.
30 Rawlings, note 23.

ORIC highlights the following key factors that can strengthen the organisational governance and accountability of PBCs:

> **Independent directors.** There is a growing recognition among corporations that the appointment of independent directors with expertise in finance, law or corporate governance can greatly benefit the standards of governance and management of a corporation, and also serve to enhance the knowledge and skills of the member directors.
>
> **Board composition, roles and powers**. This requires differentiation between the roles and responsibilities of the board and management as set out in the rule book of the corporation, with clear accountability to the members or stakeholders. Members should elect the majority of the board. There should be a clear distinction between the roles of the CEO [Chief Executive Officer] and the chairperson and the same person should not perform both roles. The CEO should also not be a director of the board. The board should undertake a documented performance review of the CEO.
>
> **Board processes and governance.** The board of the corporation should have documented policies and processes about board and member/shareholder meetings (agendas, preparation and distribution of board papers, regular financial reports, minutes, meeting frequency) as well as current strategic and costed business plans for the corporation.
>
> **Relationship with members/stakeholders.** The board of directors should act in the best interests of the corporation as a whole and its rule book should provide transparency and accountability to its members. The members should have the power (stipulated in the rule book) to remove directors and hold an annual general meeting every year. The board should provide a comprehensive annual report at the annual general meeting.[31]

Many of these factors are demonstrated in the case study of the Kalkadoon Constitution Indigenous Land Use Agreement, which sets out clear mechanisms for accountability and transparency: see Text Box 3.2.[32]

Text Box 3.2:
The Kalkadoon Constitution Indigenous Land Use Agreement

Kalkadoon Peoples native title consent determination

On 12 December 2011, the Kalkadoon Peoples' native title rights and interests were recognised over approximately 40 000 square kilometres around Mount Isa in North West Queensland. This included exclusive native title rights to use and enjoy 4 000 square kilometres of the native title determined area and non-exclusive rights over the remaining lands and waters.[32]

I congratulate the Kalkadoon Peoples and the many organisations and individuals who were involved in the consent determination of the native title claim.

31 Registrar of Indigenous Corporations, note 21.

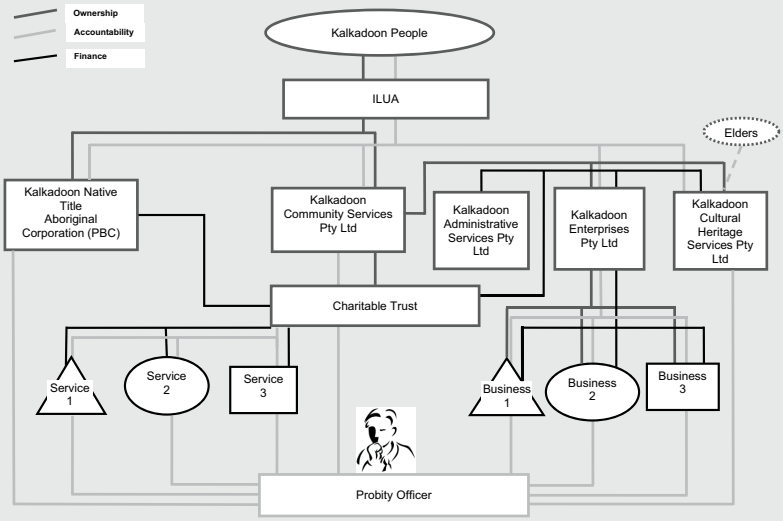
32 National Native Title Tribunal, 'Native Title recognition for the Kalkadoon People', (Media Release, 12 December 2012). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/NativeTitlerecognitionfortheKalkadoonPeople.aspx.

Kalkadoon Constitution Indigenous Land Use Agreement

The Kalkadoon Constitution Indigenous Land Use Agreement (Kalkadoon Constitution ILUA) establishes a transparent governance framework for the Kalkadoon Peoples post-native title determination. It is a binding legal document setting out 'the management and conduct of the collective affairs of the Kalkadoon People in relation to the ILUA Area'.[33]

Kalkadoon organisations

As required by the Native Title Act, the Kalkadoon Peoples have established the Kalkadoon Native Title Aboriginal Corporation (Kalkadoon PBC) to be the registered native title body corporate for their native title.[34] Kalkadoon Community Services, Kalkadoon Enterprises, Kalkadoon Cultural Heritage Services and Kalkadoon Administrative Services have also been created as separate Kalkadoon organisations to enable the Kalkadoon Peoples to realise social, economic, educational, business, employment and training opportunities as the traditional owners of the Mount Isa region. The roles, values, principles and rules that govern each of these organisations are described in the Kalkadoon Constitution ILUA and the relationships between these organisations are illustrated in the following diagram.



Transparency and accountability mechanisms within the Kalkadoon Constitution ILUA

The Kalkadoon Constitution ILUA sets out the transparency and accountability mechanisms that support the Kalkadoon Peoples to have effective, culturally relevant and legitimate governance over their country. This has two benefits:

1. The ILUA enshrines the values and principles of the Kalkadoon Peoples and provides a process for the Kalkadoon Peoples to determine and achieve their aspirations.

33 The Kalkadoon People, *Kalkadoon Constitution Indigenous Land Use Agreement*, Chalk and Fitzgerald (2011), Agreed Terms, Clause 3.1.

34 The Kalkadoon People, above, Background paragraph C.

2. By articulating the operations and entities of the Kalkadoon Peoples, the ILUA assists the Kalkadoon Peoples to meet the legislative and regulatory requirements of the Government.

The transparency and accountability mechanisms in the Kalkadoon Constitution ILUA include:

Role of the probity officer

The role of the probity officer ensures compliance with the Kalkadoon Constitution. This requires the probity officer to receive reports, receive and investigate complaints, refer complaints to authorities, report on investigations and compliance generally, assist in improving compliance, help resolve disputes and undertake any other functions as required.[35] To enable these functions to be carried out, the probity officer has the power to attend meetings and obtain records, acquire information and have access to and interview people.[36]

The probity officer cannot be a Kalkadoon person or an officer of a Kalkadoon organisation or a person that has a contractual agreement with a Kalkadoon organisation. This is to ensure the separation of powers within the governance structure and prevent the potential for conflict between a person's duties as the probity officer and a person's interests under the Kalkadoon Constitution ILUA.[37]

Decision-making processes

The Constitution requires the Kalkadoon Peoples to make collective decisions, which means that they must make decisions at a Kalkadoon meeting. Only decisions made at a Kalkadoon meeting (including land decisions) can be relied upon by a Kalkadoon organisation as an authoritative decision of the Kalkadoon Peoples.[38]

Rules about Kalkadoon meetings such as who can attend, timeframes for and notifications of meetings, quorum requirements, decision-making processes, and recording discussions and decisions are set out in the Constitution. A Kalkadoon meeting may consist of all Kalkadoon Peoples who have attained the age of 15 years and who wish to attend, participate in and vote at the meeting – regardless of whether the Kalkadoon person is a member of any of the Kalkadoon organisations or not.[39] This accessibility to attend Kalkadoon meetings facilitates community participation in decision-making processes that affect all Kalkadoon Peoples.

The decision-making process at a Kalkadoon meeting involves proposed resolutions to be made in writing and put forward to the meeting verbally. There must be an opportunity for discussion on the resolution, during which 'the Kalkadoon People present will…attempt to reach consensus about the matter'.[40]

Although directors of Kalkadoon organisations and the probity officer may attend and participate in a Kalkadoon meeting, they are not entitled to vote on any resolution.[41] The Kalkadoon Peoples have a significant role in the management and conduct of their collective affairs, with the separation of powers between the Kalkadoon People and Kalkadoon organisations acting as a 'check and balance'. This is

35 The Kalkadoon People, above, Clause 2(a)–(j).
36 The Kalkadoon People, above, Schedule 2, Clause 3.
37 The Kalkadoon People, above, Schedule 2, Clause 4.2.
38 The Kalkadoon People, above, Schedule 3, Clause 1.
39 The Kalkadoon People, above, Schedule 3, Clause 5.1.
40 The Kalkadoon People, above, Schedule 3, Clause 5.10.
41 The Kalkadoon People, above, Schedule 3, Clause 5.1.

demonstrated by the requirement for Kalkadoon Peoples to set the strategic direction of Kalkadoon organisations by approving and reviewing their Strategic Plans.[42]

Role of elders within the Kalkadoon governance framework

The significant role of elders under traditional law and custom and as custodians of Kalkadoon traditional knowledge, custom and law is acknowledged in the Constitution.[43] For example, Kalkadoon elders may be consulted by any Kalkadoon Person, any Kalkadoon organisation and any officer or staff member of a Kalkadoon organisation about any matter relating to traditional knowledge, law or custom.[44]

(iv) PBCs identify and pursue the aspirations of native title holders

I observe in Chapter 2 that Aboriginal and Torres Strait Islander peoples need to be given the space and resources to develop our governance so that we can achieve our aspirations. This requires PBCs to undertake strategic planning to identify opportunities and develop policies that reflect the social, cultural and economic aspirations of the native title holders. SANTS comments that:

> Without this stewardship [of a clear strategy and policies], an overwhelming focus on compliance can result in the group becoming weighed down in processes which in itself has a tendency to undermine governance. In driving towards a common goal or strategy, the native title group also has greater potential to gradually develop into more complex issues once the fundamental responsibilities with respect to native title business are mastered.[45]

The critical role of planning is illustrated in the case study of the Yawuru Peoples' 'Four Pillar Knowledge Vision' strategy that informs and guides their community governance: see Text Box 3.3.

Text Box 3.3:
The Yawuru Peoples 'Four Pillar Knowledge Vision': informing community governance

The 'Four Pillar Knowledge Vision'

The Yawuru Peoples have developed the 'Four Pillar Knowledge Vision', which is a strategy designed to inform and guide their community governance. This strategy establishes a foundation for the Yawuru Peoples' aspirations following their native title determination over the township of Broome and

42 The Kalkadoon People, above, Schedule 3, Clause 2.
43 The Kalkadoon People, above, Schedule 9, Clause 1.
44 The Kalkadoon People, above, Schedule 9, Clause 3.
45 Thomas, note 19.

surrounding areas in 2008 and the registration of the Global Agreement (comprising two Indigenous Land Use Agreements) in 2010.[46]

The 'Four Pillar Knowledge Vision' focuses on gathering information about the Yawuru Peoples native title group and the broader Indigenous community residing in the Broome region to ensure that 'governance arrangements in the post-native title determination era… [are] informed by locally controlled and customised information'.[47] Notably,

> …as an incorporated land-holding group, the Yawuru people of Broome are among the first in Australia to move in this area of information gathering, certainly in terms of the degree of local control, participation and conceptual thinking around the logistics and rationale for such an exercise.[48]

The strategy is based on:

Knowing Our People and Community

The process for 'Knowing our People and Community' began in 2011 with a comprehensive household survey undertaken to acquire statistical and demographic information about the Indigenous population in Broome.[49] The survey recognised the limitations of previous census data collected by the Australian Bureau of Statistics (ABS), which significantly under-represented the Indigenous population residing in Broome as well as ignoring cultural complexity and therefore had limited use in providing information that assists to identify the objectives of the contemporary Broome Indigenous community.

The survey was carried out by a team of local Broome Aboriginal people who surveyed every Indigenous household in Broome 'door to door'. They collected information on population size, including by dwelling category and age distribution, socio-economic composition, and cultural identity and language. The key to its success was local knowledge working in tandem with academic expertise from the Australian National University's (ANU) Centre for Aboriginal Economic Policy Research (CAEPR).

The information from the survey is now being used to inform Yawuru investment decisions and policy and program development as well as engagement with government and industry. For example, the Yawuru Language Revitalisation Project has been identified as a priority, with the engagement of Yawuru language workers and senior people in the community working together to record Yawuru language to teach in schools and for other applications such as publications, art work and geographic place names.

The survey assists governance processes by:

- providing Yawuru leaders with an informed basis for decision-making

46 The native title determination of the Yawuru Peoples was reported in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (2009), pp 58–63. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/chapter3.html#3 (viewed 17 September 2012). The Yawuru Peoples Global Agreement was reported in M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2010* (2011), pp 25–27. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 17 September 2012).

47 J Taylor, B Doran, M Parriman and E Yu, *Statistics for Community Governance: the Yawuru indigenous population survey of Broome*, CAEPR Working Paper No. 82/2012 Australian National University (2012), p 7. At http://caepr.anu.edu.au/Publications/WP/2012WP82.php (viewed 24 August 2012).

48 Taylor et al, above, p 3.

49 Taylor et al, above.

- assisting to provide a dialogue between different native title groups in the Broome and West Kimberley regions
- providing a baseline to measure impacts of economic and social change on Aboriginal society
- providing a basis for informed dialogue with Aboriginal interests, government and industry
- providing a basis for accountability for public policy and investment for Aboriginal development in the region.[50]

Knowing Our Country

In partnership with the Fenner School of Environment and Society and CAEPR at ANU, the Yawuru Peoples are using Geographic Information System (GIS) mapping technology to digitally map Yawuru Country. This process informs the geographic aspects of Yawuru Country and maps places of cultural and social significance for Yawuru Peoples. This work will also enable Yawuru Peoples to map and monitor historical, current and future use of Yawuru terrestrial and marine environments and provide Yawuru with evidence – both from a Yawuru cultural perspective and from western science – to assess the actual and potential impacts of the various activities which occur on Yawuru Country.

A Yawuru Cultural Management Plan has been produced to inform future research projects and activities on Yawuru Country as well as guide the joint Park Management Agreements that Yawuru Peoples have entered into with the Shire of Broome and the Department of Environment (Western Australia). The Cultural Management Plan also seeks to ensure that other people walk, work on and enjoy Yawuru Country with respect for Yawuru Peoples and their Country.

Knowing Our Story

Knowing Our Story focuses on a process of identifying and consolidating the research, commentary and photography that was produced prior to and during the native title process. This includes the transcripts from the native title court cases, the affidavits produced during the preparation of the court cases, the Common Gate Exhibition produced by the Lingiari Foundation, and oral histories from Yawuru People. This material will be catalogued and placed into a Yawuru Centre for Knowledge to inform future generations about the Yawuru Peoples and their Country.

Building Our Economic Prosperity

The Global Agreement settling native title with the Western Australian Government resulted in the Yawuru Peoples being the largest single landowners in Broome. This means the Yawuru Peoples have significant responsibilities both to manage these land holdings and to ensure the land holdings are used to establish the economic foundation for the Yawuru into the future. This requires building economic capacity within the community and careful planning so that the unique position of the Yawuru Peoples is not lost in town planning and development policies undertaken in Broome.

50 P Yu, *The Power of Data in Aboriginal Hands* (Paper presented at Social Science Perspectives on the 2008 National Aboriginal and Torres Strait Islander Social Survey Conference, 11-12 April 2011), The Australian National University, Canberra, p 7. At http://caepr.anu.edu.au/sites/default/files/Seminars/presentations/Peter%20Yu%20-%20The%20Power%20of%20Data%20in%20Aboriginal%20Hands2.pdf (viewed 5 September 2012).

The 'Four Pillar Knowledge Vision' strategy encompasses the principle of self-determination for the Yawuru Peoples. By informing themselves about their community, their country, their stories and potential economic opportunities, the Yawuru Peoples are building their capacity to make informed decisions about achieving their objectives.

(b) PBCs have adequate funding and resources

All NTRBs and NTSPs that responded stressed significant concerns about the funding and resources available for PBCs to undertake their statutory functions. PBCs must be provided with adequate funding if they are to fulfil their statutory obligations and achieve their objectives. The issue of funding is especially critical where a determination of native title is not accompanied by agreements with external stakeholders – such as mining companies and/or state/territory/local governments – that provide an on-going and substantial source of income for the PBC.

The administrative and legal capacity of a PBC is dependent upon adequate funding and resources. Funding amounts must recognise that many PBCs operate in remote regions and have members who live in dispersed areas. This means that undertaking statutory functions such as holding annual general meetings is expensive. SANTS states that:

> From a practical perspective, the [native title] group must have financial capacity. This basic funding requirement is essential to ensure that the governing bodies are in a position to satisfy not only the relevant statutory requirements, but furthermore, demonstrate accountability to the wider community. Financial capacity enables essential activities such as meetings and provides for the ongoing administrative costs associated with the day to day management of the native title group. …
>
> …It is important to note that for many native title groups there are often significant costs for holding such meetings given logistical difficulties where members are spread across large or remote areas. This is particularly the case where a consent determination has been successfully achieved without any form of financial settlement to go in conjunction with the determination.[51]

The lack of funding and resources for PBCs has resulted in NTRBs and NTSPs assisting PBCs to fulfil their functions. Some NTRBs and NTSPs note that they are well placed to assist PBCs and provide a resource and knowledge base for PBCs, while others urge more funding to be allocated to PBCs. For example, the Torres Strait Regional Authority (TSRA) notes that to achieve effective governance in the Torres Strait, PBCs need to be properly established with core funding:

> …while PBCs are able to access some funding through TSRA administered grants, this is limited and non-ongoing. Not all PBCs in the region have the capacity to apply for or manage grant funding. This is being addressed through the TSRA Governance and Leadership PBC Capacity Building project.[52]

FaHCSIA reports that in 2011–2012, almost $1.7 million was given to eight NTRBs/NTSPs to provide basic support to all PBCs throughout the country.[53] In addition, FaHCSIA funds programs – such as leadership

51 Thomas, note 19.

52 J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 July 2012.

53 F Pratt, Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commissioner, 16 October 2012.

workshops, the Aurora Project and the AIATSIS Native Title Unit – that aim to build the capacity of PBCs.[54]

I note, however, that the level of support funding for PBCs only comprises approximately 2% of the total funding for NTRBs and NTSPs. Given the increasing numbers of native title determinations and PBCs, this level of funding is inadequate for PBCs and native title holders to achieve economic independence and, as I discuss below, limits their ability to build their administrative, legal and business capacity.

I recommend that the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources. [Recommendation 5]

(c) The administrative capacity of PBCs

PBCs require the administrative capacity to meet their statutory obligations. The TSRA notes that although native title has been determined over most of the Torres Strait region:

> Many PBCs in the Torres Strait still lack the resources and administrative capacity (i.e. office space, computer, reliable email access, phone access or printers) to achieve effective governance. These PBCs rely on the resources available at the local council offices or through their employers.[55]

Administrative capacity needs to be addressed 'at different levels, both at the individual level of directors and community members and at an institutional level in terms of business systems, infrastructure and human resources.'[56]

The GLSC acknowledges that the administrative capacity of PBCs can be affected by constraints such as the:

- remote geographical locations of some native title determinations, which impacts on the cost of organising meetings and/or hiring staff
- level and type of future act activity, which can generate funding but also place pressure on the administrative capacity of the PBC
- requirement to operate in a rapidly changing external environment, including responding to regulators, government departments and external stakeholders.[57]

The administrative capacity of PBCs can be increased through training and mentoring programs. A number of organisations commented positively on support programs provided by NTRBs and NTSPs, the FaHCSIA Indigenous Leadership Program, the Aurora Project, ORIC and the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). While there is demand for these programs to be expanded, it is critical that these programs are undertaken in a way that provides support and builds the capacity of PBCs and native title holders.

The TSRA suggests that:

> Training and mentoring should focus on the specific needs of a PBC when it is first established. While the Office of the Registrar of Indigenous Corporations provides initial governance training, the purpose of this training is to ensure that all PBC members are aware of the roles, obligations and responsibilities of PBCs…

54 Pratt, above.
55 Kris, note 52.
56 Thomas, note 19.
57 Bokelund, note 18.

> An on-going mentoring program would assist with further capacity building and better governance.[58]

SANTS also notes that key areas to improve the administrative capacity of PBCs include 'increased access to governance and business training with a heightened focus on corporation specific service delivery, and also mentoring and leadership programs'.[59]

I am aware that there is some uncertainty about how the role of the newly-established ACNC will interact with ORIC in terms of PBCs complying with statutory requirements under the CATSI Act, but acknowledge that these processes are continuing as this Report is being finalised. SWALSC notes:

> …at this stage, we are rather concerned that a proposed co-operative arrangement between ORIC and the ACNC has not been concluded, and that leaving this unresolved will result in many CATSI Corporations having a dual reporting obligation which will not do much more than just put extra strain on administrative systems.[60]

I reiterate the importance of Government ensuring that PBCs are not subject to unnecessary 'red-tape' and bureaucratic burden.

(d) The legal capacity of PBCs

Given the complex legislative frameworks within which PBCs operate, it is essential that PBCs have the legal capacity to comply with their statutory obligations. This includes the 'ability to identify when external advice on legal or governance issues is required'.[61]

SANTS outlines the need for PBCs to have access to legal support:

> …readily accessible and consistent legal support is also an important factor in ensuring good governance. This may also extend to financial, business and administrative support depending on the size of the native title group and the nature of their dealings… Whilst a number of the Boards for native title groups currently rely on legal advisors, in the long run it is hoped that these groups will be in a position to operate independently with respect to good governance practices. In the interim, it is important that NTRBs/NTSPs are funded to continue to provide native title groups with readily accessible legal support services.[62]

(e) The business capacity of PBCs

Almost 20 years after the implementation of the Native Title Act, we are starting to reap some significant benefits from the settlements emerging out of native title determinations and Indigenous Land Use Agreements (ILUAs). In Chapter 1, I reported on the dramatic increase in the number of registered ILUAs, with 150 ILUAs registered in the last year alone. I believe that many of these agreements, settlements and determinations provide native title holders with the best opportunity to build sustainable outcomes that have the potential to deliver intergenerational benefit.

PBCs are central to the realisation these opportunities. However, as well as adequate funding and resources, administrative and legal capacity, it is essential that PBCs are able to access the necessary expertise in areas such as business development, finance and venture capital. YMAC observes that:

58 Kris, note 52.
59 Thomas, note 19.
60 Firth, note 22.
61 Thomas, note 19.
62 Thomas, above.

> …once an agreement is reached, good corporate governance alone is not sufficient for native title groups to successfully achieve the outcomes they want from native title, particularly in relation to economic development. They also require reliable, affordable support to develop commercial governance and acumen. For example, a native title group may have a number of ideas about how they would like to invest in the care of their elders and young people; however, they need support and opportunities to translate concepts into practical projects and, importantly, have access to finance in order to make them viable over the longer term.[63]

A lack of business development capacity can result in PBCs becoming dependent on external financial expertise:

> Likewise, a lack of business acumen, or more specifically, a limited understanding of how the private sector operates can also restrict the capacity for a native title group to develop its own business and identity independently. One common feature of this situation is the undue reliance of some groups on external 'consultants'. In becoming dependent on external support, the native title group is then unable to progress business without this support, exposing the group to collapse as soon as this support becomes unavailable for any reason. Short term, project based consultancies supported by Commonwealth funding makes groups particularly vulnerable to a scenario.[64]

The MCA, NNTC and several NTRBs and NTSPs highlight the need to explore policy and governance reforms to maximise economic benefits arising from native title and mining development opportunities.

As reported in Chapter 1, I welcome the Government's recent amendment of tax legislation to clarify that native title benefits are not subject to income tax. However, there is concern that the Government to date has not been keen to institute a new form of tax registration for PBCs that want to undertake economic development activities. The MCA explains that:

> …there is no current class of exempt entity that specifically addresses the systemic and interrelated social-economic challenges faced by Indigenous communities to assist them to reach individual and community economic independence, particularly in the context of maximising the benefits of resource agreements. Indigenous trusts are forced to rely upon the concept of charitable trusts and institutions as the only path to exempt status.
>
> Charity in relation to philanthropy…is difficult to reconcile for Indigenous communities seeking to take responsibility for their own well-being in the absence of any extensive not-for-profit or charity sector operating in many remote and regional areas. Their community values will comprise values of altruisms, poverty relief and charitable purposes but must also extend towards economic independence, self-reliance, recognition of family networks, traditional law and custom and self-preservation.[65]

The unwillingness of Government to address this concern appears inconsistent with the aims of the Government's Indigenous Economic Development Strategy 2011–2018 (the IEDS), which I report on in Chapter 1. The IEDS recognises that 'Indigenous enterprises are in a unique position to capitalise on business opportunities arising from native title settlements and…payments under native title agreements'.[66]

One option that aims to maximise economic benefits and reduce the administrative, legal and financial burden on PBCs is the Indigenous Community Development Corporation (ICDC) model that has been developed by the MCA and the NNTC: see Text Box 3.4.

63 Hawkins, note 26.
64 Thomas, note 19.
65 M Hooke, CEO, Minerals Council of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 24 July 2012.
66 Australian Government, *Indigenous Economic Development Strategy 2011–2018* (2011), p 52. At http://www.fahcsia.gov.au/sites/default/files/documents/09_2012/ieds_2011_2018.pdf (viewed 8 October 2012).

Text Box 3.4:

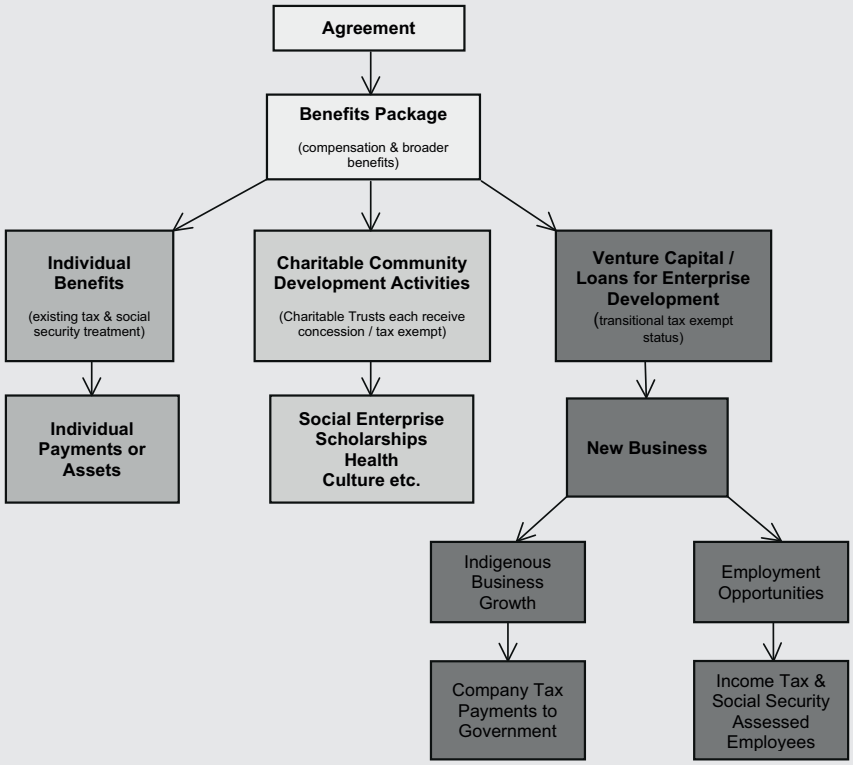
Indigenous Community Development Corporation: a model for managing native title and other payments

The Minerals Council of Australia (MCA) and the National Native Title Council (NNTC) have developed the Indigenous Community Development Corporation (ICDC) as a model for managing native title and other payments negotiated by Aboriginal and Torres Strait Islander peoples.

The objective of the ICDC is to accept and distribute payments on a tax-free basis so as to:

- maximise the economic and social benefits for current and future generations of native title groups
- reduce administration for native title groups that have minimal governance capacity
- improve governance arrangements.

The ICDC is a single entity that will facilitate funds accumulation, economic development, environment and land management, housing, education and learning, culture and community development as shown in the following diagram.



Native title groups will be able to either choose to 'opt in to have their mining and/or other agreement payments managed' under the ICDC or 'continue with current practices which include a mixture of individual distributions and the establishment of charitable and discretionary trusts'.[67]

The critical difference with the ICDC is that it will provide opportunities for economic development activities and funds accumulation (see Venture Capital / Loans for Enterprise Development option in the diagram above); activities which are dis-incentivised under current legislation governing charitable trusts and institutions.[68] It is these accumulation funds and business development initiatives that will facilitate intergenerational benefits, particularly where smaller agreement funds can be pooled to deliver 'real' outcomes over time.[69]

The ICDC intends to incorporate 'best practice' governance and management processes by implementing the following principles:

- the majority of Directors will be traditional owners and will be appointed through an approved and transparent regime
- the Board will be compliant with, and have the competencies as required by, a relevant corporate regime
- the appointment of independent and experienced Directors will be encouraged
- there will be limited terms for Directors, however a maximum number of years a Director can serve will not be limited
- audits and reviews will be undertaken by independent and qualified auditors
- there will be public disclosure requirements
- approved accumulation investment and accumulation distribution plans will be mandatory for assets and income over a predetermined threshold
- a qualified and independent Trustee will be appointed to provide advice and/or manage the accumulation fund
- the separation of investment and operational management processes will be encouraged
- the development of capacity building and succession plans as well as an internal dispute resolution process will be required.[70]

I understand that consultations between the NNTC, MCA and Treasury indicate that implementing the ICDC will require new legislation as the 'scope for economic development and accumulation funds will…be too limited under existing legislation'.[71] I encourage the Government to explore options such as the ICDC that enable native title holders to achieve their social, economic and cultural development aspirations.

67 Hooke, note 65.
68 Minerals Council of Australia and National Native Title Council, *Indigenous Community Development Corporation Communiqué* (April 2012).
69 T Postma, Assistant Director – Social Policy, Minerals Council of Australia, Email to Louise Bygrave, Senior Policy Officer Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 11 October 2012.
70 Hooke, note 65.
71 Minerals Council of Australia and National Native Title Council, note 68.

(f) Native title rights and interests

The nature and content of determined native title rights and interests can impede or enable native title holders to achieve their economic, social and cultural aspirations. Although native title outcomes have been limited by common law decisions, governments still have a role to facilitate constructive native title outcomes. Native Title Services Victoria (NTSV) notes that:

> …non-exclusive rights on public land that amount to little more than the rights enjoyed by the general public or the embellishment of existing statutory rights on third party owned pastoral leases is not a useful foundation for building economic development or showcasing self-determination… The challenge is for State, Territory and particularly the Commonwealth Government to recognise this fact and work with claimants to craft settlements that will facilitate such change. Such settlements will not come about through 'bare' consent determinations.[72]

SANTS also observes that:

> A lack of understanding or unrealistic views on what respective native title rights or interests have been recognised also has the potential to limit the ability for native title groups to achieve long term outcomes… Quite often the disappointment in the wake of realising the lack of real power that is translated through these native title rights and interests can distract and defeat the drive of a native title group to successfully function.[73]

If federal and state/territory governments view the native title system as providing economic, social and cultural opportunities for Aboriginal and Torres Strait Islander peoples, they need to be realistic about negotiating native title rights and interests that enable these opportunities. As SANTS suggests:

> …There is also the opportunity to refocus existing government programs and initiatives toward native title corporations. For example, the programs of DEEWR [Department of Education, Employment and Workplace Relations], IBA [Indigenous Business Australia], ILC [Indigenous Land Corporation], DSEWPaC [Department of Sustainability, Environment, Water, Population and Communities] and others could better service native title groups through stronger engagement and opening a dialogue around needs, opportunities and service/program delivery options.[74]

In this way, the governance of governments can support and build the capacity of native title holders to achieve their social, cultural and economic development aspirations.

(g) The capacity of PBCs to manage native title and engage with alternative land/resource management and cultural heritage processes

In addition to the statutory requirements of the Native Title Act, the PBC Regulations and the CATSI Act, PBCs may also be required to undertake statutory functions in accordance with state/territory legislation in relation to alternative land/resource management and cultural heritage processes. This can be a double-edged sword as, on the one hand, these alternative processes can lead to a disjuncture between cultural heritage processes and native title governance[75] but on the other hand, these processes can provide opportunities for native title holders. For example, SANTS notes that:

72 M Storey, Chief Executive Officer, Native Title Services Victoria, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2012.
73 Thomas, note 19.
74 Thomas, above.
75 Bokelund, note 18 and Storey note 72.

> The interaction between land/resource management, cultural heritage processes and the governance of native title groups will ultimately depend on the nature of those processes and the native title group itself… In some instances these processes could prove to be a distraction and add a layer of complexity if the native title group is not ready to get to that stage. Alternatively, these processes could deliver a range of advantages for example, provide financial capacity for the group's development, deliver a positive tangible outcome from the group's hard work in addition to a level of 'control' or 'power' that the native title group anticipated from the native title process.[76]

In last year's Native Title Report, I outlined the *Right People for Country* Project in Victoria, which creates a process for resolving disputes between Aboriginal peoples over land ownership and cultural heritage.[77]

Alternate governance processes for managing our lands, territories and resources are also outlined in the case study on establishing effective Indigenous governance over lands, territories and resources in Cape York: see Text Box 3.5.

Text Box 3.5:
Establishing effective Indigenous governance over lands, territories and resources in Cape York Peninsula, Queensland

Background

Establishing effective Indigenous governance over lands, territories and resources in the Cape York Peninsula region of far north Queensland has been a long-term and on-going conversation between various Aboriginal language, clan and tribal groups; the Queensland and Federal Governments; and numerous external stakeholders including pastoralists, tourism operators, recreational and commercial fishers, mineral and resource companies, and Indigenous and non-Indigenous service providers.

Indigenous governance that incorporates community governance and organisational governance, and responds to the governance of governments, has focused on organisational governance structures over lands, territories and resources. For example, the Cape York Land Council – now the NTRB for the region – was established in 1990 to work with and fight on behalf of traditional owner groups for the return of their lands, territories and resources.

The legislative and policy framework over lands, territories and resources in Cape York

The legislative and policy framework that Aboriginal peoples are required to navigate in Cape York in relation to their lands, territories and resources includes the:

- *Aboriginal Land Act 1991* (Qld) (ALA)[78]

76 Thomas, note 19.

77 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2011* (2011), pp 111–114. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport11/chapter2.html (viewed 24 September 2012).

78 The *Aboriginal Land Act 1991* (Qld) provides for the grant, and the claim and grant, of land as Aboriginal land, and for other purposes.

79 The Cape York Heads of Agreement was signed in 1996 by the Cape York Land Council, the Peninsula Regional Council of the Aboriginal and Torres Strait Islander Commission, the Cattlemen's Union of Australia, the Australian Conservation Foundation and the Wilderness Society, and in 2001 by the Queensland Government. It addressed issues of economic development, native title, Indigenous advancement and conservation in the Cape York region.

- Cape York Heads of Agreement 1996[79]
- Cape York Peninsula Land Use Strategy[80]
- *Land Act 1994* (Qld)
- *Nature Conservation Act 1992* (Qld) (NCA)
- *Native Title Act 1993* (Cth)
- *Water Act 2000* (Qld)
- *Wild Rivers Act 2005* (Qld)
- *Cape York Peninsula Heritage Act 2007* (Qld) (Heritage Act). [81]

Few of these acts, however, have involved traditional owners from the Cape in their design and development:

> Very little legislation, especially regarding land tenure, and natural and cultural resource management, is shaped with input from Traditional Owner Custodians, and it rarely reflects their rights and interests or their governance, autonomy and Indigenous social structures.[82]

Rather, legislation and policies have largely aimed to regulate the use of and access to country and/or resources by traditional owners, and prioritise the needs of non-Indigenous interests over the interests of traditional owners.

These legislative and policy frameworks also consider lands, territories and resources from a non-Indigenous world-view. This means that resources such as water and biodiversity are considered to be the property of the Queensland Government. In addition, lands and territories are delineated according to non-Indigenous boundaries rather than traditional Aboriginal clan estate or language group boundaries. Many of these legislative processes also cover large areas of land that incorporate the traditional lands and territories of more than one language group.

> Traditional governance and customary tenure is very different to the tenure arrangements of the Government. Lines on the Government's maps do not correlate to the Traditional Owners' customary boundaries. This can lead to confusion in relation to who is speaking for what country, incorrect modelling for land trust and issues of representation on land trusts. This has ramifications for the transfer of land to Aboriginal people (e.g. under the ALA) in regard to boundaries of transferred land, contested boundaries and where boundaries of lands are relocated. It is important that the correct Traditional Owners are involved in this process.[83]

80 The Cape York Peninsula Land Use Strategy involves the Queensland and Federal Governments and the local community, and gives consideration to land tenure reform and discussions regarding World Heritage cultural and environmental value in Cape York.

81 The *Cape York Peninsula Heritage Act 2007* facilitates the region's World Heritage values, outlines the capacity to undertake sustainable economic activities in support of Indigenous development including identifying Indigenous Community Use Areas, confirms the protection of native title rights in Wild River declaration areas, and facilitates special Indigenous water reserves. A breakthrough reform enabled by the Heritage Act (through amendments to the NCA and the ALA) is the negotiation and creation of a new form of National Park – one with underlying Aboriginal land tenure and a guarantee of joint management arrangements between the relevant traditional owners and the Queensland Government.

82 Chuulangun Aboriginal Corporation, *Submission to Inquiry into the Future and Continued Relevance of Government Land Tenures across Queensland*, 2 August 2012, p 3.

83 Chuulangun Aboriginal Corporation, above, p 5.

The forced relocation of many Aboriginal and Torres Strait Islander peoples around the Cape York region also means that the needs and well-being of those moved from their own traditional lands to the traditional lands of others must be considered in land dealings.

While the need to create effective governance over traditional lands naturally creates tensions among Aboriginal groups, this is often further exacerbated by legislation such as the Native Title Act and the ALA determining what Indigenous governance should look like – for example, PBCs registered under the CATSI Act or Land Trusts. This can lead to governance structures reflecting non-Indigenous governance processes, such as one chairperson heading an organisation, rather than Indigenous governance processes that ensure the right people make decisions about their country.

A particular challenge for Aboriginal peoples across Cape York is how to balance their responsibilities under their traditional laws and customs with their legislative obligations. For example, the Chairperson of the Oyala Thumotang Land Trust has stressed the critical relationship between the responsibilities of Land Trust representatives to their families to ensure they are fully informed about decision-making processes concerning their lands, territories and resources; and their obligation to ensure sound organisational governance as a Land Trust established under legislation with statutory responsibilities.[84]

Contemporary Indigenous governance in Cape York

The barrage of legislation and policies introduced by Queensland and Federal Governments has impacted on the relationship of traditional owners to their lands, territories and resources. The following highlights the effect and evolution of three statutes on Indigenous governance over lands, territories and resources in Cape York.

Land Trusts under the Aboriginal Land Act 1991

A number of national parks have been transferred back to traditional owners under the ALA with an underlying tenure of inalienable Aboriginal freehold. Some of these areas include the lands and territories of up to four different traditional owner groups and more than 75 extended families.

Land Trusts established under the ALA tend to reflect legislative governance requirements rather than community governance models; the Trusts have a constitution, a board of directors (usually made up of representatives from each group but also possibly including historical people) and a chairperson. These are referred to as 'Hybrid Land Trusts'.

This model has resulted in challenges in situations where the Land Trust is required to manage lands and territories on behalf of more than one group, but there is a cultural requirement to ensure that the right people are speaking for the right country.

84 R Burke, Chairperson, Oyala Thumotang Land Trust, Telephone interview with K Kiss, Principal Advisor Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 5 October 2012.

> A land trust chair…may make a decision on behalf of the whole land parcel… The implications of this for the transfer of land to Traditional Owners are that a trustee (e.g. a land trust under the ALA) might grant a lease for commercial purposes without obtaining the approval of the particular Traditional Owners for a given area.[85]

In order for this governance framework to work effectively, clear rules must be established and included in the constitution of the Land Trust to ensure that:

- the right people are making decisions about developments occurring on their lands and territories
- there are appropriate dispute resolution processes between traditional owner groups.

Land Trusts and the Cape York Peninsula Heritage Act 2007

Recent legislative developments – such as the Heritage Act, which (through amendments to the ALA and NCA) allows traditional owner groups to negotiate joint management of national parks[86] – include greater flexibility to establish governance structures that incorporate traditional Indigenous governance into an organisational governance structure.

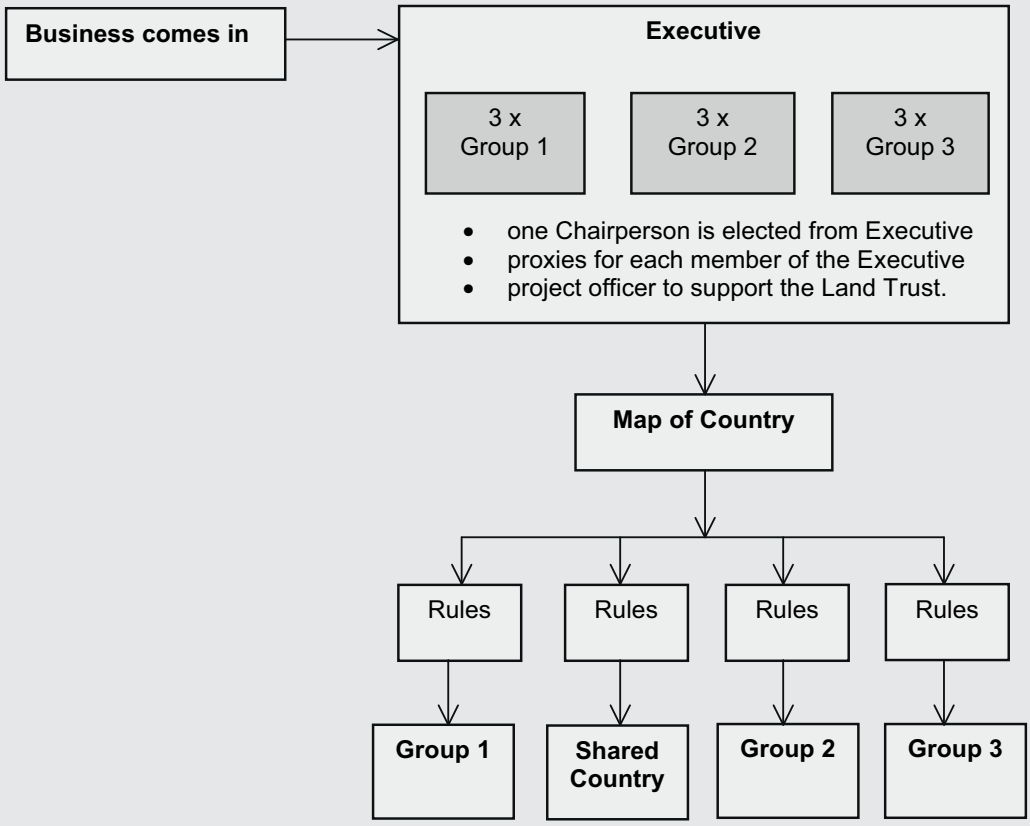
This model allows traditional owners to have a higher level of participation and engagement in park management. In some instances parcels of land have been handed back to traditional owners as inalienable freehold, which means that traditional owners can use these lands for residential purposes or to pursue economic development opportunities such as eco-tourism. These outcomes are confirmed in Indigenous Management Agreements and/or Use and Access Agreements.

Traditional owner groups who have been involved in land dealings under the ALA-NCA-Heritage Act framework have developed governance frameworks that incorporate the elements of community governance, organisational governance and governance of governments. In particular, they have developed governance structures that reflect traditional models of decision-making, while ensuring that their organisational governance is consistent with the legislative requirements for managing their lands, territories and resources.

For example, the following model was developed to ensure transparent organisational governance and prioritise clear community governance processes for three traditional owner groups involved in their national park handover. The decision-making processes that incorporate and reconcile the relationships between the language groups, and the legal obligations of the Land Trust are outlined in the Land Trust Constitution and illustrated in the diagram below.

85 Chuulangun Aboriginal Corporation, note 82.

86 Department of National Parks, Recreation, Sport and Racing, Queensland Government, *Joint Management of Cape York Peninsula National Parks*. At: http://www.nprsr.qld.gov.au/managing/joint_management_of_cape_york_peninsula_national_parks.html#a_new_move_joint_management (viewed 5 October 2012).



In accordance with this model, when a development or project is proposed in the national park, it is communicated to the Executive, who is charged with managing and controlling the affairs of the Land Trust in accordance with its Constitution, the NCA (including any relevant statutory management plan) and the park's Indigenous Management Agreement.[87] This involves the Executive deciding how the project needs to be addressed and who needs to be involved in the decision-making. This then is fed down to the appropriate traditional owner group/s for action through the group's representatives.

87 An Indigenous Management Agreement is required to be developed between the Queensland Government and the Land Trust prior to the grant of Aboriginal freehold and the dedication of the joint management national park. It is a legally binding agreement that underpins the new joint management partnership.

In terms of community governance, the flexibility in this model enables traditional owner groups to establish rules for internal decision-making that are relevant to the impact of projects and developments on their country. For example, if a project only affects traditional owner group 1, then groups 2 and 3 do not need to be involved in the decision-making. This information is then fed back up to the Executive through the three representatives from group 1, and the Chairperson on behalf of the Land Trust communicates that to the relevant project proponent.

This model also enables communication and information sharing between groups about the potential impacts of developments and projects. For example, if activities on the lands of group 1 affect the lands of group 3, discussions are able to take place at the traditional owner group level to appropriately inform the Executive about their decision-making. Similarly, rules can be established concerning proposed projects on country that has shared responsibility between the groups, such as water ways.

This process allows for the mapping of country to ensure that traditional boundaries are agreed and understood between the traditional owner groups. It can also provide for decision-making and consultation rules for land identified as 'shared country'.

The establishment of Indigenous Reference Groups in Cape York

The Queensland Government's Department of Environment and Heritage Protection is currently working with Cape York traditional owner groups 'to develop a regional governance framework that supports improved engagement between the traditional owners of Cape York Peninsula and the Queensland Government around natural resource management matters.'[88] This framework is supported by the establishment of Indigenous Reference Groups (IRGs).

This is a constructive approach given land tenure management across Cape York is extremely complex, operates within a wide range of statutes (outlined above) and often involves conflicting or inconsistent governance requirements. There is also a large number of existing local and regional Aboriginal and Torres Strait Islander organisations in Cape York that manage the rights and interests of land rights holders. The complexity of effectively navigating this landscape has been described as follows:

> The field of governance…involves three sets of contested relationships that are constitutive of this field and its inherent complexities. Firstly, this field involved the articulation of homelands-based, 'sub-regional' and 'regional' Aboriginal organisations, in addition to the role played by the State and Federal government agencies. Secondly, the regions field of governance involves both putative and enacted relationships between contemporary forms of traditional Aboriginal law and custom, and 'intercultural' and 'mainstream' governance processes. Lastly, the regions field of governance is marked by various forms of conjoint Aboriginal identity, articulated at different social scales.[89]

This regional governance framework reflects the way traditional owners make decisions and empowers them in decisions about their country. For example, the development of this regional framework has to date been based on river basins. The intent is that IRGs, while not a decision-making body:

88 Department of Environment and Resource Management, *Terms of Reference for Developing Long-Term Sustainable Governance on the Cape (Draft),* April 2010.

89 B R Smith, 'Regenerating governance on Kaanju homelands' (2008) as cited in Wik Projects Ltd, *Developing Long-Term Sustainable Indigenous Governance on the Cape Report,* Prepared for the Department of Environment and Resource Management (October 2010), p 10.

> …would provide advice to the [then] Minister for the Department of Environment and Resource Management relating to the wild rivers declaration proposal for their specific river basin, including any aspirations for future economic development opportunities in the basin.[90]

It is anticipated that the membership of the IRGs would:

> …reflect the relative place based indigenous entities and institutions that service the related rights and interests of the people of the relevant river basin, e.g. Native Title PBC, Land Trusts, cultural heritage bodies, Local Councils, ORIC organisations, Homelands, Land and Sea Centres, Indigenous business, clan families, gender groups etc.[91]

While these are important considerations in constituting IRGs, consultations have revealed a preference for the 'clan estate' as the primary focus of the engagement strategy.[92] This is to improve engagement and decision-making by those who are from that country. The people in an IRG are individuals who have the authority from the Elders (or are Elders themselves) to speak for country and pass on information to their clan estates. Don De Busch, Indigenous Engagement Co-ordinator with Cape York Natural Resource Management notes that 'the IRG process is a repatriation of traditional governance arrangements that have always existed in the governance of the landscape through our law.'[93]

Proposed foundational principles for the establishment of the regional governance framework include:

- connection to country is the essential foundation of legitimacy and authority – acknowledging that there may not always be agreement about the nature and extent of the connection of particular individuals, families and groups
- autonomy and respect for individuals needs to be recognised and balanced with collectivism and kinship
- so far as organisations representing traditional owners are concerned, authority is diverse, plural and flows from the bottom up
- while organisations achieve their authority and mandate by being representative of traditional owners, they also need to be equitable in how they deal with people and distribute resources
- Indigenous people should accept responsibility for resolving conflict and/or uncertainty about, among other things, who speaks for country – acknowledging that, among Indigenous people, there are often 'competing norms which would sanction significantly different and rival codifications of land tenure' and that, accordingly, such resolution may be difficult, fragile and will require ongoing focus and commitment.[94]

90 Cape York Natural Resource Management Ltd, *Establishing Wild Rivers Indigenous Reference Groups, Interim Report on the Grant Agreement Between the State of Queensland as represented by the Department of Environment and Resource Management and Cape York National Resource Management Ltd*, (undated), p 3.

91 Cape York Natural Resource Management Ltd, above, p 4.

92 Cape York Natural Resource Management Ltd, above.

93 D De Busch, Indigenous Engagement Co-ordinator, Cape York Natural Resource Management, Personal Communication to L Bygrave, Senior Policy Officer, Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 12 October 2012.

94 Wik Projects Ltd, *Developing Long-Term Sustainable Indigenous Governance on the Cape Report*, Prepared for the Department of Environment and Resource Management (October 2010) pp 14–15.

3.5 Conclusion

PBCs provide native title holders with an opportunity to achieve the standards of effective, culturally relevant and legitimate Indigenous governance that I outlined in Chapter 2. As the interface between native title holders and a large number of external organisations and stakeholders, PBCs are required to deal with a multitude of issues and competing interests.

As can be seen from this Chapter, PBCs face significant challenges in realising their potential. They struggle for necessary resources across a range of areas such as adequate funding, administrative and legal capacity, and business development.

PBCs also have to reconcile the rights of Aboriginal and Torres Strait Islander peoples, including native title holders, 'to maintain and develop their own indigenous decision-making institutions' as articulated in Article 18 of the Declaration with the governance requirements of the Native Title Act, PBC Regulations and the CATSI Act.

However, for PBCs to confront these challenges, the three components of community governance, organisational governance and the governance of government must be grounded in the human rights principles set out in the Declaration.

This means that we as Aboriginal and Torres Strait Islander peoples must take control of our governance, with the support of our organisations; and governments must remove unnecessary bureaucratic burden from our communities and build our capacity to realise our economic, social and cultural development aspirations.

As this Report illustrates, the Declaration provides a guide – to Aboriginal and Torres Strait Islander peoples and to governments – about what we each need to do to achieve these outcomes.

3.6 Recommendations

I recommend that:

3. The Australian Government reviews the *Native Title Act 1993* (Cth), *the Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.
4. The Australian Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.
5. The Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources.

Appendices

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 2012.

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Department of Justice
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Appendix 2

Recommendations from the *Native Title Report 2010* and the *Native Title Report 2011*

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.

2.6 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 Northern Territory National Emergency Response Act 2007 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).

Native Title Report 2011

Chapter 1: Assessing key developments in the Reporting Period

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 4: Options for addressing lateral violence in native title

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.

Appendix 3

Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework[1]

General principles

These Guiding Principles are grounded in recognition of:

a. States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;

b. The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;

c. The need for rights and obligations to be matched to appropriate and effective remedies when breached.

These Guiding Principles apply to all States and to all business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure.

These Guiding Principles should be understood as a coherent whole and should be read, individually and collectively, in terms of their objective of enhancing standards and practices with regard to business and human rights so as to achieve tangible results for affected individuals and communities, and thereby also contributing to a socially sustainable globalization.

Nothing in these Guiding Principles should be read as creating new international law obligations, or as limiting or undermining any legal obligations a State may have undertaken or be subject to under international law with regard to human rights.

These Guiding Principles should be implemented in a non-discriminatory manner, with particular attention to the rights and needs of, as well as the challenges faced by, individuals from groups or populations that may be at heightened risk of becoming vulnerable or marginalized, and with due regard to the different risks that may be faced by women and men.

I. The State duty to protect human rights

A. Foundational principles

1. States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.

2. States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

B. Operational principles

General State regulatory and policy functions

3. In meeting their duty to protect, States should:

1 J Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework,* (A/HRC/17/31) (2011). At http://www.ohchr.org/documents/issues/business/A.HRC.17.31.pdf (viewed 31 August 2012).

a. Enforce laws that are aimed at, or have the effect of, requiring business enterprises to respect human rights, and periodically to assess the adequacy of such laws and address any gaps;

b. Ensure that other laws and policies governing the creation and ongoing operation of business enterprises, such as corporate law, do not constrain but enable business respect for human rights;

c. Provide effective guidance to business enterprises on how to respect human rights throughout their operations;

d. Encourage, and where appropriate require, business enterprises to communicate how they address their human rights impacts.

The State-business nexus

4. States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.

5. States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.

6. States should promote respect for human rights by business enterprises with which they conduct commercial transactions.

Supporting business respect for human rights in conflict-affected areas

7. Because the risk of gross human rights abuses is heightened in conflict-affected areas, States should help ensure that business enterprises operating in those contexts are not involved with such abuses, including by:

   a. Engaging at the earliest stage possible with business enterprises to help them identify, prevent and mitigate the human rights-related risks of their activities and business relationships;

   b. Providing adequate assistance to business enterprises to assess and address the heightened risks of abuses, paying special attention to both gender-based and sexual violence;

   c. Denying access to public support and services for a business enterprise that is involved with gross human rights abuses and refuses to cooperate in addressing the situation;

   d. Ensuring that their current policies, legislation, regulations and enforcement measures are effective in addressing the risk of business involvement in gross human rights abuses.

Ensuring policy coherence

8. States should ensure that governmental departments, agencies and other State-based institutions that shape business practices are aware of and observe the State's human rights obligations when fulfilling their respective mandates, including by providing them with relevant information, training and support.

9. States should maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.

10. States, when acting as members of multilateral institutions that deal with business related issues, should:

    a. Seek to ensure that those institutions neither restrain the ability of their member States to meet their duty to protect nor hinder business enterprises from respecting human rights;

    b. Encourage those institutions, within their respective mandates and capacities, to promote business respect for human rights and, where requested, to help States meet their duty to protect against human rights abuse by business enterprises, including through technical assistance, capacity-building and awareness-raising;

    c. Draw on these Guiding Principles to promote shared understanding and advance international cooperation in the management of business and human rights challenges.

II. The corporate responsibility to respect human rights

A. Foundational principles

11. Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.

12. The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.

13. The responsibility to respect human rights requires that business enterprises:

    a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;

    b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

14. The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise's adverse human rights impacts.

15. In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

    a. A policy commitment to meet their responsibility to respect human rights;

    b. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

    c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

B. Operational principles

Policy commitment

16. As the basis for embedding their responsibility to respect human rights, business enterprises should express their commitment to meet this responsibility through a statement of policy that:

    a. Is approved at the most senior level of the business enterprise;

    b. Is informed by relevant internal and/or external expertise;

    c. Stipulates the enterprise's human rights expectations of personnel, business partners and other parties directly linked to its operations, products or services;

    d. Is publicly available and communicated internally and externally to all personnel, business partners and other relevant parties;

    e. Is reflected in operational policies and procedures necessary to embed it throughout the business enterprise.

Human rights due diligence

17. In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

    a. Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;

    b. Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;

    c. Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve.

18. In order to gauge human rights risks, business enterprises should identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships. This process should:

    a. Draw on internal and/or independent external human rights expertise;

    b. Involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.

19. In order to prevent and mitigate adverse human rights impacts, business enterprises should integrate the findings from their impact assessments across relevant internal functions and processes, and take appropriate action.

    a. Effective integration requires that:

        (i) Responsibility for addressing such impacts is assigned to the appropriate level and function within the business enterprise;

(ii) Internal decision-making, budget allocations and oversight processes enable effective responses to such impacts.

b. Appropriate action will vary according to:

(i) Whether the business enterprise causes or contributes to an adverse impact, or whether it is involved solely because the impact is directly linked to its operations, products or services by a business relationship;

(ii) The extent of its leverage in addressing the adverse impact.

20. In order to verify whether adverse human rights impacts are being addressed, business enterprises should track the effectiveness of their response. Tracking should:

a. Be based on appropriate qualitative and quantitative indicators;

b. Draw on feedback from both internal and external sources, including affected stakeholders.

21. In order to account for how they address their human rights impacts, business enterprises should be prepared to communicate this externally, particularly when concerns are raised by or on behalf of affected stakeholders. Business enterprises whose operations or operating contexts pose risks of severe human rights impacts should report formally on how they address them. In all instances, communications should:

a. Be of a form and frequency that reflect an enterprise's human rights impacts and that are accessible to its intended audiences;

b. Provide information that is sufficient to evaluate the adequacy of an enterprise's response to the particular human rights impact involved;

c. In turn not pose risks to affected stakeholders, personnel or to legitimate requirements of commercial confidentiality.

Remediation

22. Where business enterprises identify that they have caused or contributed to adverse impacts, they should provide for or cooperate in their remediation through legitimate processes.

Issues of context

23. In all contexts, business enterprises should:

a. Comply with all applicable laws and respect internationally recognized human rights, wherever they operate;

b. Seek ways to honour the principles of internationally recognized human rights when faced with conflicting requirements;

c. Treat the risk of causing or contributing to gross human rights abuses as a legal compliance issue wherever they operate.

24. Where it is necessary to prioritize actions to address actual and potential adverse human rights impacts, business enterprises should first seek to prevent and mitigate those that are most severe or where delayed response would make them irremediable.

III. Access to remedy

A. Foundational principle

25. As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

B. Operational principles

State-based judicial mechanisms

26. States should take appropriate steps to ensure the effectiveness of domestic judicial mechanisms when addressing business-related human rights abuses, including considering ways to reduce legal, practical and other relevant barriers that could lead to a denial of access to remedy.

State-based non-judicial grievance mechanisms

27. States should provide effective and appropriate non-judicial grievance mechanisms, alongside judicial mechanisms, as part of a comprehensive State-based system for the remedy of business-related human rights abuse.

Non-State-based grievance mechanisms

28. States should consider ways to facilitate access to effective non-State-based grievance mechanisms dealing with business-related human rights harms.

29. To make it possible for grievances to be addressed early and remediated directly, business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted.

30. Industry, multi-stakeholder and other collaborative initiatives that are based on respect for human rights-related standards should ensure that effective grievance mechanisms are available.

Effectiveness criteria for non-judicial grievance mechanisms

31. In order to ensure their effectiveness, non-judicial grievance mechanisms, both State-based and non-State-based, should be:

    a. Legitimate: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

    b. Accessible: being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;

    c. Predictable: providing a clear and known procedure with an indicative timeframe for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;

    d. Equitable: seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;

    e. Transparent: keeping parties to a grievance informed about its progress, and providing sufficient

information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;

f. Rights-compatible: ensuring that outcomes and remedies accord with internationally recognized human rights;

g. A source of continuous learning: drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms;

Operational-level mechanisms should also be:

h. Based on engagement and dialogue: consulting the stakeholder groups for whose use they are intended on their design and performance, and focusing on dialogue as the means to address and resolve grievances.

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 Aboriginal peoples 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/documents/DRIPS_en.pdf (viewed 2 October 2011).

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 6 September 2012).

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