ALRC: Review of the Native Title Act 1993

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION

14 May 2014

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1 Introduction

1. The Australian Human Rights Commission (the Commission)[1] makes this submission to the Australian Law Reform Commission (ALRC) in its Inquiry into the *Native Title Act 1993* (Cth) (the Native Title Act).

2. The Native Title Act was introduced in response to the historic High Court decision in *Mabo v Queensland [No 2]*.[2]

3. The Preamble to the Native Title Act states that in enacting the law, the people of Australia intend:

   - to rectify the consequences of past injustices…for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

   - to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[3]

4. The Native Title Act, which in its original form 'endeavoured to accommodate the realities of the past and provide a fair way to deal with land in the future, based on contemporary notions of justice'[4], has been in operation for more than 20 years.

5. During this time, the Native Title Act has undergone numerous reviews focused on increasing flexibility and efficiency in its implementation.

6. The Act was significantly amended in 1998[5] in ways that the Commission has stated 'seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander peoples'.[6] Further amendments in 2010 created a new future act process.[7] Other than this, reforms to both the Native Title Act and the native title system more generally have been ad hoc and only 'tinkered around the edges'. This has resulted in a native title system that has created some opportunities for Aboriginal and Torres Strait Islander communities, but which remains slow and cumbersome in the delivery of outcomes.[8]

7. The Commission welcomes the opportunity to contribute to an inquiry process aimed at improving the overall operation of the native title system, and ensuring that it delivers on the original intent outlined in the Objects and Preamble of the Act, for all parties involved.

8. The Social Justice and Native Title Reports, tabled annually in Parliament by the Aboriginal and Torres Strait Islander Social Justice Commissioner have provided extensive analysis of the Native Title Act and the operation of the native title system. These reports have also provided detailed recommendations on positive reforms that would contribute to achieving the stated aims outlined in the Native Title Act. The recommendations and analysis of these reports should inform this review process.[9]

9. The ALRC has an opportunity to propose reforms that can result in meaningful and substantial change in terms of the operation of the Act, and deliver outcomes for Aboriginal and Torres Strait Islander peoples that are commensurate with full recognition and status as Australia's First Peoples.

10. The Commission will provide general comment as it relates to the ALRC Issues Paper, *Review of the Native Title Act 1993* (the Issues Paper) and the questions raised within.

11. This submission will then provide specific comment on seven key areas:

    - consistency of the Native Title Act with the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and other international standards
    - active native title reviews and inquiries
    - the Native Title Amendment Bill 2012 (Cth)
    - connection and continuity
    - extinguishment of native title rights and interests
    - commercial native title rights and interests and compensation
    - other issues for consideration – good faith.

2 Recommendations

12. The Australian Human Rights Commission recommends that the ALRC:

    - assess the Native Title Act and the broader operation of the native title system against international human rights standards and address concerns raised by the Committee on the Elimination of Racial Discrimination.
    - work in conjunction with existing native title working groups, review and inquiry committees to ensure an efficient and consistent approach is applied to reform processes.
    - recommend that the Australian Government reintroduces and supports the passage of the Native Title Amendment Bill 2012 through the Parliament.
    - recommend that the Native Title Act be amended so that it is consistent with the Full Federal Court's decision in De Rose.

- recommend that the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.[10].

- recommends amendments to the Native Title Act that:

    i. address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

    ii. clarifies that where the State establishes that the society which existed at settlement has not been able to maintain 'continuity and vitality' in its observance of laws and customs due to the actions of settlers, that the lack of continuity and vitality shall be disregarded.

    iii. provides a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the forced relocation of communities onto missions.

- recommend that the Australian Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment of native title to be disregarded.

- recommends reverting s 24MD(2)(c) of the Native Title Act to its original wording.

- recommend that the Native Title Act be amended to clarify that native title rights and interests can include commercial or economic rights and interests.

- recommend repealing section 26(3) of the Native Title Act to allow procedural rights in relation to offshore areas.

- recommends inclusion of explicit criteria as to what constitutes 'good faith' in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in the *Western Australia v Taylor* ,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'.

3 General Comments

13. The Commission notes the scope of this inquiry is wide ranging and aims to understand variations in law and practice affecting native title across the country; and 'contribute to the longer-term governance and operation of the native title system'.

14. The Commission is of the view that the key priorities for native title reform are to:

    - establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test

    - enable native title holders to govern their lands, territories and resources through their Prescribed Bodies Corporate (PBC's).[11]

15. The Commission also considers it appropriate that any suggested amendments that relate to benefits obtained from either determinations of native title or Indigenous Land Use Agreements (ILUA's), also take into consideration the need to build good governance capacity within the native title system. This is particularly important to enable PBCs to manage native title benefits into the future, and to ensure that they have the capacity to administer and evaluate their statutory responsibilities, particularly those included in ILUA's, and the capacity to respond appropriately where there is a breach of agreement.

16. The Commission suggests that this issue be given consideration by this inquiry, but that it is coordinated with the current *Review into the Roles and Functions of Native Title Organisations*.[12]

17. The Commission also refers the ALRC to the Native Title Reports and Submissions made by the Commission to the numerous inquiries into native title conducted over many years. These reports and submissions provide relevant analysis and proposed amendments to law and policy with regard to:

    - the protection of the cultural, social and economic rights and interests of Aboriginal and Torres Strait Islander peoples concerned with and derived from their lands, territories and resources

    - the trends in native title over the past twenty years and how they are relevant to connection requirements, authorisation and joinder provisions

    - the variations in the operation of the native title system at the State and Territory level across Australia and how they interrelate with land rights, cultural heritage and other relevant legislation

    - the operation of s 223 of the Native Title Act, connection and continuity, and the meaning of 'traditional'

- interruption to connection and the operation of the law regarding extinguishment
- commercial native title rights and interests
- good faith negotiations
- agreement-making and economic development
- the impacts of and options for addressing lateral violence in native title.

4 The Native Title Act and its consistency with international human rights standards

18. The High Court decision in *Mabo* was founded on human rights.[13] Consequently, the intention of the Native Title Act was to acknowledge the fundamental human rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources.

19. The international human rights system provides a framework by which governments can develop and implement their laws and policies in ways that are consistent with international standards.

20. The standards established in international law are 'relevant to native title in that they protect property against arbitrary and discriminatory interference'.[14]

21. Human rights treaties Australia has ratified protect the rights of Indigenous peoples to the ownership, use and occupation of their lands, territories and resources, and the expression of their cultural identity. This includes through Articles 1, 2, 26 and 27 of the *International Covenant on Civil and Political Rights* (ICCPR), Articles 1, 2, and 15 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR), and Articles 2 and 5 of the *International Convention on the Elimination of all Forms of Racial Discrimination* (ICERD). The standards recognised in these treaties are further articulated in the *United Nations Declaration on the Rights of Indigenous Peoples.*

22. In monitoring Australia's performance against our human rights obligations, human rights treaty bodies including the United Nations Human Rights Committee and the Committee on the Elimination of Racial Discrimination (CERD), have provided recommendations for reform that would bring the native title system in line with human rights standards.[15] Recommendations of the Human Rights Committee and CERD are provided at Appendix 1.

4.1 The United Nations Declaration on the Rights of Indigenous Peoples

23. The rights and interests articulated in the *Mabo* decision and the subsequent Native Title Act are clearly articulated in the *United Nations Declaration on the Rights of Indigenous Peoples*[16] (the Declaration).

24. The Declaration is a remedial instrument, designed to rectify a history of failings when it comes to protecting Indigenous peoples' human rights. The Declaration contains the 'minimum standards for the survival, dignity and well-being of the indigenous peoples of the world'.[17] It elaborates the rights already set out in existing human rights instruments, including the treaties to which Australia is a party. In many ways, the Declaration reflects customary international law.[18]

25. The Declaration is underpinned by four key principles: self-determination, participation in decision making, respect for and protection of culture, and equality and non-discrimination; while Articles 25-32 relate specifically to Indigenous peoples relationships and rights to lands, territories and resources. These Articles include rights to:

    - maintain and strengthen spiritual relationships with their lands, territories and resources and to uphold responsibilities to future generations (Art 25)
    - own, use, develop and control the lands, territories and resources they possess by reason of traditional ownership or traditional possession (Art 26)
    - redress, including restitution or just, fair and equitable compensation (Art 28)
    - the conservation and protection of the environment and the productive capacity of lands, territories and resources (Art 29)
    - maintain, control, protect and develop cultural heritage, traditional knowledge and traditional cultural expressions (Art 31)
    - determine and develop priorities and strategies for development or use of lands, territories and resources (Art 32).[19]

26. These Articles also provide clear guidance to governments to facilitate the realisation of these rights including:

    - legal recognition and protection of these lands, territories and resources with due respect given to customs, traditions and land tenure systems of Indigenous peoples concerned (Art 26)
    - the establishment and implementation of a fair, independent, impartial, open and transparent process that is developed in conjunction with and gives due recognition to Indigenous peoples laws, traditions, customs

and land tenure systems, and adjudicates the rights of Indigenous peoples to their lands, territories and resources (Art 27)

- that the free, prior and informed consent of indigenous peoples concerned is obtained prior to the approval of any project affecting their lands, territories and resources, particularly in connection with development, utilisation or exploitation of mineral, water or other resources; to provide effective mechanisms and take appropriate measures to provide just and fair redress; and to mitigate adverse environmental, economic, social, cultural or spiritual impact (Art 32).

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

28. In order that the Native Title Act and the implementation of the native title system are consistent with internationally agreed human rights standards, reforms to the Native Title Act should be reflective of these standards.

29. The Commission notes that the Issues Paper refers to Article 38 of the Declaration which advises States to take appropriate measures, including legislative measures, to achieve the ends of the Declaration. It is important to ensure that both the Native Title Act and the operation of the native title system are consistent with the principles and rights outlined in the Declaration. As such, it would also be appropriate to draw on Article 27 of the Declaration (outlined above) which extends the focus from legislative measures to include processes concerned with implementing the native title system.

5 Current native title reviews and inquiries

30. A number of reviews of the native title system are currently underway, including:

- the tax treatment of native title payments and how these payments can better benefit Indigenous communities[20]
- a review of the roles and functions of native title organisations[21]
- this review of the Native Title Act 1993[22].

31. It is essential that these various working groups, reviews and inquiries work together to provide a consistent approach to ensuring that the native title system provides Aboriginal and Torres Strait Islander peoples with opportunities to achieve economic, social and cultural aspirations,. This will limit the amount of overlap, ensure the efficient use of resources, and support a consistent approach to reform.

32. The Commission recommends that the ALRC not only 'have regard to the recommendations', but work in conjunction with existing native title working

groups, and current review and inquiry committees to ensure an efficient and consistent approach is taken to the reforms.

6 The Native Title Amendment Bill 2012 (Cth)

33. The Native Title Amendment Bill 2012:

    - enables parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment such as parks and reserves
    - clarifies the meaning of good faith under the right to negotiate regime, and the conduct and effort required of parties in seeking to reach agreement
    - streamlines processes for Indigenous Land Use Agreements (ILUA's).

34. The Commission provided submissions to both parliamentary inquiry processes related to this Bill.[23] The Commission supported the passage of the Native Title Amendment Bill 2012 because it is consistent with the right of self-determination and promotes the ability to enjoy and benefit from culture as required by the ICCPR, the ICESCR, and the Declaration.[24]

35. Despite recommendations by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, and the Senate Legal and Constitutional Affairs Legislation Committee[25] to pass the Bill; and being deemed to be compatible with human rights by the JCHR [26], the Native Title Amendment Bill 2012 lapsed at the dissolution of the House of Representatives on 5 August 2013.

36. The Commission recommends that in the circumstance that this has not occurred by the reporting timeframe, that the ALRC recommend that the Australian Government reintroduces and supports the passage of the Native Title Amendment Bill 2012 through the Parliament.

37. The recommendations provided by the Commission to the inquiries concerning the Native Title Amendment Bill 2012, as well as the Native Title Amendment (Reform) Bill 2011, have been provided for consideration by the ALRC at Appendix 1.

7 Connection and continuity

38. The Commission considers that addressing issues concerning the onerous standards of proof required for Aboriginal and Torres Strait Islander peoples to prove native title over their lands, territories and resources is a key priority for native title reform.

7.1 Connection

39. For Aboriginal and Torres Strait Islander peoples, establishing their claims to native title involves extensive requirements for proving their identity and their connection to country.

40. In order to lodge a native title claimant application in the Federal Court, and then meet that merit and procedural conditions of the registration test set out in the Native Title Act[27], members of a claim group must navigate an unfamiliar system to provide, in the appropriate legal format, the following information:

    - a description of the native title claim group
    - the boundaries of the claimed land and waters
    - a list of claimed native title rights and interests, which are ‘readily identifiable’ and can be established *prima facie* by members of the claim group
    - the factual basis upon which the claim group has a connection to the claim area that has continued since sovereignty
    - the ability to demonstrate an on-going connection with the claim area by members of the claim group.

41. The Aboriginal and Torres Strait Islander Social Justice Commissioner, in Chapters two and four of his *Native Title Report 2011*[28] highlighted how the process of describing their relationships to each other and their connection to their lands, territories and resources in ways that meet the requirements under the Native Title Act, can cause considerable stress on Aboriginal and Torres Strait Islander peoples and their communities. He also suggested that in the shadow of dispossession, the current arrangements including agreeing on the membership of the claim group; deciding on who will be the applicant; and determining the boundaries of the claim area can contribute to lateral violence[29] within Aboriginal and Torres Strait Islander communities.

42. Taking into consideration the impacts of colonisation and the original intent of the Native Title Act, native title stakeholders have consistently called for a just and equitable native title system. This will require reforms that address the broad inadequacies of the system that concern the culture and identity of Aboriginal and Torres Strait Islander peoples, including improving the recognition of traditional ownership and addressing the current burden of proving native title.

43. Section 223 of the Native Title Act currently requires that claimants ‘have a connection with the land or waters’ that is the subject of the claim, and have such a connection by virtue of their traditional law and customs. Section 190B of the Act requires that the native title claim group show that at least one member of the claim group has or previously had a ‘traditional physical connection’ with a part of the land or waters covered by the application, or would have had such a connection if not for things done by the Crown, a statutory authority or leaseholder.[30]

44. Requiring evidence of a physical connection sets a standard that may prevent claimants who cannot demonstrate an ongoing physical connection due to the impacts of colonisation, but can demonstrate a continuing spiritual connection to the land by having their native title rights protected and recognised.[31]

45. Since the Full Federal Court decision in De Rose,[32] the courts have rejected the need for the claimants to demonstrate an ongoing physical connection with the land.[33]

46. The Native Title Amendment (Reform) Bill 2011[34] proposed amendments to s 223 that clarify the required connection may be spiritual.

47. The Commission recommends that the Native Title Act be amended so that it is consistent with the Full Federal Court's decision in De Rose.

7.2 Continuity

48. The high standards for proving continuity, as derived from the High Court decision in *Yorta Yorta v Victoria*[35], have had a detrimental impact on native title claims. For example, the Larrakia people were unable to prove their native title claim over vacant Crown land in Darwin because the Federal Court found their connection to their land and their acknowledgement and observance of their traditional laws and customs had been interrupted – even though they were, at the time of the claim, a 'strong, vibrant and dynamic society'.[36]

49. Chief Justice French AC of the High Court of Australia, in an extra curial speech, suggested that the *Native Title Act 1993* could be amended to provide for a presumption in favour of native title applicants, which 'could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from settlement to the present time'.[37]

50. The Commission supports amending the Native Title Act to establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test set out at section 190A of the Native Title Act.[38]

51. The onus would then shift onto the respondent, usually state or territory governments, to demonstrate that there is evidence of 'substantial interruption' in the acknowledgment of traditional laws or the observation of traditional customs that sets aside the presumption. This will clarify that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity.

52. This is an important proposal given that the CERD has expressed concern about the onerous evidential burden on claimants proving native title.[39]

53. With regard to 'substantial interruption'[40], the definition of native title in the Native Title Act does not require continuity, and for this reason, the Act similarly does not contemplate what constitutes a substantial interruption in continuity. However, the courts have interpreted the Native Title Act as requiring literal continuous connection, ignoring 'the reality of European

interference in the lives of Indigenous peoples'.[41] What constitutes a 'substantial interruption' is not settled.

54. The claim of the Larrakia people illustrates the vulnerability and fragility of native title. A break in continuity of traditional laws and customs for just a few decades was sufficient for the Court to find that native title did not exist. This was despite Justice Mansfield concluding that the Larrakia people 'clearly' existed as a society in the Darwin area with a structure of rules and practices directing their affairs.[42]

(a) Consideration of Reasons for Interruption

55. Given the Court is currently unable to take into account the reasons for the interruption[43], native title claimants are effectively frustrated in satisfying the requirements of demonstrating continuous connection in circumstances where the interruption has been caused by colonisation.

56. A consequence of the construction of s 223 is that there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs.

57. In furtherance of the purposes of the Act[44], the Commission recommends amendments that:

- address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

- provides for a presumption of continuity, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.[45]

- clarifies that where the State establishes that the society which existed at settlement has not been able to maintain 'continuity and vitality' in its observance of laws and customs (as required by the Yorta Yorta test), due to the actions of settlers, that the lack of continuity and vitality shall be disregarded.[46]

- provides a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the forced relocation of communities onto missions.[47]

(b) Definition of 'traditional'

58. Further, the Commission is of the view that the interpretation of 'traditional' under the Native Title Act sets too high a test and may not allow for traditional laws and customs to develop and progress over time in the way that all cultures adapt and change over time.

59. The Commission submits that an approach that allows for 'traditional' laws and customs to change over time provided they remain 'identifiable' is consistent with the recognition of Aboriginal and Torres Strait Islander peoples' rights to culture and would clarify the level of adaptation allowable under the law.[48]

60. It is important to note, that a presumption of continuity as suggested above would be undermined if respondents could rebut the presumption simply by establishing that a law or custom is not practised as it was at the date of sovereignty.[49]

8 Extinguishment of native title rights and interests

8.1 Compulsory acquisition

61. Following his visit to Australia in August 2009, the Special Rapporteur on the Rights of Indigenous Peoples observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the Declaration and other international instruments.[50]

62. Section 24MD(2)(c) of the Native Title Act currently states that 'compulsory acquisition extinguishes the whole or the part of the native title rights and interests'.

63. As originally enacted, this section of the Native Title Act stated that 'acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition that led to extinguishment'.[51]

64. The Commission recommends reverting s 24MD(2)(c) of the Native Title Act to its original wording.[52]

8.2 Agreements to disregard prior extinguishment

65. The Native Title Act does not currently allow parties to reach agreement about disregarding extinguishment of native title except in particular circumstances set out in section 47 (pastoral leases held by native title claimants), section 47A (reserves covered by claimant applications) and section 47B (vacant Crown land covered by claimant applications).

66. In response to the Native Title Amendment (Reform) Bill 2011, the Commission supported the insertion of a new s 47C, which intended to enable an applicant and a government party to make an agreement, at any time prior to a determination, that the extinguishment of native title rights and interests is to be disregarded,[53] and expands the range of circumstances in which the extinguishment can be disregarded.[54]

67. The Native Title Amendment Bill 2012 also proposed a new s 47C, which would allow historical extinguishment of native title over national, State and Territory parks and reserves to be disregarded where there is agreement

between the relevant government party and the native title party. This amendment also proposed to:

- enable the government party to include a statement in the agreement that it agrees to disregard extinguishment of native title over public works within the agreement area, if the public works were established or constructed by or on behalf of the relevant government party
- provide notification requirements to give interested persons an opportunity to comment over a two month period on the proposed agreement
- ensure the validity of other prior interests (such as licenses and leases) and maintain public access to the area
- provide that the non-extinguishment principle applies, so that any current native title interests over the land would have continued to exist but would suppress rather than extinguish any native title rights to the extent of any inconsistency
- exclude Crown ownership of natural resources from the operation of section 47C.

68. The Commission supported these amendments to expand the areas where historical extinguishment of native title can be disregarded. However, the Commission recommended expanding the proposed provision in the following two ways:

    - alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B of the Native Title Act; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
    - expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants.

69. The Commission therefore recommends that the Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment of native title to be disregarded.[55]

9 Commercial native title rights and interests and compensation

9.1 Commercial or economic native title rights and interests

70. The Declaration affirms the right of Aboriginal and Torres Strait Islander peoples to self-determination. By virtue of that right, Aboriginal and Torres Strait Islander peoples 'freely determine their political status and freely pursue their economic, social and cultural development'.[56]

71. The Native Title Act does not clearly specify that native title rights and interests can be of a commercial nature.

72. In fact, the Commission is of the view that economic development for Aboriginal and Torres Strait Islander peoples is hindered by obstacles in the native title system. The previous Social Justice Commissioner identified six specific aspects of native title law and policy that can act as inhibitors to economic development. These include:

    - the test for the recognition of native title
    - the test for the extinguishment of native title
    - the nature of native title: a bundle of rights
    - the rules that regulate future development affecting native title rights
    - inadequate resourcing for Aboriginal and Torres Strait Islander bodies in the native title system
    - the goals of governments' native title policies.[57]

73. In the recent Federal Court decision of *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*[58] the Court found that in some cases native title rights may include the right to access, take and use resources for trading or commercial purposes.[59]

74. The Commission welcomes this interpretation and submits that s 223(2) of the Native Title Act should be amended to clarify that native title rights and interests can include commercial or economic rights and interests.

75. Further, s 26(3) of the *Native Title Act 1993* limits the right to negotiate to acts that relate 'to a place that is on the landward side of the mean high-water mark of the sea'. However, the High Court's decision in *Commonwealth v Yarmirr* recognised that non-exclusive native title rights and interests can exist over offshore areas.[60]

76. The Social Justice Commissioner has highlighted the anomaly between section 26(3) and the courts' recognition that non-exclusive native title rights and interests can exist in relation to offshore areas.[61] The Commission also notes that an amendment to repeal section 26(3) was included in the Native

Title Amendment (Reform) Bill 2011, and the subject of inquiry and report by the Senate Legal and Constitutional Affairs Legislation Committee.[62]

77. The Commission recommends that the Committee consider repealing section 26(3) of the *Native Title Act 1993* to allow procedural rights in relation to offshore areas.

9.2 Compensation for the extinguishment of native title rights and interests

78. The Native Title Act includes an entitlement to compensation for the extinguishment of native title in certain circumstances.[63]

79. Despite 20 years of the operation of the Native Title Act, the Federal Court delivered its first judgement for compensation for the extinguishment of native title rights and interests on 1 October 2013 to the claimants of the De Rose Hill native title determination in South Australia.

80. However, the judgement does not contain any clear statements or guidance as to how compensation should be assessed.

81. Consultation with those involved in the De Rose Hill compensation determination would assist the ALRC in developing relevant legal principles including for example:

    - what process should be established to determine whether the acts identified in compensation applications are compensable
    - 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.

10 Other issues for consideration – Good faith

82. Good faith native title negotiations have been discussed in numerous submissions and Native Title Reports and are an ongoing concern of the Commission.

83. Article 32 (2) of the Declaration provides that:

> 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.

84. The good faith negotiation requirement is one of the few legal safeguards that native title parties have under the future act regime contained within the Native Title Act.[64]

85. In *FMG Pilbara Pty Ltd v Cox* (*FMG*)[65], the Federal Court considered the obligation to negotiate in good faith. It found that

> there could only be a conclusion of lack of good faith within the meaning of [s 31]...where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.[66]

86. The Commission considers that the Federal Court decision in *FMG v Pilbara* has diluted the content of this important procedural right for native title parties.[67]

87. The previous government attempted to address the need to clarify the meaning of good faith within the Act, but progress on this issue has stalled.

88. The Senate Standing Committees on Legal and Constitutional Affairs considered good faith negotiations in their report on the Native Title Amendment Bill 2012. The Committee recommended incorporating the Njamal Indicia set out in the *Western Australia v Taylor* (1996) 134 FLR 211 as the good faith negotiation criteria.[68]

89. Accordingly, the Commission recommends the ALRC consider the issue of good faith for the purposes of this inquiry. The Commission also recommends inclusion of explicit criteria as to what constitutes 'good faith' in the Native Title Act, in order to strengthen the Act and prevent parties from waiting 'until an arbitrated outcome is available to them'.[69] The criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in the *Western Australia v Taylor,* 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'.[70]

90. Proposed amendments 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)
- extending the minimum negotiating period from six months to eight months, but allowing a shorter period where appropriate
- providing that the onus of proving negotiation has been in good faith is on the party asserting good faith[71]
- requiring a party to negotiate in good faith using all reasonable efforts before applying to the arbitral body.[72]
- giving the arbitral body the ability to intervene if negotiations break down, including the ability to:
  - i. issue negotiation orders specifying actions to ensure requirements for good faith are met[73]
  - ii. make a material breach declaration if a negotiation order is breached with appropriate consequences for the party responsible[74]

iii. make non-binding recommendations about the process which the negotiation parties should follow

iv. ensuring that the expedited procedure can only be utilised where the grantee party requests that it apply.[75]

91. The Commission is of the view that consideration should also be given to:

- including a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith
- inserting a 'reasonable person' test which may be used in assessing the actions of a proponent seeking a determination when negotiations are at a very early stage.[76]

92. The Native Title Amendment Bill 2012 proposed section 31A, which set out good faith requirements for parties in relation to negotiating a proposed agreement. These requirements were outlined in proposed section 31A(2) and included the negotiating parties:

- attending and participating in meetings at reasonable times
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
- making reasonable proposals and counter proposals
- responding to proposals made by other negotiation parties for the agreement in a timely manner
- giving genuine consideration to the proposals of other negotiation parties
- refraining from capricious or unfair conduct that undermined negotiation
- recognising and negotiating with the other negotiation parties or their representatives
- refraining from acting for an improper purpose in relation to the negotiations
- any other matter the arbitral body considers relevant.

93. The Commission considers these amendments as a key legal safeguard for native title parties under the future act regime.[77]

11 Appendix 1 – Relevant recommendations on Native Title Reform made by the Human Rights Council, the Committee on the Elimination of Racial Discrimination and the Australian Human Rights Commission

Report/Submission	Recommendations
Human Rights Council	
Universal Periodic Review - 2011	86.102 Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life (United Kingdom) 86.11. Ratify ILO Convention No. 169 and incorporate it into its national norms
Committee on the Elimination of Racial Discrimination	
General Comment XXIII (Indigenous Peoples - 18/08/97)	5. The Committee especially calls upon States parties to recognize and protect the rights of indigenous peoples to own, develop, control and use their communal lands, territories and resources and, where they have been deprived of their lands and territories traditionally owned or otherwise inhabited or used without their free and informed consent, to take steps to return those lands and territories. Only when this is for factual reasons not possible, the right to restitution should be substituted by the right to just, fair and prompt compensation. Such compensation should as far as possible take the form of lands and territories.
CERD Report on Australia	16. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and

- 2005	indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention. (article 5) The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all. 17. The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands. (article 5) The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.
CERD Report on Australia - 2010	18. Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands, and the fact that in spite of large investment of time and resources by Indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5). The Committee urges the State party to provide more information on this issue, and take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving

	data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve "better native title claim settlements in a timely manner". It also recommends that the State party enhance adequate mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources.
Australian Human Rights Commission - Aboriginal and Torres Strait Islander Social Justice Commissioner - Native Title Reports	
Native Title Report 2013	3.12: The Australian Government reintroduces the Native Title Amendment Bill 2012 (Cth) and supports its passage through the Parliament. 3.13: The Australian Government considers the following outstanding recommendations in the Native Title Report 2009: 1. That the Native Title Act 1993 (Cth) be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test. 2. That the Native Title Act 1993 (Cth) provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.
Native Title Report 2012	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.
Native Title Report 2011	**Review of the Native Title Act** 1. That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the United Nations Declaration on the Rights of Indigenous Peoples. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. This inquiry could form part of the Australian Government's National Human Rights Action Plan. **International human rights mechanisms** 2. That the Australian Government take steps to formally respond to, and implement, recommendations which advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, made by international human rights mechanisms including: ◦Special Rapporteur on the rights of indigenous peoples • Expert Mechanism on the Rights of Indigenous Peoples • United Nations Permanent Forum on Indigenous Issues • Treaty reporting bodies **Implementation of the recommendations from Native Title Reports** 4. That the Australian Government should implement outstanding recommendations from the Native Title Report 2010 and provide a formal response for next year's Report which outlines the Government's progress towards implementing the recommendations from both the Native Title Report 2010 and Native Title Report 2011. **Implementation of the Declaration** 5. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a

	national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect. **Lateral violence, cultural safety and security in the native title system** 6. That targeted research is undertaken to develop the evidence base and tools to address lateral violence as it relates to the native title system. This research should be supported by the Australian Government. 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.
Native Title Report 2010	**Chapter 2: ‘The basis for a strengthened partnership’: Reforms related to agreement-making** 2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of: • the impact of the current burden of proof

	• the operation of the law regarding extinguishment • the future act regime • options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements). 2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure. 2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making. 2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011. 2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the Native Title Amendment Act (No 1) 2010 (Cth)) as a measure of last resort. 2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the Native Title Amendment Act (No 1) 2010 (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements. 2.7 That the Australian Government: • consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples • provide a clear, evidence-based policy justification before introducing reforms that are designed to ensure the ‘sustainability’ of native title agreements. 2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other

	Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes. **Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement** 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.
Native Title Report 2009	**Chapter 2: Changing the culture of native title** 2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples. 2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries. 2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians. **Chapter 3: Towards a just and equitable native title system**

	3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership. 3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements. 3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society. 3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time. 3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters. 3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so. 3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance. 3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order. 3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements. 3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information. 3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information. 3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.

	3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement. 3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 to provide greater transparency in the respondent funding process. 3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by: • repealing section 26(3) of the Native Title Act • amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3) • reviewing time limits under the right to negotiate • amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination • shifting the onus of proof onto the proponents of development to show their good faith • allowing arbitral bodies to impose royalty conditions. 3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature. 3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose. 3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances. 3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as: • the prospect of a negotiated outcome being reached • the resources of the parties

	• the interests of the other parties to the proceeding. 3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.
Native Title Report 2008	**Chapter 2: Changes to the native Title system – one year on** 2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples. 2.2 That the Australian Government respond to the recommendations made in the Native Title Report 2007 on the 2007 changes to the native title system. 2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act. 2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBC's capacity to operate. **Chapter 3: Selected native title cases – 2007-2008** 3.1 That the Australian Government pursues consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be to amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. 3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.

	3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state: In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223: • whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander • whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander. 3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.
Native Title Report 2007	**Chapter 1: Changes to the Native Title System** 1.1 That the Australian Government immediately appoint an independent person to conduct a comprehensive review of the whole native title system and report back to the Attorney-General by 30 June 2010. This review is to: • focus on delivering the objects of the Native Title Act in accordance with the preamble; • seek significant simplification of the legislation, and structures so that all is in an easily discernable form; and • call for wide input from all stakeholders in native title, especially ensuring that the voice of Indigenous peoples is heard. 1.2 That the government convene a national summit on the native title system with extensive representation. 1.3 That the Attorney-General monitor the 2007 changes to the Native Title Act and prepare a report to Parliament before the end of 2009, in such a way that it identifies: • the extent to which Indigenous people are gaining recognition and protection of native title in accord with the preamble to the Native Title Act; • the extent, if at all, to which the parties' rights are compromised by the changes; and • the extent to which the new powers given to the National Native Title Tribunal are used.

	Chapter 8: Where to native title 8.1 That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry: • into how the compensation provisions of the Native Title Act are currently operating; and • whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation. In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments. The tribunal present to Parliament specific options for reform: • to ensure Indigenous people can effectively and practically access their human right to compensation; and • to ensure the amount of compensation is just, fair and equitable. 8.2 That the Native Title Act be amended to insert a definition of 'traditional' for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests. 8.3 That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993. 8.4 That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.
Native Title Report 2005	**Recommendation 1: Native title policy reform**

<table>
<tr><td></td><td>That State, Territory and Commonwealth governments alter their native title policies to:

• increase funding to NTRBs and PBCs
• adopt and adhere to the National Principles on economic development for Indigenous lands set out in the Native Title Report 2004. These principles are that native title agreements and the broader native title system should:

1. Respond to the traditional owner group's goals for economic and social development

2. Provide for the development of the group's capacity to set, implement and achieve their development goals

3. Utilise to the fullest extent possible the existing assets and capacities of the group

4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands

5. Integrate activities at various levels to achieve the development goals of the group.</td></tr>
<tr><td colspan="2">Australian Human Rights Commission – Submissions to Parliamentary Inquiries concerning the Native Title Amendment Bill 2012</td></tr>
<tr><td>House Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012</td><td>1. Support the passage of the Native Title Amendment Bill 2012.
2. Consider incorporating the changes outlined in paragraph 15 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:
i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.
3. Consider the implications of the amendment outlined in paragraph 28 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body.
4. Collaborate with the Senate Legal and Constitutional Affairs Legislation Committee on their Inquiry into the Native Title Amendment Bill 2012.</td></tr>
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	5. Consider the following outstanding recommendations in the Native Title Report 2012 in relation to implementing the United Nations Declaration on the Rights of Indigenous Peoples: i. 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. ii. That the Australian Government ensures that 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) are consistent with the United Nations Declaration on the Rights of Indigenous Peoples. 6. Consider the following outstanding recommendations in the Native Title Report 2009 in relation to shifting the burden of proof for native title: i. That the Native Title Act 1993 be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test. ii. That the Native Title Act 1993 provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society. 7. Consider repealing section 26(3) of the Native Title Act 1993 to allow procedural rights in relation to offshore areas. 8. Consider amending section 223(2) of the Native Title Act 1993 to specify that native title rights and interests include the 'right to trade and other rights and interests of an economic nature'. 9. Consider the following outstanding recommendation in the Native Title Report 2012 in relation to Prescribed Bodies Corporate: i. 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 alternate legislation in relation to their lands, territories and resources. 10. Recommend that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title 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 inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian, State and Territory governments, and respondent stakeholders including mining and pastoral interests.
Senate Legal and	1. Support the passage of the Native Title Amendment Bill 2012.

<table>
<tr><td>Constitutional Affairs Legislation Committee</td><td>2. Consider incorporating the changes outlined in paragraph 13 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:
i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.
3. Consider the implications of the amendment outlined in paragraph 26 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body.
4. Collaborate with the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on an amendment to the Bill that would effectively reverse the onus of proof for native title claimants in relation to their on-going connection to their traditional lands, territories and resources, and to implement any other proposals recommended by that Committee for the future reform of the native title system.</td></tr>
<tr><td colspan="2">Australian Human Rights Commission Submission - Native Title Amendment (Reform) Bill 2011</td></tr>
<tr><td>Senate Legal and Constitutional Affairs Committee</td><td>1. The Committee endorse the stated intention of the Reform Bill.
2. The Committee recommend the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples.
3. A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.
4. The Committee recommend the Australian Government give full consideration to items 5-9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.</td></tr>
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[1] The Commission is Australia's national human rights institution and is established by the Australian Human Rights Commission Act 1986 (Cth). The Commission has responsibilities under the AHRC Act to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples. The Commission also has responsibilities to report annually on the effect of the Native Title Act on the exercise and enjoyment of human rights of Aboriginal people and Torres Strait Islanders. See s 209 of the *Native Title Act 1993* (Cth)

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

[3] *Native Title Act 1993* (Cth), preamble.

[4] Z Antonios, *Native Title Report 1998,* Human Rights and Equal Opportunity Commission (1999), p 11. At http://www.humanrights.gov.au/publications/native-title-reports#1998 (viewed 19 April 2014).

[5] *Native Title Amendment Act 1998* (Cth). Also see Z Antonios, *Native Title Report 1998,* Human Rights and Equal Opportunity Commission (1999), pp 73–116; T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 4–7. At http://www.humanrights.gov.au/publications/native-title-reports (viewed 19 April 2014).

[6] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p 6. At http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 25 January 2012).

[7] *Native Title Amendment Act (No 1) 2010* (Cth). See M Gooda, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 36–37. At http://www.humanrights.gov.au/publications/native-title-report-2010 (viewed 22 April 2014).

[8] The Federal Court of Australia observes that there has been a marked increase in the number of applications resolved by consent since 2010–11; from 10 native title consent determinations in 2010–11 to 37 consent determinations in 2011–12 and 28 consent determinations in 2012–13. The Federal Court reports that the average resolution time for applications has increased since 1994 with a slight levelling in recent years. As at 30 June 2013, the median time for resolution of applications was 12 years and 11 months.

[9] Australian Human Rights Commission, Social Justice and Native Title Reports, at: http://www.humanrights.gov.au/social-justice-and-native-title-reports (viewed 20 April 2014).

[10] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report* 2008, Australian Human Rights Commission (2009), p 90. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

[11] M Gooda, *Social Justice and Native Title Report 2013,* Australian Human Rights Commission (2013), p 104. At: http://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013 (viewed 20 April 2014).

[12] Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations Discussion Paper* (June 2013). At https://www.deloitteaccesseconomics.com.au/uploads/File/DAE_NTOR%20Discussion%20Paper.pdf (viewed 23 April 2014).

[13] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.

[14] 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 1 May 2014).

[15] See for example, United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review – Australia,* Human Rights Council, Seventeenth Session, 24 March 2011, UN Doc A/HRC/17/10, pp 19-21, recommendations 86.102-86.118. At: http://www.ohchr.org/EN/HRBodies/UPR/PAGES/AUSession10.aspx (viewed 20 April 2014). Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by states parties under article 9 of the Convention, Australia, seventy seventh session* UN Doc CERD/C/AUS/CO/15-17 (2010) para 18. At http://www.ohchr.org/EN/countries/AsiaRegion/Pages/AUIndex.aspx (viewed 20 April 2014). Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia,* UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At http://www.ohchr.org/EN/HRBodies/CCPR/Pages/CCPRIndex.aspx (viewed 23 April 2014).

[16] The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the United Nations General Assembly on 13 September 2007 (resolution 61/295). Australia gave their formal support to the Declaration on 3 April 2009.
[17] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 43.
[18] For a discussion of the legal status of the Declaration, see P Joffe, 'Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?' in J Hartley, P Joffe and J Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (2010) 70, pp 85–93; Permanent Forum on Indigenous Issues, Report on the eighth session, UN Doc E/C.19/2009/14 (2009), Annex, General Comment 1, paras 6-13. At http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_14_en.pdf (viewed 29 April 2014).
[19] *United Nations Declaration on the Rights of Indigenous Peoples*, 2007, arts 25-32.
[20] Taxation of Native Title and Traditional Owner Benefits and Governance Working Group, *Report to Government*, Commonwealth of Australia (2013). At http://www.treasury.gov.au/PublicationsAndMedia/Publications/2013/Taxation-of-Native-Title (viewed 23 April 2014).
[21] Deloitte Access Economics, above note 12.
[22] M Dreyfus, *Terms of* Reference – *Review of the Native Title Act 1993* (3 August 2013). At http://www.ag.gov.au/Consultations/Documents/AustralianLawReformCommissionnativetitleinquiry/ReviewoftheNativeTitleAct1993-finaltermsofreference-3August2013.PDF (viewed 9 October 2013).
[23] See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Native Title Amendment Bill 2012* (25 January 2013). At http://www.humanrights.gov.au/submissions/native-title-amendment-bill-2012 (viewed 20 April 2014). Australian Human Rights Commission, *Submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on the Native Title Amendment Bill 2012 and future reform of the native title system* (25 January 2013). At: http://www.humanrights.gov.au/submissions/native-title-amendment-bill-2012-and-future-reform-native-title-process (viewed 17 April 2014).
[24] For a discussion about the Native Title Bill 2012 (Cth) see M Gooda, *Social Justice and Native Title Report 2013,* Australian Human Rights Commission (2013), Appendix 3. At: http://www.humanrights.gov.au/publications/social-justice-and-native-title-report-2013 (viewed 17 April 2014).
[25] House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Advisory Report: Native Title Amendment Bill 2012* (2013); Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Senate Committee Report Native Title Amendment Bill 2012 [Provisions]* (2013).
[26] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011, Sixth Report of 2013* (May 2013), p 45, para 1.170; para 1.173; p 48, para 1.178; p 49, para 1.181.
[27] *Native Title Act 1993* (Cth), s190B and 190C.
[28] Mick Gooda, *Native Title Report 2011,* Australian Human Rights Commission (2011), Chapters 2 and 4. At: http://www.humanrights.gov.au/publications/native-title-report-2011-chapter-2-lateral-violence-native-title-our-relationships-over (viewed 22 April 2014).
[29] Lateral violence is created by experiences of powerlessness, which results in people within an oppressed group expressing their frustration and anger through engaging in conflict with each other.
[30] *Native Title Act 1993* (Cth), s 190B (7).
[31] T Calma, above note 6, p 86.
[32] *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.
[33] T Calma, above note 6, p 86.
[34] The aim of the Native Title Amendment (Reform) Bill 2011 was to 'enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples by addressing the barriers claimants face in making the case for a determination of native title rights and interests; and procedural issues relating to the future acts regime. See Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth), p 2.
[35] *Yorta Yorta v Victoria* (2002) 214 CLR 422.
[36] *Risk v Northern Territory* [2006] FCA 404, para 839. The decision was upheld on appeal to the Full Federal Court: *Risk v Northern Territory* (2007) 240 ALR 75.
[37] Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), [29].

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[38] Section 190A of the *Native Title Act 1993* (Cth). Also see T Calma, above note 6,p xv.
[39] Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by states parties under article 9 of the Convention, Australia, seventy seventh session* UN Doc CERD/C/AUS/CO/15-17 (2010). At http://www.ohchr.org/EN/countries/AsiaRegion/Pages/AUIndex.aspx (viewed 20 April 2014).
[40] T Calma, above note 6, Chapter 3.
[41] Justice A M North & T Goodwin, Disconnection - the Gap between Law and Justice in Native Title, A proposal for reform (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 7.
[42] Risk v Northern Territory [2006] FCA 404, para 938.
[43] *Yorta Yorta v Victoria* (2002) 214 CLR 422, para 90.
[44] *Native Title Act 1993* (Cth), preamble.
[45] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), p 89. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009)..
[46] Justice A M North & T Goodwin, above note 42, p 16.
[47] Justice A M North & T Goodwin, above note 42, p 16.
[48] For a discussion of the rights of Indigenous peoples to culture, including adaptation and revitalisation of culture, see T Calma, above note 6, pp 87-88.
[49] T Calma, above note 6, p 85.
[50] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At http://unsr.jamesanaya.org/country-reports/report-on-the-situation-of-indigenous-peoples-in-australia-2010 (viewed 23 April 2014).
[51]T Calma, above note 6, p 106.
[52] Formerly s 23(3) of the *Native Title Act 1993* (Cth).
[53] Explanatory Memorandum, note 7, p 6.
[54] M Gooda, *Native Title Report 2010*, Australian Human Rights Commission (2011), pp 39-41. At http://www.humanrights.gov.au/publications/native-title-report-2010 (viewed 22 April 2014).
[55] M Gooda, above, p 39.
[56] *United Nations Declaration on the Rights of Indigenous Peoples*, art 3. Indigenous peoples also have the right to 'determine and develop priorities and strategies for exercising their right to development': art 32.
[57] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Report 2005, Human Rights and Equal Opportunity Commission (2006), p 35. At http://www.humanrights.gov.au/social_justice/sj_report/index.html#2005 (viewed 13 December 2010).
[58] [2010] FCA 643 (2 July 2010).
[59] [2010] FCA 643, 752-757 (2 July 2010).
[60] *Commonwealth v Yarmirr* [2001] HCA 56.
[61] See W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2000* (2001), pp 85–115; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p 106. At http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 25 January 2012).
[62] Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Reform) Bill 2011* (Parliament of Australia). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/native_title_three/index.htm (viewed 25 January 2012).
[63] See for example, Native Title Act 1993 (Cth), ss 17, 18, 22E, 53.
[64] T Calma, above note 6, p 34.
[65] (2009) 175 FCR 141. This decision was discussed in Native Title Report 2009, pp 31–35.
[66] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 [27].
[67] T Calma, above note 6, p 34.
[68] Senate Standing Committees on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012 [Provisions],* Commonwealth of Australia 2013, ISBN 978-1-74229-790-3, 18 March 2013, pp vii and 7-9. At:

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http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed%20inquiries/2010-13/nativetitle2012/report/index (viewed 29 April 2014).

[69] 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).

[70] 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 (viewed 21 April 2014).

[71] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 7, proposed s 31(2A).

[72] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 9, proposed s 35(1A).

[73] See s 229 of the *Fair Work Act 2009* (Cth).

[74] See s 235 of the *Fair Work Act 2009* (Cth).

[75] Attorney-General's Department, Draft Consultation Paper, *Summary of proposed legislative reforms*, July 2012, p 2.

[76] For further information on these options, see T Calma, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 31–35, 104–107. At http://www.humanrights.gov.au/publications/native-title-reports (viewed 23 April 2014). S Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, p 15. See also: Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [76].

[77] See Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee on the Native Title Amendment Bill 2012* (25 January 2013). At http://www.humanrights.gov.au/submissions/native-title-amendment-bill-2012 (viewed 20 April 2014). Australian Human Rights Commission, *Submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on the Native Title Amendment Bill 2012 and future reform of the native title system* (25 January 2013). At: http://www.humanrights.gov.au/submissions/native-title-amendment-bill-2012-and-future-reform-native-title-process (viewed 17 April 2014). 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 (viewed 21 April 2014).