Chapter 2

Native Title Policy – State and Commonwealth profiles

Human rights principles require that Indigenous people's relationships to land, based on traditional laws and customs, be given legal recognition and protection. International legal principles also recognise that Indigenous peoples have economic, social and cultural human rights. Native title, as it is constructed through the Australian legal system, has a limited capacity to meet these human rights standards. Nevertheless it is clear that native title has become more than the recognition of rights by the legal system: it is also a process by which traditional owner groups are brought into a relationship with the State through the lodging of a native title claim.

State, Territory and Commonwealth governments' native title policies have a significant effect on the scope and content of the agreements they make with native title applicants. Such policies influence whether agreements will be confined to the legal definition of native title rights and interests or whether they address broader criteria. The following section provides a national overview of native title policies as they are presently formulated at the State[1] and Federal level and the bureaucratic structures in which these policies are situated. These policies are then evaluated in the following chapter by reference to the following criteria:

- Does the policy contribute to the economic and social development of the group in accordance with international human rights principles?
- Is the policy formulated with the effective participation of Indigenous people?

The material included in this chapter was drawn from publicly available government policy documents and also information from various Indigenous organisations across Australia. In each State and the Northern Territory, consultants retained by the Commissioner interviewed officers from Native Title Representative Bodies and also various other organisations and people who

1 Reference to State governments' policies and practices in this Chapter includes reference to Territory government policies and practices.

had relevant experience of the Government's engagement with traditional owner communities. The research and interviews were conducted between August and October 2003.

Following the research, representatives of the Commissioner and consultants met with every State Government and, subsequently, the Commonwealth Government. This enabled the Commissioner to gain a better understanding of government actions and policies. In December 2003, most States were provided with, and invited to comment on their particular policy profile and my analysis of whether these policies contributed to the economic and social development of the group in accordance with international human rights principles.

New South Wales

Native Title Developments, as at 11 December 2003

	NSW	National Total
ILUAs[2] (registered: in notification or awaiting reg decision)	4 : 0	105 : 16
Determination that native title exists (litigated: consent)	0 : 1	7 : 24
Determination that native title does not exist (litigated: consent)	9 : 1 *	13 : 2
Native title claimant applications not finalised (registered: not registered)	43 : 16	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings: no. of claims)		11 : 22

* 9 Local Aboriginal Land Council unopposed non-claimant determinations that native title does not exist pursuant to s40AA *Aboriginal Lands Rights Act 1983* (NSW) and 1 consent determination that native title does not exist to confirm a surrender of native title through Arakwal ILUA.

\# Not including hearings for the preservation of evidence.

Native title policy

The NSW Government's approach to native title is summarised by the Department of Lands as follows:

> The NSW Parliament has recognised that land in the State of New South Wales was traditionally owned and occupied by Aboriginal people. The New South Wales Government understands that land is of spiritual, social, cultural and economic importance to Aboriginal people. As a result, the NSW Government supports the recognition by Australian law of native title rights held in relation to land by Aboriginal or Torres Strait Islander people as established in the landmark 1992 Mabo (No. 2) decision of the High Court of Australia. The New South Wales Government acknowledges the right of Aboriginal people within the State to lodge native title claims or to seek agreements concerning their native title rights. The NSW Government supports the use of the Indigenous Land Use Agreements (ILUA's) to provide a flexible and cooperative means of resolving native title issues to achieve fair and equitable outcomes for all parties.

2 Indigenous Land Use Agreements.

> Negotiated ILUA provides an opportunity to also avoid costly and divisive litigation. Where the recognition of native title rights is sought under an ILUA, the State requires that credible evidence be produced to demonstrate that native title does continue to exist before agreement can be reached.[3]

The Premier of NSW issues memoranda on a range of matters. It is the Premier's memoranda on native title that form the basis of the NSW Government's policies and practices in this area.[4] The six memoranda with relevance to native title are:

1995 – No. 43	Handling of Claims to Native Title
1998 – No. 66	Compliance with new procedures under the Commonwealth's Native Title Act
1998 – No. 77	Native Title Legislation
1999 – No. 23	Native Title and Indigenous Land Use Agreements
2001 – No. 06	Partnerships: A New Way of Doing Business with Aboriginal People

It is useful to provide more detail on two of these memoranda: Indigenous Land Use Agreements, and Partnerships.

In 1999 the Premier issued a Memorandum in relation to the use of Indigenous Land Use Agreements (ILUAs) to resolve native title matters.[5] The Memorandum advises that if an agency of the NSW Government is considering the possible use of an ILUA they should first write to the Premier seeking approval and setting out the information about the land or waters concerned, the purpose of the proposed ILUA and the matters intended to be covered by it. It notes that some ILUAs may require Cabinet approval. The Cabinet Office reports directly to the Premier and is responsible for ensuring priorities are managed, technical requirements are met, standard conditions are used and precedents are developed that can be used across the public sector in NSW. While the agency may negotiate the details of the ILUA (with legal assistance provided by the Crown Solicitor's Office), when completed, the details must be submitted to the Premier for approval prior to the State formally committing to enter into it. The Memorandum acknowledges that while not all matters may be capable of being resolved through an ILUA, in appropriate cases they can be a productive means of dealing with native title matters. The Memorandum is silent on whether this includes the use of ILUA's in the context of a consent determination.

In 2001 in response to the end of the term of the Council for Aboriginal Reconciliation, a Premier's Memorandum announced the development of a new plan of action to build a partnership between Aboriginal people and the

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3 <www.dlwc.nsw.gov.au/landnsw/llsd/ladant.html#What%20is%20nt>.

4 <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1995/m95-43.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_ memos/prem_circs/circ98/c98-66.html>; <www.premiers.nsw.gov.au/pubs_dload_ part4/prem_circs_memos/prem_circs/circ98/c98-77.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1999/m99-23.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm>.

5 Memorandum No 99-23, *Native Title and Indigenous Land Use Agreements*, available at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1999/m99-23.htm> accessed 12 December 2003.

NSW Government.[6] The new plan includes a range of measures aimed at strengthening Aboriginal leadership and economic independence. A high level committee of officials was charged with the responsibility for overseeing the development of the plan. The plan identifies a number of strategies for working in partnership and institutes new arrangements for achieving tangible progress in Aboriginal affairs by making clusters of government agencies jointly responsible for meeting agreed targets. There will be seven priority areas: health, education, economic development, justice, families and young people, culture and heritage, and housing and infrastructure. It is expected the plan will cite a number of agreements or partnerships in a number of different areas, for example in relation to justice, health, and service delivery. There is no specific mention of native title matters to be included in the plan.

In November 2002, the NSW Government, ATSIC and the NSW Aboriginal Land Council entered into the *NSW Service Delivery Partnership Agreement*, the purpose of which is to improve social and economic outcomes for Aboriginal and Torres Strait Islander peoples in NSW. An overview of the Partnership Agreement is provided in *Social Justice Report 2002*.[7]

The NSW Government has not provided financial assistance to NSW Native Title Representative Bodies (NTRB) to progress native title claims.

> …the NSW Government is of the view that the Commonwealth bears the responsibility for ensuring these bodies are sufficiently funded to enable them to perform their statutory functions.[8]

Since 1983 the state government has transferred land with a current value of $680 million to Aboriginal Land Councils in NSW. The *Aboriginal Land Rights Act 1983* (NSW) (s28) also provided that 7.5 % of land tax in NSW would be paid to the NSW Aboriginal Land Council from 1984 to 1998 to be used for the purposes of the Act. Approximately $580 million was paid to the NSW Aboriginal Land Council over this period. Currently the fund has a balance of $500 million available for land purchase.

Government structure

In NSW, the Premier has primary responsibility for native title policy, including whether to enter into an Indigenous Land Use Agreement. The Premier is assisted in this area by the Cabinet Office, the Crown Solicitor's Office and the Department of Lands (formerly the Department of Land and Water Conservation). The Cabinet Office, plays a key role in providing policy advice to the Premier and for co-ordination between the Crown Solicitor's Office, the Department of Lands, the Premier's Office and the Cabinet. The Crown Solicitor's Office provides legal advice, and the Department of Lands has the primary responsibility for the day-to-day conduct of the NSW Government's response to native title applications and other native title matters.

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6 Memorandum No 2001 – 06, *Partnerships: A New Way of Doing Business with Aboriginal People*, available at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm>, accessed 12 December 2003.

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission, Sydney 2003, p225.

8 Correspondence from NSW government, 12 January 2004.

The NSW Government identifies the Department of Aboriginal Affairs' mission or charter as 'To empower Aboriginal people in NSW through social, economic and cultural independence and reconciliation'.[9] The Department is responsible for wider policy development and program delivery on social and economic development for Aboriginal people in NSW. Its website contains details of its economic and community development policies and programs.[10] The Department also administers some economic development initiatives which it shares with the Department of State and Regional Development.[11] These initiatives have an emphasis on business development. The Department of Aboriginal Affairs explains its role as working 'closely with Aboriginal people to develop policies and projects that protect their rights and interests in relation to land and cultural heritage. The Department … monitors the development of native title policy in NSW, including the effectiveness of NSW Government agencies in their development and delivery of native title policy and services'.[12]

Following the appointment of the new Ministry in NSW in April 2003, the Minister assisting the Minister for Natural Resources (Lands) was nominated as the State Minister for the purposes of the *Native Title Act*. The Minister represents the NSW Government in native title determination applications and has the primary day-to-day conduct of the NSW Government's response to native title applications and other native title matters. However, the power to agree to an ILUA is maintained by the Premier and not State agencies.

Negotiation threshold

The NSW Government requires a native title determination application to be lodged with the Federal Court. However it does not require the application to have passed the registration test in the *Native Title Act 1993* (Cth) before it will enter into negotiations.

The NSW Government's position on entering into negotiations over a native title determination application is that it requires the presentation of credible evidence 'to demonstrate that native title does continue to exist before agreement can be reached'.[13] The Government has published no general document identifying what matters should be addressed by credible evidence. However, it has provided some guidance to claimants by way of individual letters which require particular information depending on the circumstances of the case. One letter provided to me by the NSW Crown Solicitors referred the claimant to the Queensland Government's connection guidelines as an indication of what is required by the NSW Government.

This letter also specified matters in relation to which the Government is prepared to negotiate under an ILUA on the receipt of credible evidence:

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9 <www.directory.nsw.gov.au/result/detail-organisation-frames.asp?origin=false&xpath=Root/NSWGOV/o=NSW%20Government_comma_c=AU/ou=Portfolio/ou=Aboriginal%20Affairs/nswOrder=03_plus_ou=Organisations/NSWOITOrgUnit@ou=Department%20of%20Aboriginal%20Affairs,> accessed 10 September 2003.

10 <www.daa.nsw.gov.au>.

11 <www.smallbiz.nsw.gov.au/aboriginal/default.htm>.

12 <www.daa.nsw.gov.au/landandculture/>, accessed 3 December 2003.

13 <www.dlwc.nsw.gov.au/landnsw/llsd/ladant.html#What%20is%20nt> accessed 10 September 2003.

a. the recognition of native title and a consent determination depending on the nature of the evidence;
b. a co-management agreement with respect to national parks, Crown reserves and other Crown lands under the *Crown Lands Act 1989* (NSW), which would provide for:
   (i) an advisory committee role
   (ii) jobs and training positions for Aboriginal people
   (iii) special rights in respect to land, eg right to conduct eco-tourism
   (iv) cultural protection measures;
c. consideration for the naming or co-naming of sites of significance;
d. eligibility for appointment to boards and committees as the indigenous representative for the area;
e. possible transfer of vacant Crown land to a corporation representing the native title group;
f. the undertaking of future acts and compensation issues;
g. withdrawal of the native title application if not determined by the Court.[14]

However, the Government has advised that it is 'prepared to negotiate non-native title resolutions of native title claims without requiring the production of credible evidence of native title'.[15]

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in New South Wales.

In 2000, the Arakwal People signed an Indigenous Land Use Agreement with the NSW Government through the National Parks and Wildlife Service and the then Department of Land and Water Conservation, a range of community groups and the Byron Shire Council. The NSW Government has also provided some assistance to the Arakwal People for a feasibility study for the National Park that was to be created in part of their claim area.

Under the agreement, the Arakwal People have agreed to the creation of the Arakwal National Park, located around Cape Byron adjacent to Byron Bay, to be jointly managed by the Arakwal People and the National Parks and Wildlife Service. The Park will provide jobs and training for Arakwal people. The Arakwal People also agreed to the surrender of their native title in three small parcels of land in exchange for the transfer of two of those parcels under the *Aboriginal Land Rights Act 1983* (NSW) to the Arakwal Corporation (Iron Bark Avenue Land and Paterson Street Land) and the opening of a public road. The agreement provides for Crown land to be transferred to the Arakwal Corporation for traditional owners to live on and also provides for the transfer of land for the construction of a cultural centre and tourist facility.[16]

In 2001 an ILUA was reached between the Twofold Bay Native Title Group, the Department of Defence and the State of NSW over a proposed Naval Ammunitioning Facility near Eden in southern NSW.[17] The Commonwealth

14 Correspondence from New South Wales Crown Solicitors Office, 5 November 2003.
15 *ibid.*
16 See <www.atns.net.au/biogs/A000136b.htm>; <www.atns.net.au/biogs/A000168b.htm; www.atns.net.au/biogs/A000172b.htm> accessed at 5 September 2003.
17 <www.atns.net.au/biogs/A000818b.htm> accessed at 5 September 2003.

provided some assistance to the NSW Aboriginal Land Council (when it was the NTRB for NSW) to engage Senior Counsel to negotiate an agreement on behalf of the native title claimants over some Crown land required for defence purposes. The Commonwealth also provided some assistance for some anthropological work in the area.

On 9 September 2003, the NNTT announced the resolution of the Kamilaroi People's native title claim over Crown land near Coonabarabran.[18] A Memorandum Of Understanding has been signed between the Kamilaroi People, the Coonabarabran Local Aboriginal Land Council, the Coonabarabran Pony Club, the Coonabarabran Showground Reserve Trust, the Coonabarabran Shire Council and the NSW State Government. Under the terms of the MOU, the native title application is withdrawn and replaced by an application for a grant under the *Aboriginal Land Rights Act 1983* (NSW).

Northern Territory

Native title developments, as at 11 December 2003

	NT	National Total
ILUAs (registered : in notification or awaiting reg decision)	29 : 1	105 : 16
Determination that native title exists (litigated : consent)	4 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	0 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	150 : 34	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	2 : 3	11 : 22

Not including hearings for the preservation of evidence.

Native title policy

The Northern Territory Government has advised that it will enter into negotiations with the NTRBs for Consent Determinations. However the government has indicated it will require anthropological evidence of an acceptable standard before it will agree to a Consent Determination (though it has no current policy on this). The Ministry of Justice has indicated that the government will continue to negotiate with a native title claimant group while the evidence was being gathered.

The Territory Government has an economic development strategy,[19] part of which addresses Indigenous economic development. This strategy envisages 'equitable opportunity for Indigenous Territorians to participate in economic

18 National Native Title Tribunal, 'A lot of 'local happiness' at the signing of the Coonabarabran agreement, Media Release, 8 September 2003, available at <www.nntt.gov.au/media/1062991413_532.html> accessed at 5 September 2003.

19 Northern Territory Government, *Building a Better Territory*, June 2002, <www.otd.nt.gov.au/dcm/otd/publications/major_projects/economic_development_strategybuilding_a_better_territory.pdf> accessed 17 December 2003.

growth', and outlines both strategic approaches and associated priority actions for each strategy. The five main themes of the Indigenous economic development strategy are:

- promote Indigenous capacity to participate in economic development;
- enable Indigenous people to use their rights to land to advance their economic well-being to boost Territory economic development;
- maximize opportunities for sustainable employment for Indigenous Territorians;
- identify and exploit opportunities for Indigenous economic development arising from the growth of both core and emerging industries in the Territory; and
- support the development of Indigenous business enterprises.

The Northern Territory Government accepts the established role of the NTRBs in managing processes within and between Indigenous groups, particularly as between the two Land Councils effectively all Indigenous people in the Northern Territory are represented.

The government's approach to native title negotiations is reflected in its recent initiatives to jointly develop with the Northern Land Council and the Central Land Council a submission to the Commonwealth Government's review of the *Aboriginal Land Rights (Northern Territory) Act;* as well as drafting the *Parks and Reserves (Framework for the Future) Bill 2003* as a mechanism for the establishment, maintenance and management of a comprehensive system of parks and reserves in the Northern Territory.

Government structure

The Territory's Chief Minister manages a whole-of-government approach to Indigenous matters through the Office of Indigenous Policy located in the Office of the Chief Minister. The Office of Indigenous Policy indicates that it works in areas of policy development including:

- Indigenous economic development;
- Service delivery by NT Government agencies, especially improving coordination across government;
- Issues relating to land and native title;
- Indigenous governance and building capacity to develop sustainable communities;
- Access to mainstream and indigenous-specific government programs and services; and
- Communicating with the indigenous and the wider community.[20]

The Office of Indigenous Policy also provides whole-of-government strategic policy advice on Indigenous affairs including:

20 <www.dcm.nt.gov.au/>.

- Coordinating policies and strategies to resolve outstanding land issues;
- Coordinating Indigenous Economic Development policy;
- Developing options to improve the social well being and living conditions of Indigenous Territorians;
- Development of effective Indigenous governance and capacity building to develop sustainable communities;
- Improving access to mainstream and Indigenous-specific government programs and services; and
- Communicating the NT Government's policies to the Indigenous and wider community.[21]

Several other government departments (such as the Departments of Justice, Lands, Planning and Environment, Business, Industry and Resource Developments) have specific units which deal with issues of native title under the *Aboriginal Land Rights Act*. These units address matters such as:

- providing specialised legal services to government and client agencies in respect of Aboriginal land and native title matters. A significant proportion of this work involves representing the Northern Territory in matters before the High Court, Federal Court, Aboriginal Land Commissioner and the National Native Title Tribunal (Aboriginal Land Unit, Department of Justice); and
- researching land related records and compile tenure history reports and maps of land parcels to assist with the resolution of native title and Aboriginal land claims (Native Title Unit, Department of Lands, Planning and Environment).

Negotiation threshold

The Ministry of Justice has advised that there are no negotiation threshold issues in the Northern Territory. The Northern Territory Government hosted the first Indigenous Economic Forum, *Seizing our Economic Future* held in Alice Springs in March 2003. Indigenous Economic Forums are a priority of the Northern Territory Government which made three initial commitments following the first forum:

- undertake a detailed examination of the various findings and proposals emerging from the forum;
- establish a more coherent policy framework across the whole of the Northern Territory Government in relation to Indigenous economic development at the Territory-wide and regional levels. This framework will identify the roles and responsibilities of individual departments and agencies in relation to program and policy responsibilities and be available to all relevant stakeholders;

21 <www.dcm.nt.gov.au/dcm/indigenous_policy/indigenous_policy.shtml>.

- establish a permanent high-risk task force on Indigenous economic development with nominated representatives from the NT Government, industry, Commonwealth agencies, Land Councils and ATSIC. The role of this task force will be to identify key strategies and directions, opportunities and barriers, establish and direct project teams where required, and deliver timely responses.[22]

In relation to intra-Indigenous disputes, the government's approach to Indigenous decision-making processes is to effectively leave these issues up to the NTRBs. It believes that after 25 years of managing the ALR Act, the NTRBs are well-equipped to manage the same overarching issues which apply to native title.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in the Northern Territory.

With regard to the National Park initiative, separate Parks Trusts (with individual ILUA's providing Northern Territory Freehold title and joint management arrangements) will be established. It is proposed to establish new National Parks over a 10-15 year period, the aim being to increase the stake Indigenous people will have in the economic future of the Northern Territory. It should be remembered however, that the High Court found that native title in the Keep River National Park is a co-existing right which was confirmed by the Federal Court determination handed down on 18 December 2003. The Court determined that native title exists and the nature and extent of the native title recognised by the common law, are non-exclusive rights to use and enjoy the land and waters in accordance with their traditional laws and customs. The determination also recognises the right of native title holders to 'make decisions about the use and enjoyment of the NT determination area by Aboriginal people who recognise themselves to be governed by Aboriginal traditional laws and customs'[23] And provides for exclusive rights over three fee simple areas granted to Aboriginal Corporations in the early 1990s.[24] Resolution of rights and interests in the Keep River is hoped will result in a co-existence template for negotiations for native title in National Parks and could in turn be applied to Pastoral Leases.

Native title has led to positive economic outcomes in the Northern Territory, for example, the negotiated settlements of the East Arm Point and Palmerston North developments with the Larrakia people, and as the determination over Alice Springs with the Arrernte people native title claimants and holders. In the case of the East Arm Point development, the Northern Territory Government acquired land for a Port. This prompted the NLC to lodge a native title application over the area. As a result of negotiation between the government and the NLC, land was provided to the Larrakia people as a freehold grant for commercial purposes and economic development. The end result has been that the Larrakia are developing some of the land at the present time. The settlement occurred a

22 <www.nt.gov.au/dcm/indigenous_policy/indigenous_policy.shtml>
23 *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283, Determination, para 5.
24 *ibid*, para 8 and 9.

week before the claim was due in the Federal Court, and as a result, the NLC subsequently withdrew the claim.

There are also Community Living Areas in the Northern Territory which comprise excisions from Pastoral Leases. These are complementary to ALRA land and are able to accommodate Indigenous people who have moved away from their country to get work. They are provided on the basis of need. The Northern Territory Government has agreed to continue granting Community Living Areas with the non-extinguishment of future grants of Northern Territory Freehold, but generally it relies upon resources from the Commonwealth Government to support the economic and social aspirations of these communities.

Queensland

Native title developments, as at 11 December 2003

	Qld	National Total
ILUAs (registered : in notification or awaiting reg decision)	60 : 13	105 : 16
Determination that native title exists (litigated : consent)	1 : 17	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 1**	13 : 2
Native title claimant applications not finalised (registered : not registered)	176 : 17	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

** Both are non-claimant determinations – one application was made by a Local Council, the other a Pastoral Lease Holder.

Not including hearings for the preservation of evidence.

Native title policy

The Queensland Government has repeatedly stated it prefers negotiating native title outcomes to litigation which is "costly for taxpayers and unlikely to resolve the practical issues which arise 'on the ground'."[25] However, it also notes that 'if negotiation fails and an agreed position cannot be reached, the claim shifts to the Federal Court for a judicial determination'.[26]

The government has produced a *Native Title Contact Officers' Manual* which is available on the internet.[27] The Manual is designed to assist government officials to 'ensure that native title is appropriately acknowledged, as required by law, in

25 'NT&ILS Business' <www.nrm.qld.gov.au/nativetitle/pdf/manual/core_business.pdf>. This is section 2.4 of the *Native Title Contact Officers' Manual* available at <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 10 November 2003. Other examples at <www.nrm.qld.gov.au/nativetitle/faq/manage_claims.html> accessed 11 November 2003; Department of Natural Resources and Mines, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Queensland Government, October 2003, Brisbane, p3.

26 'NT&ILS Business' *ibid.*

27 <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 18 December 2003.

all business conducted across government'.[28] It sets out the government's approach to negotiations:

> The State represents the interests of all Queenslanders at negotiations. The State adopts the position that no one, including native title holders, should be worse off as a result of the resolution of a native title claim.
>
> In a negotiation, the State asks that:
>
> - all existing interests be recognised and protected;
> - claimants provide evidence that they can be recognised as native title holders under the Native Title Act. Broadly, this means they must show
>   - evidence of traditional ownership and continuing connection with the area claimed; and
>   - evidence of past and existing tenure and land use be considered so that it can be decided if a determination of native title can be made. Broadly, except in the special circumstances set out in the *Native Title Act*, native title cannot be found to exist where it has been extinguished by past grants of tenure or uses of the land. The *Native Title Act* sets out many of the past grants of tenure that extinguish native title.[29]

Queensland has a state regime enabling Indigenous control of various lands: the *Aboriginal Land Act 1991* (ALA) and the *Torres Strait Islander Land Act 1991* (TSILA). These state Acts address future act issues arising from the NTA and allow for lands to be transferred to or claimed by Indigenous people in Queensland. Future acts on land under the ALA or TSILA do not extinguish native title. Nor do they affect the right of any group to make a native title claim. The Department of Natural Resources and Mines is the sole administrator of the Acts. The Aboriginal Land Tribunal deals with claims. The ALA and TSILA were drafted and implemented prior to the *Mabo* decision and the *Native Title Act*. These Acts operate independently from the claims process and administration process of the *Native Title Act*.

At the time of writing, the Queensland Government had consulted about and drafted a new cultural heritage scheme for the State: the *Aboriginal Cultural Heritage Bill 2003*. This bill acknowledges the link between cultural heritage and native title. If the bill becomes legislation, primary responsibility for Indigenous cultural heritage will move from the State's Environmental Protection Authority to the Department of Natural Resources and Mines. This will mean that native title, the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*, and cultural heritage matters will all be included in the portfolio of one Minister.

The government agreed a protocol with the Queensland Indigenous Working Group (QIWG) in 1999. This agreement was signed by the Queensland Premier and the QIWG Chair, and is available on the internet.[30] In it, the two parties commit to an open and honest process of consultation in regard to legislative

28 <www.nrm.qld.gov.au/nativetitle/pdf/manual/welcome.pdf> accessed 18 December 2003.
29 <www.nrm.qld.gov.au/nativetitle/faq/manage_claims.html> accessed 11 November 2003.
30 <www.nrm.qld.gov.au/nativetitle/pdf/manual/protocol.pdf> accessed 4 December 2003.

and policy issues. The agreement provides some basic statements of how the government will provide the Indigenous Working Group with opportunities to contribute to policy development and to review and comment on legislation, and that the government will take the Group's views into account. The document specifies a range of matters in which consultations will occur. These include:

- mining agreements;
- strategies to reduce backlog of mineral tenements;
- native title procedural rights;
- Indigenous title to and management of national parks and protected areas;
- use of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*;
- legislative review to incorporate native title into other state processes;
- incorporating social and environmental impact assessment into major project developments; and
- environmental protection policy.

The document notes the government may consult with other Indigenous parties as relevant, but specifically states that 'in every consultation with Indigenous parties, the Queensland Government will have due regard to the representative mandate of those parties when taking into account and lending weight to the parties' views'.

From 1998 to 2002 Queensland had its own procedure for dealing with applications for exploration and mining, and their effect on native title. States are permitted, under the NTA, to adopt their own procedures for these matters.[31] In an attempt to deal with a high volume, and particularly the backlog, of mining and mining exploration permit applications, the State has been involved in negotiating a number of more general approaches for dealing with the applications. This has built on the 1999 Protocol between the government and the Queensland Indigenous Working Group, and on the 2001 Kalkadoon Explorer Reference Group (KERG) ILUA.[32] The KERG ILUA is an agreement between the State and the Kalkadoon people addressing the backlog of exploration permit applications in the Kalkadoon claim area of north-west Queensland.

Also in 2001, the State and QIWG negotiated a Statewide Model ILUA[33] to deal with the backlog of exploration permit applications over the whole of the State. The State agreed to fund the negotiation and authorisation costs leading to the model ILUA and also to provide funding for additional NTRB staff needed to process mineral tenements granted through the model ILUA provisions.[34] The model ILUA operates as a standard agreement which parties can adopt, thereby saving them the time and expense of negotiating their own arrangement. However, the parties are free to negotiate their own arrangement under the NTA procedures, should they so wish. The model ILUA terms, which are endorsed

31 NTA, ss25(5) & 43.
32 <www.nrm.qld.gov.au/nativetitle/pdf/kerg_ilua.pdf> accessed 4 December 2003.
33 <www.nrm.qld.gov.au/nativetitle/pdf/statewide.pdf> accessed 4 December 2003.
34 <www.nrm.qld.gov.au/nativetitle/archives/statewide.html> accessed 16 December 2003.

by four Queensland NTRBs,[35] establish an area agreement which native title claimants can adopt as regulating the conduct of mineral exploration within their claim.

Following court proceedings throughout 2001 and 2002 challenging the Queensland procedures, in 2003 the government decided to adopt the Commonwealth's right to negotiate process, administered by the National Native Title Tribunal. This scheme included the expedited procedure provisions. However, the Queensland Government, aware of the use of the expedited procedure in other jurisdictions, sought to have some arrangement to give greater protection to native title interests than the standard expedited procedure provided. A Queensland Government official giving evidence to a Commonwealth Parliamentary inquiry explained that the expedited procedure is a considerable reduction of the procedural rights afforded to native title parties.[36] Therefore the Queensland Government intended that, for exploration permits proposed to pass through the procedure, there should be conditions providing guaranteed heritage protection plus a well-established notification process, meetings, dispute resolution and arrangements for inspections. These conditions were negotiated with QIWG and the Queensland Resources Council and the parties agreed on the *Native Title Protection Conditions*.[37] The Conditions, which have the effect of increasing the protection for the native title parties, can be placed on an exploration tenement that the government proposes to grant through the expedited procedure. Native title parties are still able to object to the tenement's processing through the expedited procedure, but it is not expected that NTRBs will support the objections.[38]

In March 2003, the State released its draft *Rural Leasehold Land Strategy*,[39] followed by regional consultative workshops. The Strategy has been developed to guide the sustainable management and use of state rural leasehold land. State rural leasehold land, which is predominantly for grazing and agriculture and covers about 65% of Queensland.[40] The draft Strategy applies to perpetual leases, pastoral holdings, term leases, and special leases issued for grazing and agricultural purposes and has formed an important background to native title negotiations. This is so particularly in negotiations between native title holders and pastoral lessees, as any proposal for tenure upgrade, for example, has now to be dealt with in the context of the likely requirements of the Strategy. The Strategy specifies its goals as including recognition and support for cultural,

35 Queensland South Representative Body, Gurang Land Council, Central Queensland Land Council, and North Queensland Land Council: <www.nrm.qld.gov.au/nativetitle/dealings/ilua.html> accessed 16 December 2003.

36 G Dickie, evidence to House of Representatives Standing Committee on Industry and Resources*, Resource and Exploration Impediments*, Official Committee Hansard, 7 March 2003, pp355-362.

37 <www.nrm.qld.gov.au/nativetitle/mining/ntpcs.html> accessed 4 December 2003.

38 National Native Title Tribunal Media Release, *Tribunal welcomes Queensland agreement making process for Indigenous and mining groups*, 16 June 2003.

39 <www.nrm.qld.gov.au/land/state/pdf/draft_leashold_land_mar03.pdf> accessed 16 December 2003.

40 There are over 8,000 leases covering an area of approximately 86 million hectares <www.nrm.qld.gov.au/land/state/managing_lh_land.html> accessed 16 December 2003.

traditional and heritage values and is based on 'recognis[ing] the interests of traditional owners and their implications for the management and use of state rural leasehold land (by encouraging the use of Indigenous access and use agreements)'.[41]

In the move to achieve native title related outcomes in Queensland, a number of agreements, ILUAs and others, have been reached. The number of registered ILUAs nationwide at 8 October 2003 was 90. Of these, 54, or 60%, were in Queensland, although the State itself is not a party to all of these agreements.

The State has provided funding to the NTRBs to assist with future act matters. The funding is for $70,000 a year for two years for each NTRB to employ an officer to deal with future acts. There is a further offer of $75,000 per year to each NTRB for a further two years on the condition that the designated officer not only processes future act applications but is involved in capacity building assisting the native title group to set up its own processes for response, for example, issuing of notices and holding of meetings.

In some instances, assistance from the State has also been received for authorisation meetings, and for the meetings necessary to negotiate ILUAs and other agreements. These have included aspects of the pilot South-West Petroleum Project and the Regional Forestry Agreement. The National Native Title Tribunal has also provided financial and logistical assistance to hold consultations, information meetings and mediation conferences.

The Queensland Government is involved in a broad partnership framework (involving Aboriginal and Torres Strait Islander communities, the government, and other parties) to work toward a better future for Indigenous people. As part of the framework, the Department of Natural Resources and Mines (NR&M) and the Environmental Protection Agency (EPA) are developing a proposal for a Land, Cultural Heritage and Natural Resources Agreement. The proposal, approved by Cabinet in November 2002 for community consultation, is currently a discussion paper called *Looking After Country Together*.[42] As part of the community consultation process the Department of Aboriginal and Torres Strait Islander Policy in association with NR&M and the EPA co-ordinated a series of fifteen state-wide community workshops from September to November 2003. The comments and submissions arising from the consultation process will assist in preparing the Agreement. *Looking After Country Together* states that the final agreement 'will lead to a formal [government] commitment…to share responsibility for outcomes, and to share effort, risks and benefits in endeavours to improve Indigenous people's access to and involvement in the management of land and sea country'.[43] While the final agreement is not yet finalised, it is possible to get some idea of the government's intentions from *Looking After Country Together*. The key outcomes envisage increased Indigenous ownership of and access to traditional land and sea country, and increased Indigenous

41 Section 4.2 draft State Rural Leasehold Land Strategy.

42 <www.nrm.qld.gov.au/land/partnership/pdf/discussion_paper.pdf> accessed 18 December 2003.

43 *Looking After Country Together*, p5.

involvement in its planning and management.[44] The overarching vision for the final agreement is that:

> By 2012, Indigenous people have significant access to, and involvement in the management of land and sea country. Indigenous people will have the resources and skills needed to effectively plan for and sustainably manage land and sea country to meet their aspirations.[45]

Looking After Country Together also covers native title, recognising that government systems need to be updated and better incorporate native title interests.[46] The paper also proposes review and where necessary amendment of legislation that relates to the management and allocation of natural resources to make such legislation compatible with contemporary Indigenous rights and interests, including native title interests.[47]

Government structure

Ministerial responsibility for native title in Queensland lies with the Minister for Natural Resources and Mines. This responsibility was transferred from the Premier in July 2002, and so the majority of the government's native title engagement is the responsibility of the Department of Natural Resources and Mines. The Department of Premier and Cabinet retains a native title policy officer responsible for advising Cabinet on native title issues.

Negotiation threshold

Prior to the High Court's August 2002 decision in *Western Australia v Ward*,[48] the state's policy towards the provision of connection reports was set out in its *Guide to Compiling a Connection Report*.[49] As a result of the *Ward* decision, however, the State revised its connection guidelines and released them in October 2003.[50]

The revised *Guide* does not include 'any substantive discussion about the underlying legal issues that must necessarily inform the writing of a connection report'.[51] However 'the author of a connection report may need to consider a number of key legal concepts that have been discussed in recent High Court

44 'Increased ownership of and access to traditional lands is not only central to the well being of Indigenous people, is it consistent with Queensland Government's commitment to social justice and to the fulfilment of prior promises.' *Looking After Country Together,* p8.

45 *Looking After Country Together,* p10.

46 '[T]he government recognises the need to update land policies and review pre-native title legislation to ensure that land, natural resource and conservation management and administration properly accommodate native title rights and interests', *Looking After Country Together,* p16.

47 To meet these strategies, *Looking After Country Together* suggests outcomes such as 'Land transfer and native title policy mechanisms and legislation are effective and well integrated', and 'Land, cultural heritage and natural resource legislation and policies accommodate Indigenous native title interests', p17.

48 *Western Australia v Ward* (2002) HCA 28.

49 Queensland Government 1999 *Guide to Compiling a Connection Report*. Brisbane.

50 Queensland Government, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, October 2003, Natural Resources and Mines, Native Title and Indigenous Land Services.

51 *ibid*, p1.

decisions, particularly *Yorta Yorta* (2002) and *Ben Ward* (2002)'.[52] In relation to establishing a claim, the *Guide* also makes clear that:

> In accordance with a preference for the recognition of native title through a mediation process rather than a litigated process, the State wishes to establish and maintain a dialogue with native title claim groups, their representatives and experts commissioned to research and write their connection report.[53]

and that:

> For purposes of mediation, the State is willing to accept the first documented contact as the primary reference point from which an inference might then be made back to the time of sovereignty…It is also recognised that the data more pertinent to an anthropological inquiry can only be found in recorded studies undertaken well after the date of first contact.[54]

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Queensland.

In a number of negotiations, the State has actively pursued outcomes beyond a native title determination. The Comalco, or Western Cape Communities Co-existence Agreement, signed in 2001, has resulted in 2003 in Comalco's divestment of the Sudley pastoral lease to the native title holders. The transfer involves economic and social outcomes in terms of several million dollars to be held in a charitable trust. All infrastructure and cattle have been given to the people; as well there are training and employment opportunities and the opportunity for people to go back onto country and develop income-generating schemes such as tourism. There will also be a native title outcome sought through the application of s47 *Native Title Act* to the lease, and a determination of exclusive possession, anticipated and allowed for by the structure of divestment.

A recent agreement in the north-west has been reached with the Department of Main Roads over the Mt Isa/Camooweal road. This will involve the opportunity for tenders for construction and employment to be submitted by local traditional owner groups, based on the model of the work done for the Georgina River Bridge and Highway project in Camooweal in 2000-2002.[55]

In other parts of the state many of the outcomes are in relation to mining and exploration. Only a minority of claims is being negotiated for native title determinations, although a number of claims are formally in mediation with the Native Title Tribunal. In one region, for example, in relation to negotiations for agreements, the Native Title Representative Body (NTRB) certified seven ILUAs in 2003 and expects to certify between 15 and 30 over the next few years. The NTRB has also been involved with the Environmental Protection Authority (EPA)

52 *ibid.*
53 *ibid*, p3.
54 *ibid*, p5.
55 <www.ministers.dotars.gov.au/ja/releases/2000/november/a167_2000.htm> accessed 16 December 2003.

in the Queensland Regional Forestry Agreement.[56] Other discussions with the State are taking place in relation to opal mining and a gem fields ILUA. Over the past eighteen months, two NTRBs have been dealing with a government authority, Burnett Water Pty Ltd, in relation to four projects. Although a proposed ILUA was not signed by all the native title applicants, a number of related outcomes have been agreed. These include some cash compensation; training, employment, and business opportunities; cultural awareness training for all contractors; and funding for a project officer for the NTRB to be employed full-time for one year. The company has also helped with a project proponent service agreement.

Other negotiations have resulted in a Memorandum of Understanding between Ngadjon Jii people, the EPA, and the Wet Tropics Management Authority, a Commonwealth agency.[57] Although separate from the native title claim negotiations, and explicitly not a native title determination or recognition of native title, the MOU arose out of those discussions and through the active involvement of the Native Title and Indigenous Land Services negotiator. Perhaps most significantly, the area of agreement is within a National Park, the first of its kind in Queensland. Included in the MOU is an agreement that access to an area of the park of particular significance, known as Top Camp, will be restricted to Ngadjon Jii people. The MOU also includes a Ngadjon Jii right to bury, which the EPA could include, not as a native title right, but under the *Nature Conservation Act 1992* (Qld). The MOU is specific about the agreement being to 'maximise the economic and social benefits' to Ngadjon Jii People and to acknowledge the cultural importance of the area. The Commonwealth, through the Wet Tropics Management Authority, played an active role in the agreement, and is a party.

South Australia

Native title developments, as at 11 December 2003

	SA	National Total
ILUAs (registered : in notification or awaiting reg decision)	1: 0	105: 16
Determination that native title exists (litigated : consent)	0: 0	7: 24
Determination that native title does not exist (litigated : consent)	1: 0	13: 2
Native title claimant applications not finalised (registered : not registered)	21: 7	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	1 : 1	11 : 22

Not including hearings for the preservation of evidence.

56 The Regional Forestry Agreement process emerged from the National Forest Policy, agreed to by the Commonwealth, State and Territory governments in 1992. This involvement ended on 30 June 2003.

57 See joint media release, *Historic Accord Recognises Benefits of Indigenous Park Management*, 27 February 2003, issued by Queensland Government's Environmental Protection Agency, ATSIC, Wet Tropics Management Authority, and North Queensland Land Council <www.rainforest-crc.jcu.edu.au/latestNews/media%20releases/IndParkManage.doc> accessed 16 December 2003.

Native title policy

The South Australian Government's approach to Indigenous decision-making processes is to acknowledge and to work effectively with the Aboriginal Legal Rights Movement (ALRM) and the Congress of Native Title Management Committees. The Congress has representation from all of the native title claims in South Australia represented by the ALRM. This forum, administered by the ALRM, represents the grass roots constituency that provides the ALRM (and indirectly the South Australian Government) with instructions on progressing their respective native title claims by negotiation and/or litigation.

The South Australian Government supports the State-wide ILUA negotiation process which is described by the Indigenous Land Use Agreement (ILUA) Negotiating Team as "a joint venture by the parties involved in negotiating native title issues in South Australia". Key stakeholders that participate in this process include the South Australian Government, the ALRM, the South Australian Farmers Federation, and the South Australian Chamber of Mines and Energy. The South Australian Government's approach to the ILUA negotiations is by way of a five-member ILUA Negotiation Team comprising the Native Title Section of the Crown Solicitor's Office in the Attorney-General's Department, the Department of Primary Industry Resources, the Department for Environment and Heritage, and the South Australian Department of Aboriginal Affairs and Reconciliation (DAARE).

The SA Crown Solicitor's Office advises that the Native Title Section also works closely with the Attorney-General's Indigenous Land Use Agreement (ILUA) Negotiating Team in efforts to negotiate Indigenous Land Use Agreements as an alternative to taking cases to court. The Crown Solicitor's Office has provided advice on native title and land-related issues to Ministers, Departments and agencies, has assisted the Attorney-General in the development and preparation of State native title legislation, and has prepared a Native Title Handbook for the assistance of Departments and agencies.

It is significant that the NTRB for the State has publicly commended the Government's approach to engagement. The ALRM's attitude to the South Australian Government is best summed up by Malcolm Davies (ALRM Chairman) with reference to the State-wide Framework Negotiation Strategy whereby "the ALRM Council has established strong workable relationships with peak government and non-government bodies".[58] Neil Gillespie (CEO, ALRM) adds that "there is wide support from the Government of South Australia and other representative peak bodies in working with ALRM Council and the Native Title Unit."[59]

The South Australian Government confirms that the ALRM has received insufficient funding from ATSIC to enable them to negotiate; this resulted in the South Australian Government providing funds totalling $5.4 million to 30 June 2003, with an additional $1.5 million for the current financial year.

58 Aboriginal Legal Rights Movement Inc, *Annual Report 2001-2002*, Adelaide, 2002, p2.
59 *ibid*, p3.

The ALRM as a relatively small NTRB does not currently have the capacity to comprehensively promote the economic and social development of the Indigenous people it represents. In fact, the ALRM highlights the "most difficult issue confronting ALRM are the limitations on the services that ALRM is able to provide to native title claimants. The limitations on service provision exist because of budget restrictions."[60] Furthermore, the ALRM states that even though "the South Australian Government provided significant funding assistance to ALRM to enable the State-wide Framework Negotiation Strategy to progress" the South Australian Government has indicated that it too "only has limited funds available to assist ALRM this financial year."[61]

Government structure

The South Australian Premier and Attorney-General have joint responsibility for native title issues in South Australia. The Crown Solicitor's Office in the Attorney-Generals Department provides a legal service to government in the areas of native title law, Aboriginal heritage and related matters.

Negotiation threshold

The South Australian Government has negotiation threshold issues which include the registration of a native title claim before it will proceed with negotiations (notwithstanding the fact that it engages in non-native title negotiations), the resolution of any significant native title claim overlaps, the need to have a reasonably cohesive native title claimant group, a willingness to negotiate, and a stable functioning management committee. It is considered that the effective functioning of the Management Committees and the ALRM will provide the necessary cohesion and stability to enable inter and intra-group disputes to be resolved, enabling negotiated outcomes to occur.

The Crown Solicitor's Office has indicated that the South Australian Government has no connection report criteria for Consent Determinations. It intends to develop criteria over the next 12-15 months.

A statement by the government in late 2002 indicated a willingness to pursue consent determinations 'as an adjunct to pre-negotiated ILUAs in appropriate cases'.[62] The State has proposed a three-stream level of assessment, providing different options to the claimants: the first, to proceed to a consent determination; the second, to proceed to a negotiated ILUA (but a consent determination would not be available); and the third stream where the State considers 'the claim is so tenuous or ill-founded that the State cannot justify recognising it through ILUA negotiation'.[63] The government stated that it will develop, with ALRM, the relevant levels of connection evidence for categorising claims under these three streams, and the means by which the evidence is obtained.

60 *ibid*, p1.
61 *ibid*, p21.
62 See 'Consent Determinations' <www.iluasa.com/news.asp>, accessed 23 December 2003.
63 *ibid*.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in the state.

The South Australian Government is negotiating with the Narunggar people. The ALRM certified the Narunggar ILUA over an area with no registered native title claim. The Narunggar ILUA embraces a wide range of issues including local government, planning, heritage and future acts. The negotiations over the Port Vincent Marina with the Narunggar people arose because the Crown Solicitor's Office could not guarantee that native title was extinguished. Therefore, an ILUA was negotiated.

National Parks in South Australia are problematic at the present time because National Parks declared before 1975 extinguished native title. As a result, the South Australian Government is considering its position regarding future co-operative management. There is also a policy question on the level of engagement the government wants to have with Indigenous people in park management. It is proposed for example, that the Unnamed Conservation Park, in the far central-west of South Australia, on the border of Western Australia will be managed by the Traditional Owners under a three tiered agreement.

The South Australian Government considers that National Parks issues will be addressed on a park by park basis, rather than by a single overarching agreement. There is no single government approach to the joint management of National Parks at the present time. The unnamed conservation park is under the *Maralinga Tjurutja Land Rights Act 1984* (SA). The South Australian Government is seeking co-operative management of National Parks with Aboriginal people: legislation is being considered to allow the transfer and co-management of the unnamed conservation park and the establishment of a Board of Management involving Indigenous people as well as an Advisory Committee. It is envisaged that amendments under the *National Parks and Wildlife Act 1972* for the unnamed conservation park will be adapted more generally by the South Australian Government.

Future Act agreements between native title claimants and mining/exploration companies occur in South Australia and generally include provisions for heritage, land access, low impact exploration procedures, protection of Aboriginal sites and employment and training opportunities.

Statewide negotiations[64]

In 1999, the SA Government proposed to ALRM that native title claims in South Australia should be settled by negotiation. The government indicated that:

- it expected that negotiated agreements would involve recognition of native title, rather than its extinguishment;
- everything was 'on the table' for potential negotiation;[65] and
- one of the government's primary goals for negotiated agreements would be to establish how native title rights are to be understood to enable practical co-existence.

The proposal for state-wide negotiations was supported by SA Chamber of Minerals and Energy (SACOME) and the SA Farmers Federation (SAFF). Meetings between ALRM, the government, and these two organisations commenced in 1999, with all parties agreeing that court actions would be a costly and lengthy way of pursuing settlement of native title claims. The parties also considered that litigation would likely hinder sustainable relationships between native title groups and other parties.

ALRM had some preliminary discussions with these organisations about the possibilities. However, ALRM was cautious not to assume the role of negotiating the mechanisms and procedures for settling native title claims in South Australia without substantial involvement of native title claimant groups. As ALRM candidly observed about itself:

> Institution building with native title claimants was a fundamental part of our work in 2000 because no existing institution has authority to speak for native title claimants in Statewide negotiations. … While ALRM is a Statewide Aboriginal organisation, managed through an elected board, its representative structure reflects its original primary role as a criminal law and justice advocacy service, with members elected from amongst the residents of the various places in SA where large numbers of Aboriginal people live. The structure long predates recognition of native title and has no clear accountability to native title groups. The opportunity presented to ALRM to enter into Statewide negotiations thus immediately presented the challenge of establishing whether the various

64 Material in this case-study is drawn from the following sources, unless otherwise indicated: P Agius & o'rs, "Doing Native Title as Self-Determination: Issues From Native Title Negotiations in South Australia", draft paper for *Pacific Regional Meeting of the International Association for the Study of Common Property*, Brisbane, September 2003; P Agius & J Davies, "Initiatives in Native Title and Land Management in South Australia: the Statewide Native Title Negotiations Process", conference paper *15th Biennial Conference of the Australian Rangeland Society*, Kalgoorlie, September 2002; P Agius, "Innovative Agreements in Native Title and Cultural Heritage", conference paper for *Cultural Heritage and Native Title 2003 Conference*, Brisbane, September 2003; P Agius & J Davies, "Post Mabo Institutions for Negotiating Coexistence: Building a Statewide Negotiation Process for Native Title in South Australia", conference paper *2001, Geography – A spatial odyssey*, Otago, January 2001; J Davies, "Traditional CPRs, new institutions: Native Title Management Committees and the Statewide Native Title Congress in South Australia", conference paper *Pacific Regional Meeting, International Association for the Study of Common Property*, Brisbane, September 2003; State of South Australia (Indigenous Land Use Agreement Negotiation Team), *Submission to Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, October 2000, available at <www.aph.gov.au/senate/committee/ntlf_ctte/report_19/submissions/sub06.doc> accessed 22 December 2003.

65 J Davies "Traditional CPRs, new institutions" *ibid*, p2.

> native title groups want to be part of Statewide negotiations, and, if so, how they will be represented.[66]

In mid 2000, the SA Government provided $870,000 to the ALRM to facilitate decision-making by native title groups about participation in the proposed state-wide negotiations. The government indicated the funds had 'no strings attached'.[67] The decision-making process involved native title claims throughout the state. Native title claims in SA each had their own native title management committee, drawn from among the claimants, to assist in managing the claim. Across the state, there were over 20 management committees, each having authority from its claimant group to manage that claim process and the exercise of procedural rights under the NTA. Accordingly, ALRM considered it important for these committees to consider the proposal for state-wide negotiations.

A series of meetings of the native title management committees culminated in them deciding to form a state-wide organisation and to participate in the proposed state-wide negotiations. The state-wide group of native title management committees, called the Congress, made its decisions through an 'opt in' process. This process allowed for issues to be discussed within each native title management committee, which follow their own procedure, and then report the result back to the larger meeting leading to the larger group's collective decision.

The comprehensive and inclusive decision-making about entering negotiations gave the SA Government confidence in the process and ALRM's role. The government explained the process to a Commonwealth Parliamentary Inquiry:

> Recently, almost all the State's Native Title Management Committees, which represent the great majority of native title claimants in South Australia, agreed to enter into ILUA negotiations on matters of State-wide application as one group, with the ALRM's Native Title Unit to act as a facilitator for the negotiations. ... The outcome of this meeting [of the Congress of native title management committees] is a strong signal that native title claimants, as well as the South Australian Government, SAFF and SACOME, see the ILUA negotiations as being preferable to litigation in resolving native title issues.[68]

The SA Government has made a concerted effort to ensure broad engagement and input into the negotiations. The government established a Cabinet Committee to oversee the progress of the negotiations comprising the Attorney-General, Deputy Premier (also the Minister for Primary Industries and Resources), Minister for Environment and Heritage, and Minister for Aboriginal Affairs. The SA Government is represented in the state-wide process through a negotiating team drawn from the main public sector agencies that impact on native title matters.[69] This team enables the government's policies from a wide field to be brought to the negotiation table, and the outcome of negotiations to be put in place in agencies.[70]

66 P Agius and J Davies "Post Mabo Institutions for Negotiating Coexistence"*, op.cit,* p3.

67 *ibid,* p4.

68 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission, op.cit,* p4.

69 Members of the team come from the Attorney-General's Department, Department of Primary Industry Resources (PIRSA), Department for Environment and Heritage (DEH), and South Australian Department of Aboriginal Affairs and Reconciliation (DAARE); see <www.iluasa.com/sag.asp> accessed 22 December 2003.

70 See <www.iluasa.com/sag.asp> accessed 22 December 2003.

Since 1999, more organisations have joined the state-wide negotiations including the SA Fishing Industry Council, Local Government Association of SA, and Seafood Council (SA) Ltd. The National Native Title Tribunal attends meetings as an observer.

While all parties acknowledge the process is cheaper than litigation, there is still a need for substantial funding, particularly to enable the many meetings to occur. Continuity of funding for participation is an issue for all parties because each is reliant on special allocations from State and/or Commonwealth sources to maintain its involvement. An ALRM officer explained that 'mutual advocacy for each other's funding requirements has emerged as all parties realise that they cannot make progress to their own goals for the negotiations without the participation of other parties'.[71]

Certainly all parties have their funding difficulties, but the major resourcing issue is funding for ALRM and native title claimants to take part in the negotiations. This has been identified by both the SA Government[72] and ALRM. Both parties are hoping ATSIS will be able to assist with funding, but ATSIS/ATSIC's historic emphasis has been on litigation/mediation of specific claims; it did not provide funding for the state-wide process.[73] Early in the negotiations, the State Government explained this situation to a Commonwealth Parliamentary Inquiry:

> Under the Native Title Act it is envisaged that such funding [funding of the representative body (ALRM) and native title claimants to take part in the negotiations] will be provided by ATSIC. To date, however, despite several approaches and submissions to ATSIC, it has refused to provide any such funding, preferring instead to fund only litigation. The state government is of the view that this priority for litigation is inappropriate, although it acknowledges that preparation of cases does need to continue in parallel with ILUA negotiations. We find ATSIC's stance frustrating and baffling. In our view, resources should be applied to the ILUA negotiation process because of the very real prospect of greatly reducing the long-term cost of resolving native title issues.[74]

Along with the development of the Congress (representing native title management committees across the state), the process has seen negotiations conducted through a main table and various side tables. The Main Table:

- develops protocols for discussion between parties for the settlement of individual native title claims;
- provides a forum for parties to raise concerns from their 'sector'; and
- oversees a work program to address these concerns.

The Side Tables:

- consider specific issues (such as mineral exploration, national parks or fishing and sea rights);
- involve only those parties who have active interests in those particular issues;

71 P Agius and J Davies "Initiatives in Native Title and Land Management in South Australia" *op.cit*, p3.

72 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission*, *op.cit*, p10.

73 P Agius "Innovative Agreements", *op.cit*, p3.

74 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission*, *op.cit*, p10.

- enable more detailed research and discussion of these issues; and
- formulate proposals for the Main Table to consider.

An important aspect of the process is ongoing achievement of meaningful outcomes, rather than locking claimants into waiting for an all-or-nothing settlement choice at some stage in the future. Accordingly, while progressing toward a mechanism for addressing native title throughout the state, there have also been substantial and important outcomes during the process. ALRM sees the state-wide negotiation process as already having delivered significant outcomes including:[75]

- Several pilot projects involving negotiations between native title management committees and development interests which have produced Memoranda of Understanding and ILUAs with support from the Congress;
- On-going multi-stakeholder working parties actively reviewing a range of issues, including Aboriginal heritage management, National Parks and land access;
- High levels of community and stakeholder participation in relationship-building and cross-cultural recognition;
- Establishment of the Congress of South Australian Native Title Management Committees (Congress) as a recognised peak body on native title issues in the state;
- Development of Native Title Management Committees' (NTMC) capacity to make decisions for themselves, to choose whether or not to be involved in negotiations proposed by the state, to set strategic direction and priorities in the process, and to participate directly in decision-making and deliberations about native title and Indigenous rights;
- Significant increases in the capacity of Native title management committees and the Congress to drive and manage complex negotiations;
- Reduced anger, frustration and time delays for native title interests and other parties in Native Title processes;
- Withdrawal of a government argument that native title was historically extinguished across the state in 1836;
- Substantial amendment of the Confirmation and Validation Bill before it was presented to the South Australian Parliament in December 2000;
- Aboriginal representation on the state government's Ministerial Advisory Board;
- Continuing engagement on issues of policy and process from native title claimants, the State Government, SAFF, SACOME, SAFIC, and the Seafood Council of Australia, and the South Australian Local Government Association (SALGA);
- Clear guidelines and procedures for Aboriginal burials on pastoral leases, facilitating the continuation of this traditional practice;[76] and

75 Unless otherwise indicated, this list is derived from P Agius and o'rs "Doing Native Title as Self-Determination", *op.cit*, pp8-9.

76 P Agius and J Davies "Initiatives in Native Title", *op.cit*, p5.

- developed an employment and training strategy for Aboriginal people in the minerals and energy sector.[77]

It is illustrative to consider a few of these points in more detail.

One of the pilot projects (the first point listed above) has been the development of a mineral exploration template. This was developed by ALRM, SACOME and the SA Government over two years. It provides standard terms for an ILUA which claimant groups can adopt specifying an alternative procedure to the NTA's right to negotiate. Individual parties are then able to choose this arrangement (saving time and money) or negotiate different terms. The template has been/is being used in a couple of negotiations by the Antakarinja and Arabunna claimant groups. There have also been moves, at the state-wide level, toward a Pastoral Template and Local Government template, which may be developed by broadening the principles negotiated in a specific negotiations.

The second point included in the list of significant outcomes above is the issue of Aboriginal heritage. ALRM, SACOME, SAFF and the government worked together to develop a proposal for a South Australian Aboriginal Heritage scheme. The proposal follows the parties' agreement there should be a scheme that would provide both a strong level of protection of Aboriginal heritage and certainty for all land users about how they can use the land involved. The proposal is available on the internet[78] and has been distributed for public consultation.

The state-wide negotiation process is not only providing benefits at the macro level, but there are also tangible results for individual native title claims. The ALRM sees a useful outcome of the process so far has been the SA Government's acceptance of the authority and governance structure established through the native title management committees. The government does not require native title claimant groups in SA to prove their connection to country through assembling anthropological evidence in a connection report prior to entering negotiations.[79] This is in contrast to government requirements relating to the initial step in Queensland (1999) and WA (2001).[80]

The SA Government has commended the state-wide negotiation process to the Federal Court, saying:

> The process has, amongst other things, developed a high level of understanding between the parties and enhanced the capacity of claim groups to negotiate in an informed and responsible manner. The establishment of the Congress of Native Title Management Committees is but one example of the capacity building strategy and the ILUA process generally. In this light the State [Government] has worked and continues to be willing to work in a constructive way with … other parties to resolve claims by negotiation/mediation rather than litigation.[81]

77 *ibid*, p1.

78 See <www.iluasa.com/heritage_prot_scheme.asp> accessed 22 December 2003. The proposal is available at <www.iluasa.com/HSTPaper11Jun02.pdf>.

79 Note, however, that though the government does not require connection evidence before commencing negotiations, it does require connection evidence if it is to reach a consent determination in relation to a particular native title claim; see heading 'Consent Determinations' at <www.iluasa.com/news.asp> accessed 23 December 2003.

80 J Davies "Traditional CPRs, new institutions" *op.cit,* pp13-14.

81 P Agius "Innovative Agreements", *op.cit*, p4.

Native title developments, as at 11 December 2003

	Tas	National Total
ILUAs (registered : in notification or awaiting reg decision)	0 : 0	105 : 16
Determination that native title exists (litigated : consent)	0 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	0 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	0 : 1	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

Not including hearings for the preservation of evidence.

Native title policy

Native title has not been established as a major area of policy in Tasmania. There is no recognised Native Title Representative Body for Tasmania and currently there is only one native title application that affects Tasmania. The Tasmanian Government is not at the negotiation stage with this application.

Government structure

The Tasmanian Premier has personal responsibility for Aboriginal Affairs in Tasmania as the Office of Aboriginal Affairs is within his portfolio and is located within the Department of Premier and Cabinet. The Department is also responsible for administering the *Aboriginal Lands Act 1995* (Tas). The Premier is also the Minister for Tourism and National Parks.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Tasmania.

The Tasmanian Government has indicated that it has its own plans for handing land back to Aboriginal people as well as plans for the co-management of national parks.

In October 1999 the Tasmanian Government announced its intention to table in the State Parliament a package of measures to address reconciliation between Aboriginal people and the wider Tasmanian community. The package included:

- the transfer of eight areas of Crown Land totalling 52,800 ha;
- measures for determining Aboriginality for the purpose of electing members of the Aboriginal Land Council of Tasmania; and
- measures to enable the Aboriginal community to conduct traditional burial and cremation ceremonies.

The introduction of the package of measures followed two previous pieces of legislation that transferred land to the Aboriginal community. The first was the enactment of the *Aboriginal Lands Act 1995* which enabled the transfer of 12

parcels of land to the Aboriginal community. The second was the enactment of the *Aboriginal Lands Amendment (Wybalena) Act 1999* which returned Wybalena to the Aboriginal community. These Acts partially recognised the rights of the State's Aboriginal people to practice their culture and transferred ownership of a total of thirteen parcels of Crown land to the Aboriginal Land Council of Tasmania.

In response to concerns about the lack of consultation raised by the Tasmanian community about the Premier's reconciliation package, the Tasmanian Legislative Council established a Select Committee of Inquiry in November 1999 "to inquire into and report upon the *Aboriginal Lands Amendment Bill 1999*, having regard to the *Aboriginal Lands Act 1995* and any other matters seen as relevant to the Bill". The Select Committee reported in June 2000.[82] The Committee rejected the proposition that land transfers will assist reconciliation and concluded that Aboriginal people in Tasmania have no greater rights to the return of their land than Aboriginal people elsewhere in Australia. The Committee noted that claims by Tasmanian Aboriginal people are not sufficient justification to transfer Crown land. The Committee recommended that any future land claims or proposed transfers of land be removed from the political arena and be fairly assessed by an independent expert.

The Tasmanian Government responded to the Select Committee's report in August 2000 by stating that it was committed to continuing the process of reconciliation that was commenced by the Council for Aboriginal Reconciliation and that reconciliation is not just words, it requires positive actions. "The State must move forward with reconciliation by taking actions to support the long-term survival of Aboriginal culture in this State and to ensure a strong future for the Aboriginal community".[83]

The government was criticised in the report for not consulting broadly about the proposed transfer of land. The Tasmanian Government replied that it supported the view of eminent Australian historian Professor Henry Reynolds that preceding Tasmanian governments were direct successors of the colonial governors of the 1830s and, as such, the current Tasmanian Government has a responsibility to rectify past injustices. The government believed that it had a responsibility to negotiate with the Aboriginal community and to propose legislation to the Parliament.

The Select Committee also stated that it believed that land claimed by the Aboriginal community should be assessed against certain criteria. The Tasmanian Government's response was that it used the following criteria to assess the land claims of the Aboriginal community:

- significance of the land to the Aboriginal community;
- and to be owned by the Crown;
- other existing interests over the land not to be impediments to transfer;
- significance of land to non-Aboriginal community to be recognised;
- natural values to be recognised;

82 <www.parliament.tas.gov.au/ctee/old_ctees/aboriginallands.htm> accessed 5 Sepember 2003.

83 Tasmanian Government *Response to Legislative Council Select Committee Report on Aboriginal Lands*, 2000, p5.

- public access issues to be addressed;
- appropriate arrangements able to be made for dealing with public infrastructure.[84]

The Tasmanian Government rejected the proposition that the transfer of land to the Aboriginal community should be regarded as just another type of land reclassification. The return of land to the Aboriginal community also involves Indigenous rights and aspirations, the redress of historic grievances and retention of Aboriginal cultural heritage. The procedures used in other processes are not suitable for dealing with these matters sensitively.

The Tasmanian Government reiterated its intention to proceed with the package of measures.

On 12 September 2003, the Tasmanian Premier announced his intention to again reintroduce legislation proposing the hand-back of Crown land to the Aboriginal community in Tasmania. The government's previous attempt to return over 50,000 hectares of Crown land to Aboriginal people in Tasmania was blocked by the Legislative Council in March 2001.

The Department of Premier and Cabinet has advised that the Tasmanian Government is giving consideration to the co-management of National Parks in Tasmania. The details of the approach that the Tasmanian Government will adopt is still under consideration. The National Parks where this will be applied are yet to be determined.

Victoria

Native title developments, as at 11 December 2003

	Vic	National Total
ILUAs (registered : in notification or awaiting reg decision)	10 : 1	105 : 16
Determination that native title exists (litigated : consent)	0 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	18 : 2	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

Not including hearings for the preservation of evidence.

Native title policy

On 3 November 2000, the Victorian Government, ATSIC and Mirimbiak Nations Aboriginal Corporation (the then NTRB for Victoria) signed a Protocol for the Negotiation of a Native Title Framework Agreement for Victoria. The Protocol provided for the negotiation of a Native Title Framework for Victoria and the resolution of native title claims through mediation and negotiation rather than litigation. The Protocol noted that the Framework is to provide for the

84 *ibid*, p4.

development of Indigenous Land Use Agreements (ILUAs) that permit recognition, protection, and exercise of native title rights and interests, and also provides for a simplified future acts regime. The Protocol also allows for negotiation of broader outcomes including the provision of employment, training and enterprise development opportunities to Indigenous communities.

Importantly, the Protocol does not affect any existing claims or negotiations, and makes it clear that the Framework and any subsequent regimes implemented in Victoria must be consistent with the provisions of the Commonwealth's *Native Title Act 1993*.

During 2000 the Victorian Government released its Native Title Policy which:

- proposes negotiating outcomes to native title issues for the benefit of all parties;
- outlines a coordinated whole of government approach to responsibilities under the *Native Title Act 1993* (Cth); and
- proposes that a possible outcome of mediation is the recognition by government of the existence of native title.

The Policy states that the Victorian Government's preference is to seek to achieve negotiated or mediated outcomes to native title applications because they have the potential for better long term opportunities for Aboriginal people and give more certainty for industry. Native title claims in Victoria are to be resolved in the interests of both the Indigenous and the wider Victorian community. The Policy includes four strategies for achieving its aims:

- development of a coordinated Victorian Government approach to managing native title issues;
- working to achieve sustainable negotiated outcomes to native title matters;
- development of partnerships between the government, native title applicants and their representative body, and other stakeholders; and
- development of clear processes within government agencies for the implementation and management of outcomes of native title matters.

The government's Department of Natural Resources and Environment (NRE) (now the Department of Sustainability and the Environment) adopted an Indigenous Partnership Strategy to assist in building effective relationships with Victoria's Indigenous communities, to enable the Department to examine its existing policy and service frameworks, and to provide opportunities for the Indigenous community to be involved in the management of Victorian natural resources.[85] The Department formally recognises that Victorian Indigenous communities, as the traditional custodians of Victoria's land and waters, have a fundamental management role in Victoria's natural resources. The Indigenous Partnership Strategy, developed in 2001 contains eight main initiatives:

85 Minister's Foreword, *NRE Indigenous Partnership Strategy,* <www.nre.vic.gov.au/web/root/domino/cm_da/nrecab.nsf/TOC/0006020FE3D94CA7CA256B98000ABBC8#TOC> accessed 17 December 2003.

- Cultural Awareness – developing a program aimed at encouraging mutual understanding and improved relationships between Victorian Indigenous communities, NRE and NRE service providers (statutory authorities, regional bodies, and private providers) and community groups (Coastcare, Coast Action, Landcare, Bushcare, Farmsmart, etc).
- Community Partnerships – developing culturally relevant processes for improving relationships and encouraging positive participation of Indigenous people at the decision-making levels within the Department of Natural Resources and Environment.
- Capacity Building – developing the capacity and capability of Indigenous organisations and communities to initiate and manage NRE related government programs and services, and promoting an understanding within NRE of Indigenous community aspirations and potential skills for involvement in land and resource management.
- Cultural Heritage, Land and Natural Resource Management – promoting partnership with Victorian Indigenous communities, and awareness and consideration of cultural heritage as an integral component of land and resource management.
- Indigenous Employment – increasing employment opportunities for Indigenous people within NRE and its agencies.
- Economic development – increasing opportunities for purchasing goods and services from Indigenous owned enterprises and Indigenous community-run employment and training programs.
- Communication – ensuring NRE's communication strategy will deliver positive promotion of Indigenous projects and activities.
- Community profiling – assisting in the establishment of a process of community profiling as a resource for Indigenous communities.

Further details on each of these areas are available on the internet.[86]

The government has provided some assistance to Claimants to participate in negotiations. This has included financial assistance for attendance at meetings, part funding of project staff in conjunction with the NTRB, and funding for specific projects such as collaborative research with unrepresented groups.

Government structure

The Department of Justice is responsible for the Victorian Government's policy in relation to native title matters and for coordination with other government agencies within Victoria. The Department of Justice also has the primary responsibility for negotiating native title applications.

The Department of Sustainability and the Environment, which took over the land administration and management functions from the former Department of Natural Resources and Environment in December 2002, has responsibility for future act matters. The Department is divided into five regions. Each region has

86 *ibid.*

a regional coordinator who has responsibility for future act processes in that region. The Victorian Government Solicitor's Office provides legal advice on native title matters on request.

Negotiation threshold

During 2001-2002 the Department of Justice, in partnership with the then Department of Natural Resources and Environment, developed guidelines and procedures for the administration of Crown lands in compliance with the *Native Title Act 1993* (Cth). In September 2001 the Native Title Unit of the Department of Justice released the Victorian Government's *Guidelines for Native Title Proof*.[87] This document provides information to claimant groups about the nature of evidence required to establish native title rights and interests in Victoria and the steps that must be followed.

For native title applications in Victoria to be settled through mediation, agreement must be reached between the native title claimants and all other non-claimant parties about the merits of any single claim. Essentially, native title claimants must provide evidence to justify recognition of their native title rights, commonly referred to as "proof of connection". The Victorian Government advises that while the criteria in the guidelines for establishing connection have been refined following the High Court's decision in the *Yorta Yorta* case in December 2002, the *Guidelines* are still generally applicable.

Under the *Guidelines*, the level of recognition possible is commensurate with the level of traditional connection demonstrated by evidence. The *Guidelines* provide information about the level of proof required for different outcomes, the assessment of proof, the form the proof might take, the kind of government assistance that may be made available to claimants such as mapping, access to archival records, and the confidentiality of materials. Table 1 (below) shows that the sliding scale of evidence required depends on the outcomes.

87 The Guidelines are not available at present on the Department of Justice's website but can be obtained on request from the Native Title Unit, Department of Justice, Ground Floor, 55 St. Andrews Place, Melbourne.

Table 1: Native Title Negotiations in Victoria – General Evidentiary Requirements and Outcomes

Source: State of Victoria, Department of Justice, page 13

INDIGENOUS LAND USE AGREEMENTS			CONSENT DETERMINATION OF NATIVE TITLE RIGHTS IN THE FEDERAL COURT
Future Act ILUA or mining agreement where Government is not a party	Future Act ILUA where Government is a party	ILUA as an alternative to a native title determination	
INCREASING SCALE OF EVIDENCE →			
Nil in most circumstances.	Basic certainty about: · The identity of the claim group and whether any particular person is in that group; · The identity of claimed native title rights and interests; · The fundamental factual basis for native title based on tradition; · Some evidence of traditional physical connection with any part of the claim; and · The area of the ILUA being consistent with the above.	Certainty: · That the claimants constitute an identifiable community or group and are the most appropriate people to assert cultural rights and interests for the area; · That the claimants can demonstrate contemporary observance of practices based on tradition connected to the claim area; and · That the claimants maintain the cultural rights and interests claimed in a relationship with the claimed area.	Consistent with the *Native Title Act 1993* (Cth), certainty that: · The claimants are an identifiable group descended from the people who occupied or possessed the claimed lands and water at the time of sovereignty; · The claimants continue to observe a system of laws and customs derived from the system of traditional laws and customs of their ancestors; and · The system of traditional laws and customs observed by the group connects with the land and waters claimed.

Consent determinations recognising native title rights and interests are subject to an appropriate standard of evidence being provided. The *Guidelines* also state that alternatively it may be possible to recognise rights 'that do not equate to native title rights but nevertheless establish that a particular Indigenous group has the primary cultural right to a particular place or area and that such rights will be recognised under an Indigenous Land Use Agreement'.[88] The *Guidelines* state that the Victorian Government will make every effort to avoid unnecessary expense or inconvenience in resolving native title matters.

88 *ibid*, p5.

Various fact sheets providing background information about native title and Crown land are available on the Department of Sustainability and the Environment's website.[89] These fact sheets provide general information about native title, future acts and indigenous land use agreements.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Victoria.

The Indigenous Partnership Strategy, mentioned above, plays a central role in the Department's relationships with Aboriginal people and communities. For example, Parks Victoria has developed a *Framework for Working with Indigenous Communities*,[90] and the Victorian Catchment Management Council has developed an agreed set of protocols, principles and strategies for Indigenous involvement in land and water management.[91]

On 10 August 2003, the *Herald Sun*[92] reported that the Victorian Government was negotiating with 20 communities which were seeking native title rights to more than 20,000 parcels of land covering approximately 10 million hectares. The media report released the details of an in-principle agreement reached between the Victorian Government and the Wotjobaluk People in October 2002. Victorian Attorney-General was reported as stating that the Federal Court had set a deadline for 19 September 2003 for all the parties to the claim to indicate where they stand. He called on all parties, including the Commonwealth, to support the in-principle agreement. On 15 October 2003 it was reported in *The Age* that the Commonwealth had informed the claimants of its intention to oppose the native title determination application.[93] However, on 21 November 2003, *The Age* reported that the Federal Government had decided to support the in-principle agreement.[94]

The Victorian Government cites its in-principle consent determination in the Wotjobaluk native title determination application in the Wimmera region of western Victoria as evidence of the scope of negotiations over non-native title outcomes.[95] The in-principle agreement identifies a number of matters negotiated to date that will benefit the Wotjobaluk people, including a range of non-native title outcomes:

- A consent determination of native title that identifies the rights and interests that comprise native title and determines that native title exists over less than two per cent of the claim area and has been extinguished in other areas. The Wotjobaluk people's native title rights and interest to hunt, fish, gather and camp along the banks of the Wimmera River will be subject to all existing laws and regulations;

89 <www.dse.vic.gov.au>, search: Managing Crown Land – Fact Sheets.
90 <www.parkweb.vic.gov.au/resources/13_0202.pdf>.
91 <www.vcmc.vic.gov.au>, search: 'Publications', then "Protocols for Indigenous Engagement'.
92 I Haberfield and C Tinkler "Native Title Rights Push into Victoria" *Herald Sun* 10 August 2003.
93 F Shiel 'Threat to historic native title deal' in *The Age*, 15 October 2003. The reasons for this opposition will be examined in more detail in Chapter 3 of the report.
94 F Shiel, 'Canberra backs native title deal' in the *The Age*, 21 November 2003.
95 Department of Justice, Victoria, *Summary of the in-principle agreement between the Wotjobaluk and the Victorian Government*, Department of Justice, Native Title Unit, 2003.

- Recognition that the Wotjobaluk People continue to have a traditional connection to an area of land wider than the area where they hold native title, known as the 'core area';
- An agreement to co-operative management over National Parks and other Crown land areas within the core area;
- The right to be consulted over, and have a role in protecting cultural heritage in relation to major development projects in the core area;
- Financial support for the Wotjobaluk People, including the purchase of three parcels of Crown land (totalling 45 hectares), which are of particular cultural significance, and ongoing administrative assistance for the Wotjobaluk Traditional Land Council Aboriginal Corporation which will hold the native title and administer the rights and responsibilities flowing from the agreement and;
- The erection of appropriate signage in the core area.

The Victorian government notes that, with the exception of the first dot point, these outcomes were negotiated referenced to current Victorian legislation and outside the NTA and can therefore proceed irrespective of whether a determination of native title is achieved.

The Department of Justice's 2002-03 Annual Report also discusses the Government's continued negotiations with the Yorta Yorta people outside the legal framework of the NTA.[96]

Western Australia

Native title developments, as at 11 December 2003

	WA	National Total
ILUAs (registered : in notification or awaiting reg decision)	1 : 1	105 : 16
Determination that native title exists (litigated : consent)	2 : 6 ***	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	100 : 33	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	8 : 18	11 : 22

*** Does not include Wanjina : Wungurr-Willinggin – Ngarinyin Federal Court litigated decision handed down 8th December 2003 nor the Miriuwung Gajerrong FC consent determination of 9th December 2003 although the previous Miriuwung Gajerrong litigated decision that native title exists is included.

\# Not including hearings for the preservation of evidence.

Native title policy

The State's overarching native title policy, accessed through the Premier's website, is entitled *Native title: agreement not argument*.[97] This covers various aspects of the native title system. Its main commitments are:

96 Department of Justice, *Annual Report 2002-03*, Victoria Melbourne, 2003.

97 <www.premier.wa.gov.au/policies/native_title.pdf> accessed 16 December 2003.

- convene negotiations between peak industry and Indigenous groups to develop mutually acceptable template agreements to facilitate negotiations on individual titles;
- vigorously support the negotiation of regional agreements designed to facilitate early consideration of native title issues where applications are made for exploration licences or mining leases;
- vigorously promote and sponsor the negotiation of Indigenous Land Use Agreements;
- negotiate with peak industry and native title bodies to seek agreement for the introduction of a low impact exploration law based on the NSW model;
- make extensive use of the NNTT's mediation role and resources to make more effective progress on negotiations on all active native title applications in Western Australia;
- resolve native title issues by negotiation and agreement and cut currently projected expenditure on native title litigation by at least $2 million;
- enter negotiations with the Western Australian Aboriginal Native Title Working Group (WAANTWG)[98] with the aim of concluding a framework agreement.

There have been a number of developments in Western Australia corresponding to these commitments. The developments which have native title as their central focus are addressed separately below. However, there have been several reviews or inquiries which have included native title within their scope. These include:

- Ministerial Inquiry into Greenfields Exploration in Western Australia (Bowler Report 2002).[99]

  This Inquiry was held in 2002 to identify strategies to increase resource exploration in Western Australia. The Inquiry, headed by WA parliamentarian John Bowler, investigated reasons for 'reduced ... investment in greenfields mineral exploration in Western Australia and recommend[ed] actions that might be taken to achieve the level of expenditure necessary for a sustainable future for this...sector'. The Inquiry was specifically invited to cover 'Land access difficulties related to native title issues... [and] Issues associated with delays in approvals processes and granting of mineral title'. The Inquiry provided a final report to the government in November 2002.
- Review of the Project Development Approvals System (Keating Review 2002).[100]

98 WAANTWG is the umbrella organisation representing NTRBs in Western Australia.
99 <www.doir.wa.gov.au/documents/aboutus/Bowler_Report.pdf> accessed 18 December 2003.
100 <www.doir.wa.gov.au/documents/investment/PremiersProjectApprovalsFinalReport(1).pdf> accessed 18 December 2003.

The WA Government commissioned an independent committee to review the system in WA for dealing with proposals to develop projects in the State. The review's objective was to develop a system of government decision-making that is coordinated and integrated, clear and unambiguous, and that is balanced between community and developer needs. The review was asked to consider government decisions in areas including Aboriginal heritage, land tenure and planning and land use. The review's final report was provided to government in November 2002 and is now being examined in relation to resource development mechanisms.[101]

- Technical Taskforce on Mineral Tenements and Land Title Applications (November 2001).[102]

The Western Australian Government also released a discussion paper on native title and future acts. The discussion paper recommended amendments to Western Australian mining legislation aimed to reduce the backlog of mining lease applications. The discussion paper also made recommendations about the processing of non-mining future acts.

In October 2001 the Premier of Western Australia, Dr Geoff Gallop, signed an agreement entitled *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians*. The other parties to the agreement were the Western Australian ATSIC State Council,[103] the Western Australian Aboriginal Native Title Working Group (WAANTWG), Western Australian Aboriginal Community Controlled Health Organization (WAACHHO) and the Aboriginal Legal Service of Western Australia (ALS).[104] The stated purpose of the agreement was:

> to agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.[105]

NTRBs undertake negotiations with State departments and agencies on a range of issues as outlined in the following table:

101 J Edwards, Western Australia Minister for the Environment and Heritage, Water Resources, *Speech for the APPEA Environment Workshop*, Fremantle, 11-12 November 2003, available at <www.appea.com.au/download.asp?ID=403> accessed at 15 January 2004.

102 <www.ministers.wa.gov.au/main.cfm?MinId=02&Section=0201b> accessed 18 December 2003.

103 Now ATSIS State Council.

104 It is interesting to note that although the agreement purports to be between all these parties, the signatories to the agreement are confined to the Premier, ATSIC WA State Council, Minister for Indigenous Affairs and the ATSIC National Chairman.

105 *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians*, October 2001, p3.

Table 2: WA government departments – negotiation issues

Department	Issue
Department of Industry & Resources (DOIR)	exploration and mining, heritage protection, economic development
Conservation and Land Management (CALM)	conservation, national parks, land management
Department of Indigenous Affairs (DIA)	heritage and site protection, Aboriginal Lands Trust (ALT) properties.
Department of Planning & Infrastructure (DPI)	land transfers and development
Department of Fisheries	off shore areas, management of resources
Crown Solicitor's Office	litigation issues, legal arrangements

Some government agencies maintain their own indigenous policy initiatives. As set out in the table above, the Department of Fisheries, CALM, DOIR and DPI all have significant responsibilities relating to the management of land or sea, including aspects relating to Indigenous land use and management and economic development.

A recently released draft Aboriginal Fishing Strategy, developed in consultation with Aboriginal interests and other stakeholders by the Department of Fisheries, addresses three key areas:

- the recognition and inclusion of customary fishing in fisheries legislation;
- the recognition and inclusion of Aboriginal people in the management of fish resources; and
- economic development opportunities in the fishing and aquaculture industries.[106]

In July 2003 CALM released a consultation paper, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*. The consultation paper included a proposal that title to conservation areas could in future be held either as:

> Crown land reserves placed in the care and control of:
> - the Conservation Commission of Western Australia,
> - the Marine Parks and Reserves Authority, or
> - an approved Aboriginal Body Corporate;
>
> or as inalienable freehold title held by an Aboriginal Body Corporate.[107]

Some of the government's recent separate initiatives in indigenous affairs can be seen as emanating from a prior commitment to social and economic development. For example, the CALM consultation paper on joint management refers to the agreement as underpinning the policy shift on joint management.

106 Draft Aboriginal Fishing Strategy released for public comment, media statement, Hon Kim Chance, Minister for Fisheries, 26 June 2003.

107 *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper, Government of Western Australia, July 2003, p14.

So too does the Department of Local Government and Regional Development in relation to its strategy 'Working with Indigenous People and Communities', which focuses on developing principles for the Department's work with Indigenous communities on capacity building, leadership and economic development.

The State recently announced its new policy for the processing of exploration and prospecting licence applications in line with the recommendations of a Technical Taskforce aimed at reducing the current backlog of mining, exploration and prospecting tenement applications and putting in place processes to facilitate the granting of new applications.[108] Applicants will be required to sign a 'Standard Heritage Agreement' or prove they have signed an 'Alternative Heritage Agreement' before the application will be submitted to the expedited procedure process under the NTA. If no heritage agreement has been signed the application will go through the NTA right to negotiate process which requires that all native title claimants agree to the issuing of the tenement and sign the State deed.[109]

The hardening policy approach of the Western Australian Government to native title is also evidenced in media statements of the Premier and Deputy Premier at various times:

- In August 2002, the Premier, Dr Gallop, responded to the High Court's ruling on the Miriuwung-Gajerrong case by stating that the decision 'clarifies the law and provides greater certainty to people involved in native title negotiations'. Dr Gallop went on to assert that while 'intractable issues' will need to be resolved in the court 'the State Government remains committed to an orderly process of negotiation to reach agreements'.[110]
- In October 2002, the Deputy Premier Mr Ripper issued a media statement announcing the release of new 'guidelines for evidence needed to help reach agreement' on native title claims, developed in response to the state government – commissioned Wand Review recommendations. The release included the cautionary note that 'native title is a legal process and there is no escaping that fact'.[111]
- On 13 December 2002, in a media statement about the Yorta Yorta High Court decision, Mr Ripper affirmed that the government continued to prefer the 'mediated settlement of native title issues' but added that this could be achieved 'either through a determination of native title by consent, or by the negotiation of outcomes outside the native title process'.[112]

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108 *Technical Taskforce on Mineral Tenements and Land Title Applications, Final Report*, Government of Western Australia, 2001, pp19-36.

109 Department of Industry and Resources, Information Paper, Government of Western Australia, October 2003, pp1-2.

110 The Hon. Geoff Gallop, Media statement, Government of Western Australia 8 August 2002, available at <www.mediastatements.wa.gov.au/>.

111 The Hon. Eric Ripper, Media statement, Government of Western Australia, 8 October 2003, available at <www.mediastatements.wa.gov.au/>.

112 *ibid*, 13 December 2003, available at <www.mediastatements.wa.gov.au/>.

- In February 2003, Mr Ripper announced the government's 'mediation plan' for the South-West Noongar claims to 'avoid protracted Federal court cases'. He added that although the government wished to 'settle the application through negotiation … open ended negotiation for years on end is an injustice in itself'. He again referred to the government's willingness to explore avenues outside the native title process'.[113]
- In a Ministerial statement to Parliament on 25 June 2003, the Deputy Premier advised that the State had suspended mediation on the Combined Metropolitan claim (one of the South West claims) and had decided that the claim was 'best resolved through the Federal Court trial currently underway'. He added that 'proposals for land justice outcomes' had been put to the applicants, but that 'little progress was achieved'.[114]
- On 3 July 2003, when the Federal Court handed down the Ngaluma and Injibandi determination, Mr Ripper issued a statement welcoming the finding but cautioning that although the government 'believed native title agreements were preferable to court cases … the circumstances of individual applications did not always allow for mediated outcomes'.[115]

Funding for NTRBs and claimant groups has usually been provided by the Commonwealth through ATSIC, now ATSIS. Recently, however, the State has made funding available to NTRBs for an extra Future Act officer in each region. This initiative was one of the recommendations made by the Technical Taskforce on Mineral Tenements and Land Title Applications to expedite the processing of the backlog of mineral tenements applications on land under native title claim.[116] Funding is dependent on the NTRB entering into a regional heritage agreement with the State to expedite the granting of prospecting and exploration licenses.

Government structure

The Western Australian Deputy Premier has whole-of-government ministerial responsibility for native title matters. The Office of Native Title (ONT) in the Department of Premier and Cabinet provides services to the Minister and to Cabinet on native title including:

- preparation of policy advice;
- coordination of negotiations on native title claims; and
- coordination of government's handling of projects and initiatives affected by the *Native Title Act*.[117]

113 *ibid*, 27 February 2003, available at <www.mediastatements.wa.gov.au/>.
114 The Hon. Eric Ripper, Ministerial statement – combined metropolitan native title application, Government of Western Australia, available at <www.ministers.wa.gov.au/main.cfm?MinId=02&Section=0054>.
115 The Hon. Eric Ripper, *op.cit,* 3 July 2003, available at <www.mediastatements.wa.gov.au/>.
116 *Technical Taskforce on Mineral Tenements*, *op.cit*, p19.
117 Annual Report 2001/2002, Department of the Premier and Cabinet, p3.

The ONT implements the government's native title objectives through:

- resolution of native title applications;
- minimising the State's exposure to compensation liability for invalid future acts and/or compensation for the extinguishment or impairment of native title;
- resolution of native title compensation applications wherever possible by agreement;
- developing and implementing policies, procedures and practices across government that ensure the future act regimes is administered efficiently and consistently;
- negotiation and involvement in the implementation of project agreements.[118]

Negotiation threshold

In October 2002 the government, in response to its earlier commissioned review of the native title claim process in Western Australia released a document entitled *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title* (the "guidelines"). At the time of the announcement the government stated that 'with the aid of these guidelines, claimants and their representatives will be able to make a realistic assessment of their prospects of success in mediation or litigation'.[119]

The guidelines restated the government's policy of preference for native title determinations to be achieved by negotiation.[120] The guidelines assert that Aboriginal evidence is 'the most important evidence in determining the continued existence of native title rights and interests'. Further, the state expects that connection reports will contain evidentiary material in sufficient detail to establish that the native title applicants:

- are the persons or groups of persons who hold native title;
- hold, under acknowledged traditional laws and observed traditional customs, native title rights and interests, the nature and extent of which are clearly identified for the purposes of the terms of a determination as referred to in section 225(b) of the *Native Title Act 1993 (Cth),* in the claimed area; and
- have maintained a connection with the claimed area.[121]

The guidelines also state that 'The Government may wish to further test the Aboriginal evidence contained in the connection reports 'on a case-by-case basis'.[122] The guidelines are silent on the question of what is meant by 'evidence'; for example whether it is to be oral, written, sworn, or how it could be 'tested'.

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118 Budget Papers 2003-2004, 'Premier and Cabinet – Output 8: Native Title policy development, implementation and negotiation', p91.

119 "New guidelines to aid native title claim resolution", media statement, Hon Eric Ripper MLA, Deputy Premier, 8 November 2002.

120 *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*, Office of Native Title, Department of the Premier and Cabinet, Government of Western Australia, October 2002, p2.

121 *ibid,* paragraph 1.4.

122 *ibid*, paragraph 3.4.

Burrup Peninsula[123]

The Burrup Peninsula is an area of land near the mining towns of Dampier and Karratha, about 1,300km north of Perth. In 2000, the Burrup was within three overlapping native title claims. The three claims originally commenced as one application, *Ngaluma Injibandi*, which was lodged in 1994 as an inclusive claim that embraced all people of Ngarluma and Yindjibarndi descent. In 1996 and 1998, two smaller groups lodged separate overlapping claims for exclusive possession of the Burrup respectively known as the *Yaburara Mardudhunera* and *Wong-Goo-Tt-Oo* claims. The members of these smaller claims were and are considered by the Ngarluma and Yindjibarndi people to be part of the Ngarluma Yindjibarndi group.

In January 2000, the Western Australian Government notified the native title parties of its intention to acquire land for the construction of a heavy industry estate on the Burrup Peninsula and adjacent Maitland area. The notification was the culmination of many years of planning for the expansion of industrial development in the region undertaken by successive state governments through the late 1970s, 80s and 90s. The proposed industrial estates were intended to contain a number of downstream gas-processing plants, as well as associated infrastructure facilities and industrial lay-down areas. In order to accommodate the increased population that would accompany the development, the State also required an extensive release of residential and commercial land in nearby Karratha.

In late 2001, the State announced its intention to conclude an agreement with all three native title claim groups for the acquisition of the Burrup and Maitland land by the end of March 2002. The proposed short four month timeframe for completing complex negotiations (time which included important cultural 'law business' for various Indigenous people in the area) was explained as a consequence of the immutable commercial deadlines of the five international companies who had expressed interest in taking leases in the proposed estates. The government indicated that if all five proponents took leases, their proposed developments would involve 7 billion dollars worth of capital expenditure, 3,500 direct and indirect jobs, and up to a billion dollars per annum expenditure in the Australian economy. Expenditure on capital alone was large enough to have a perceivable impact on the value of the Australian dollar in international currency markets. The State had itself already committed $120 million to infrastructure development necessary for the development.

The government decided to take the lead role in the negotiations, rather than leaving this to the companies. In the ordinary course, the government would not have done this and there was little precedent for this course within Australian native title negotiations. The government considered it should take the lead role because the area:

- was covered by three overlapping claims with the right to negotiate;
- included popular recreation sites for people in the region (Hearson Cove, the most popular beach, was within a 40km radius);
- had famous and culturally important Aboriginal rock engravings;
- was important to the NW Shelf Gas Development and the operations of Hamersley Iron and Dampier Salt;

123 Unless otherwise indicated, all material in this description is drawn from F Flanagan, "The Burrup Agreement: a case study in future act negotiation", paper given at the *Native Title on the Ground Conference*, Alice Springs, June 2003.

- had high conservation value, containing unique flora and fauna; and
- was proposed for $7 billion investment in Western Australia.[124]

The government established an inter-departmental steering committee led by the Office of Native Title within the Department of Premier and Cabinet. It appointed a lead negotiator to act for the government. The committee ensured that all government actions were coordinated, and worked together with the lead negotiator.

The government provided substantial funding to the claimant groups to develop their position and expectations of the negotiations and to assist them in arriving at an informed decision in relation to the proposed development. This gave the claimant groups the capacity to bring forward a comprehensive statement of their position early in the negotiations. The government also funded representatives of the groups' choices, including lawyers and accountants.

The starting point for the negotiation process was the Ngarluma and Yindjibarndi peoples' decision to be guided by their perspectives and priorities, rather than those of the State. The government's offers made over the previous two years did not reflect the Ngarluma and Yindjibarndi peoples' aspirations. The Ngarluma and Yindjibarndi peoples agreed to present a comprehensive counter-offer to the State that would establish a clear Ngarluma Yindjibarndi negotiation position and, it was hoped, fundamentally re-set the agenda for the negotiation. Time constraints made it impossible to complete a separate Economic and Social Impact Assessment prior to fine-tuning the content of the counter-offer. However, the Ngarluma Yindjibarndi people and their advisers had the benefit of access to similar work that had already been done for the community in previous negotiations for an earlier development by Woodside on the Burrup Peninsula. This information, together with the extensive available literature published about the Roebourne Aboriginal Community, assisted in identifying the kinds of issues that would need to be addressed in any agreement that set out to minimise the negative impacts of industrial development on the community.

In March 2002, the community presented State representatives with a comprehensive proposal for the final settlement of all native title issues relating to the acquisition of the Burrup and Maitland Estates and the Karratha land. The proposal was holistic in nature. In return for the full range of acts and activities to be undertaken by the State in establishing the industrial estates, the State was asked to agree to a package of measures and benefits including land, cultural heritage and environmental protection, financial compensation, residential and commercial land, improved roads, housing, education, employment and training that would represent 'just terms' compensation for the acquisition of native title. The presentation of the document was accompanied by a traditional welcome to country and a community presentation summarising the key points of the document. The presentation of the counter-offer performed a useful reference point later on in the negotiation process as it was clearly remembered by everyone as a moment when the community was united in telling government what they wanted from the negotiation. The counter-offer was also used by Ngarluma Yindjibarndi to gauge the progress of the negotiation over the following weeks by comparing the parties' subsequent positions to the position set out in the counter-offer.

124 The material in this and the following two paragraphs is taken from the presentation by A de Soyza, "Case Study: The Burrup Peninsula Native Title and Cultural Heritage Success" presented at the *Cultural Heritage and Native Title Conference*, 29 September-1 October 2003, Brisbane.

The Burrup agreement was not made subject to any confidentiality restrictions, and is publicly available on the internet.[125] Importantly, the benefits contained in the agreement endure regardless whether any of the native title parties are determined by the Federal Court to hold native title over the Burrup or Maitland.

In exchange for the native title parties' agreement to the surrender and permanent extinguishment of native title on the industrial land on the Burrup and Maitland Estates and the land required for the State for residential and commercial purposes in Karratha, the native title parties receive the following:

Burrup Non-Industrial Land

Freehold title to Burrup Non-Industrial Land to the high-water mark conditional upon:

- the freehold title being subject to existing easements and other interests including roads;
- the land being leased back to the State for ninety-nine years (plus a ninety-nine year option). One of the terms of the lease is that the Contracting Parties cannot sell the land to anyone else without offering it to the State first;
- An agreement between Ngarluma Yindjibarndi and the WA Department of Conservation and Land Management to manage the land in accordance with a Management Plan;
- A promise by the native title parties on the title that there cannot be any buildings on the coastal strip, except for recreational purposes;
- Commissioning and funding ($500,000 over 18 months) of an Independent Study to develop a Management Plan for the land in accordance with specified terms of reference and advised by an Advisory Committee;
- Management fund of $450,000 per year over five years for management of the land;
- A Visitors/Cultural/Management Centre on the land worth $5,500,000; and
- Infrastructure funding on the land worth $2,500,000.

Approved Body Corporate

The State will provide $150,000 to a Consultant to establish an Approved Body Corporate (ABC) and $100,000 per year in operating costs for four years. The ABC will hold the freehold title to the Burrup Non-Industrial Land, and allocate and distribute the money on the basis that each member of the ABC is entitled to an equal share. Membership will be open to members of the native title parties who enter the agreement.

Karratha Commercial and Residential Land

5% of Developed Lots in Karratha to be transferred to the Approved Body Corporate.

Financial Compensation

A total of $5,800,000 in upfront payments comprising:

125 <www.naturebase.net/national_parks/management/pdf_files/imp_deed.pdf> accessed 3 December 2003.

- $1,500,000 from the State on signing of the agreement;
- $2,000,000 from the State on the date of the first taking order for a lease;
- $1,150,000 20 days after leases are granted to proponents; and
- $1,150,000 20 days after the Current Proponents make their first shipments.

Ongoing Annual Payments

For Current Proponents: the State will pay $700 per hectare per year, escalated annually after five years at CPI plus 2%.

For Future Proponents: half of Market Rent (as determined using a formula devised with Market Valuation principles).

Employment, Training and Contracting

The State will pay an Employment Service Provider based or operating in Roebourne $200,000 per year for three years. The State, native title parties and the Employment Service Provider will negotiate an agreement which requires the Employment Service Provider to:

- conduct an audit of the skills of available Aboriginal people and contractors;
- conduct a needs analysis;
- conduct an analysis of the opportunities for employment and enterprise; and
- assist people and contractors to achieve their desired employment and enterprise outcomes.

The Proponents must meet a 5% Aboriginal employment target for their Operations Workforce or, if they are unable to meet the target, pay to the Employment Service Provider a levy of $4,500 per year for every Aboriginal person below the 5% target.

Education

The State will pay $75,000 per year for two years to an Approved Body Corporate to:

- support students to 'realise their school, vocational, training and tertiary ambitions';
- create a cohesive pathway between primary, secondary, vocational education and training, and tertiary sectors; and
- introduce cultural matters into education as appropriate.

Benefits outside the Burrup Agreement

In assessing the overall impact of the negotiations, regard should also be had to a number of matters that were agreed to by the State but were not included within the formal Burrup Agreement. As a result of the Ngarluma Yindjibarndi community's negotiation position, the State also agreed to commission a Rock Art Study to monitor the emissions from industry, identify impacts on the rock art and identify potential mitigation measures. Further, the State responded to Ngarluma Yindjibarndi requests for improved housing, transport, agency co-ordination and asbestos removal by implementing the Roebourne Enhancement Scheme, a scheme with a budget allocation of over $3.5 million to address these issues for the Roebourne community.

Commonwealth

Native Title Policy

The formulation and provision of legal and policy advice to the Commonwealth Government in relation to native title is undertaken by the Native Title Unit of the Attorney-General's Department. The Unit's work includes:

- managing the Commonwealth's involvement in native title litigation;
- advising the Commonwealth on the NTA's operation;
- liaising with State and Territory governments about alternative native title regimes; and
- developing conditions for the Commonwealth's provision of financial assistance to States and Territories for various native title costs and expenses.

The Unit's stated objective for native title is 'shaping a native title system that delivers fair, effective and enduring outcomes'.[126] The Department's website specifies strategies it will employ to pursue this objective including:

- seeking to resolve native title issues through agreement, where possible;
- facilitating whole-of-government coordination across the native title system; and
- working cooperatively with stakeholders in the native title system, in particular the States and Territories, to implement the NTA.[127]

The website also outlines the Commonwealth's attitude to, and role in, litigation:

> The Commonwealth has an interest in ensuring that the Native Title Act 1993 is interpreted in a way that is consistent with the Parliament's intention. In addition, the Commonwealth has property and other direct interests in some native title applications, and also has an interest in any compensation claims relating to native title. The Native Title Unit is responsible for advising the Attorney-General on Commonwealth participation in native title litigation.
>
> As at 1 June 2003, the Commonwealth was a party to 191 native title applications (out of 620 in total). A number of the applications are before the Federal Court for determination. Most of the remainder have been referred to the National Native Title Tribunal for mediation.[128]

Commonwealth policy is to promote the resolution of native title issues by agreement. In mediation, the Commonwealth seeks to ensure that its four principles of:

- certainty of rights recognised,
- consistency with the common law,

126 <www.ag.gov.au/www/nativetitlehome.nsf> accessed 23 December 2003.

127 *ibid*, accessed 23 December 2003.

128 According to the NNTT, as at 1 July 2003 there were 622 applications in the Federal Court, of which 362 had been formally referred to the NNTT for mediation.

- compliance with the Native Title Act 1993 (Cth), and
- transparency of process are reflected in negotiations.[129]

As at 1 June 2003, there were 45 determinations of native title overall. Of these, 26 were consent determinations (mediated outcomes) and 10 were litigated determinations. Overall, 31 determinations have found that native title exists. The Commonwealth has been a party to one consent determination and five litigated determinations (two at first instance and three on appeal).[130]

In his address to the Native Title Representative Bodies Conference in Geraldton in 2002,[131] the Attorney-General outlined the Commonwealth Government's approach to native title which can be summarised as follows:

- despite the difficulties and differences, it is in everyone's interests that native title issues be resolved as quickly and harmoniously as possible and that the best way of achieving it was by agreement;
- there is a common desire for practical and workable solutions;
- the government sees meaningful resolution of native title issues as part of the process of practical reconciliation;
- the government has consistently emphasised that the future of native title is in negotiated outcomes as opposed to litigation;
- the government recognises that some litigation is necessary and inevitable, however it has been actively promoting and encouraging alternatives to litigation, such as consent determinations and Indigenous Land Use Agreements (ILUAs).

The Attorney-General also stated that the Commonwealth's position on consent determinations was founded on two key concepts underlying the *Native Title Act 1993*:

- the recognition of native title is the recognition of already existing rights; and
- the process of recognition is a publicly accountable one.

Mr Williams explained the Commonwealth's approach to consent determinations, stating that it was based on four principles:

1. Consent determinations should create certainty about the native title rights recognised.
2. Those rights should reflect what the common law allows.
3. The determination should comply with the requirements of the *Native Title Act 1993*.
4. The process by which the determination is made should be transparent.

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129 <www.ag.gov.au/www/nativetitleHome.nsf/HeadingPagesDisplay/Native+Title+Litigation?OpenDocument> accessed 24 December 2003.

130 *ibid*, accessed 24 December 2003.

131 The Hon. D Williams, Native Title: 'The Next 10 Years – Moving Forward by Agreement', paper presented at the *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, Western Australia, 3-5 September 2002.

The Attorney-General affirmed that the Commonwealth has a clear and legitimate interest in the application of these principles to all consent determinations because the credibility of the process depends on consistency, effectiveness and sustainability of consent determinations.

Native Title Funding

The *Native Title Act* establishes a system for dealing with native title that includes the Attorney-General's Department, the Federal Court, the National Native Title Tribunal and ATSIC.[132] These organisations are funded by the Commonwealth with funding also available for respondent parties to the mediation and litigation processes under the NTA.

In a fact sheet prepared on the 2001-2002 Federal Budget,[133] the Attorney-General's Department stated that it had become apparent that workloads were much higher than the estimated workloads on which funding had been based in 1997-98, and were expected to increase as the number of active native title applications peaks in 2002-03 and declines thereafter.

A government fact sheet on land and native title is included in a series of Fact Sheets on Indigenous Issues on the website of the Minister for Immigration and Multicultural and Indigenous Affairs.[134] The fact sheet provides some background to Indigenous land and native title issues and states that in the 2002-2003 financial year, the Australian Government allocated $235 million to Indigenous Land and Native Title programs, including the programs of land purchases by the Indigenous Land Corporation ('ILC'). The fact sheet also states that 'When the ILC is fully funded in 2004, it will have approximately $1.4 billion capital base, the income from which will allow it to continue indefinitely purchasing land for those Indigenous people who are unable to gain ownership by other means'.[135]

Government officers have indicated[136] that other sources should be looked to for funding: just because the Commonwealth created a mechanism by which native title holders can engage with other rights and interests, this does not mean that the Commonwealth is the only possible source of funding for establishment and ongoing operating costs. The view expressed is that there is nothing stopping the States/Territories from providing assistance, especially as they are the sphere of government primarily responsible for land administration and management.

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132 The *Native Title Act 1993* was enacted before the recent changes to ATSIC and the creation of ATSIS.

133 *Resourcing of the Native Title System* <www.ag.gov.au/www/attorneygeneralHome.nsf/Alldocs/6D4E12CD73F51880CA256BD700052C11?OpenDocument&highlight=Resourcing%20of%20the%20Native%20Title%20System> accessed 20 December 2003.

134 Minister for Immigration and Multicultural and Indigenous Affairs, 'Land and Native title', Fact sheets, available at <www.minister.immi.gov.au/atsia/facts/index.htm> accessed 23 December 2003.

135 *ibid.*

136 The Hon. D Williams, *op.cit,* 2002, response to question following paper presentation.

Funding for NTRBs is provided through ATSIS. The funding is dependent on the amount that ATSIS receives from the Commonwealth. On this matter, a consultant noted:

> ATSIC argues that the funding provided by Government was significantly less than identified as being needed in the Parker Report,[137] and less than the funding sought in Cabinet submissions. ATSIC sought increases of $22.2M in 1995-96 (and received $13.95M) and $37M in 1996-97 (receiving $27.7M). Over the past five financial years, Government funding to ATSIC for native title has remained at similar levels – $40.8M in 1996-97 and $42.5M in 2000-01. In light of these funding constraints, the effects of which have only increased since the 1998 amendments to the *Native Title Act 1993* (Cth) increased NTRB statutory functions, and the need to prioritise the recognition of native title, ATSIC subsequently decided that it was only prepared to fund RNTBC establishment costs, rather than the ongoing costs of performing functions and meeting regulatory compliance requirements.[138]

Warnings about the lack of funding for NTRBs have been consistently raised. There have been repeated calls for increases to NTRB funding in the reports of Commonwealth agencies,[139] as well as by Commonwealth Parliamentary committees.[140] The issue also was noted in reports by state governments[141] and in materials from industry.[142] A Commonwealth Inquiry into mineral exploration received many government and company submissions recommending increases for NTRB funding.[143] The issue of NTRB under-funding was comprehensively covered in the *Native Title Report 2001*.[144] Nevertheless the Commonwealth Government has chosen to make no change to funding arrangements.

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137 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies,* ATSIC, Canberra, 1995 (the Parker Report").

138 Anthropos Consulting Services & o'rs, *Research Project into the issue of Funding of Registered Native Title Bodies Corporate*, ATSIC, October 2002, p3.

139 *Parker Report*, *op.cit;* Senatore Brennan Rashid, *Review of Native Title Representative Bodies, ATSIC, March 1999* (the Love-Rashid Report).

140 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Report on *Indigenous Land Use Agreements*, September 2001, para 6.83 and recommendation 4; and Standing Committee on Industry and Resources report, *Inquiry into resources exploration impediments*, August 2003, paras 7.42-7.51 and recommendation 19.

141 For example, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Western Australian Government report November 2002, recommendations 8-12; and *Technical Taskforce on Mineral Tenements*, *op.cit*, pp103-106.

142 ABARE report commissioned by the WA Chamber of Minerals and Energy, the Minerals Council of Australia, and the WA Government, *Mineral Exploration in Australia: Trends, economic impacts & policy issues*, p76, see <www.abareonlineshop.com/product.asp?prodid=12452>.

143 See submissions to the Standing Committee on Industry and Resources, *Inquiry into resources exploration impediments*, from the Queensland Government, AIMM, Newmont, SA Government, WA Government, and Minerals Council of Australia at <www.aph.gov.au/house/committee/isr/resexp/index.htm>.

144 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002, pp55-85.

The funding of the native title system was recently discussed during a Parliamentary Inquiry into the effectiveness of the National Native Title Tribunal. The submissions to, and transcript of hearings by, the Inquiry are all publicly available.[145] The Inquiry endeavoured to present a transparent process by holding public hearings in Queensland, NSW, the Northern Territory and Western Australia.

However, the Committee also held a private briefing with the Minister for Immigration and Indigenous Affairs, the Minister responsible for NTRBs, during which the question of funding to NTRBs was discussed.[146] Transcript of this briefing is not available, so it is uncertain what exchange occurred. However, from the Committee's report, it appears the government has commissioned a report into ATSIC funding of NTRBs.[147] The Minister also stated:

> Until such time as the reasons for NTRBs performance difficulties are satisfactorily identified, the Government is unable to support any additional funding for NTRBs or, indeed, a reallocation of funding within the Commonwealth native title system more generally.[148]

However, where land councils are unable to properly perform their functions then little progress can be expected on any matter dealing with native title. This includes future act negotiations, resolving disputes between native title claimants, required notifications to native title claimants, certifications to permit arrangements to be registered with the Tribunal, or advice and representation of claimants. Land Councils assist nearly 90% of all native title claims in Australia, and are the primary institution to ensure effective input from native title parties.

NTRB funding is mainly regulated by ATSIS's grant conditions to each NTRB. New terms and conditions were presented by ATSIS in July 2003. ATSIS is focusing NTRBs more directly onto 'native title outcomes', restricting the scope for NTRBs to engage in matters such as heritage and other issues that may be important to traditional ownership interests. The grant conditions give ATSIS a complete discretion in providing the funds:

> While we [ATSIS] will endeavour to meet any timetable for release of funds, we retain discretion to reduce or suspend all or part of the Grant Funds at any time. Such action may be taken for a number of reasons, including breaches to grant conditions, budget cuts and changes in our funding policies and priorities.[149]

145 <www.aph.gov.au/hansard/joint/commttee/j-nat-tt.htm>.

146 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Report, *Effectiveness of the National Native Title Tribunal*, December 2003, para 1.11.

147 *ibid*, para 4.30.

148 *ibid.*

149 Aboriginal and Torres Strait Islander Services, *2003-04 General Terms and Conditions of Grant to bodies recognised as Native Title Representative Bodies under the Native Title Act 1993*, ATSIS, 2003, para 1.3.

Table 3: Funding figures for Native Title Representative Bodies[150]

Year	ATSIC funding for representative body function (a) $million	TSRA funding for representative body function (b) $million
1996-97	40.758	0.361
1997-98	44.277	0.368
1998-99	47.144	0.373
1999-00	46.788	0.703
2000-01	51.172	1.351
2001-02	50.503(c)(d)	1.572
2002-03	51.763(c)(d)	1.487
2003-04	53.163(c)(d)	1.555
2004-05	50.763(c)(d)	1.587
2005-06	47.063	1.630

(a) Information provided by ATSIC.
(b) Information provided by TSRA.
(c) Includes additional funding provided by the ATSIC Board of $3.94m in 2001-02, $3.4m for 2002-03 and $3.4m to be provided in 2004-05.
(d) The Government provided additional funding to ATSIC of $2.9m in 2001-02, $4.7m in 2002-03, $6.1m in 2003-04 and $3.7m for 2004-05 for representative body capacity building and priority claims resolution program.

Respondent funding

The Attorney-General's Department also administers three different schemes for providing assistance to non-native title parties:

- Under s 183 *Native Title Act*;
- Special Circumstances (Native Title) Scheme; and
- Common Law (Native Title) Scheme.

Assistance is available to any person who is a party or intends to become a party to an inquiry, mediation or proceedings related to native title. There is no 'hardship' test: financial assistance can be provided to peak bodies or organisations for members in relation to specific claims, as well as individuals or groups of persons with similar interests in a matter.

The following summary of the Attorney-General's funding for respondents is drawn from information provided to the Senate Estimates Committee by the Attorney-General's Department[151] and from the Department's published Guidelines on the assistance schemes:

150 The Attorney-General's Department provided the figures in this Table in response to a Question on Notice from Senator McKiernan on 31 May 2002. *Senate Estimates, 31 May 2002, Legal and Constitutional Committee* Source: Senate Estimates Committee QoN 241, 31 May 2002 <www.aph.gov.au>.

151 In response to Questions on Notice, for example, 31 May 2002, 13 February 2003 and 11 August 2003.

- The Attorney-General's Guidelines for the schemes are available on the Department's website.[152]
- The NTA does not require an application for assistance to be means tested in order to determine whether financial assistance may or may not be provided.
- The Guidelines provide that where appropriate, an applicant's financial circumstances will be taken into account in assessing an application for financial assistance.
- Where applications are made on behalf of a group, the parties will not be subject to individual evaluation of their financial position. This is to encourage group applications and representation, thus reducing the overall cost of providing representation and encouraging respondents to work together towards resolution of cases.
- Before a payment can be made, a grant of assistance needs to be approved by a delegate of the Attorney-General. In making a decision regard is had to the availability of assistance from any other source, whether the provision of assistance is in accordance with the guidelines, and whether it is reasonable that the application be granted.
- In assessing reasonableness, consideration is given to a range of factors, including:
  - the implications of the native title claim for the applicant;
  - does the applicant have a genuine role or genuine interest in the claim process;
  - whether the benefit to the applicant is worth the cost of the case; and
  - the novelty or legal importance of the issues raised.

There are particular administrative procedures that recipients of financial assistance must fulfil before payments are authorised. These additional processes are used by the Department to ensure that monies were expended appropriately and in accordance with the grant conditions. The table below shows the Attorney-General's annual funding to respondents since the scheme commenced.

Table 4: Native title financial assistance (non-claimants) scheme[153]

Year	Government's respondent funding for native title
1993-94	$ 1,060
1994-95	$ 683,317
1995-96	$ 949,146
1996-97	$ 1,182,229

152 <www.ag.gov.au/www/familylawHome.nsf/Web+Pages/BF02DE575B3FCC72CA256BDE00818724?OpenDocument>.

153 Table derived from a letter from the Attorney-General to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 7 October 2003.

1997-98	$ 2,021,092
1998-99	$ 7,338,997
1999-00	$ 7,032,677
2000-01	$ 7,516,936
2001-02	$ 11,266,000
2002-03	$ 10,340,366
Total	**$ 48,331,820**

The tables setting out NTRB funding and financial assistance to non-claimants clearly demonstrate large increases in funding to non claimants particularly between 1996-97 and 2001-02, against relative smaller increases in NTRB funding. As noted in the table substantive increases in NTRB can mostly be attributed to additional funding provided by ATSIC Board and Commonwealth capacity building funding. As can be seen from the table these funding allocations are expected to end in 2004-05, thereby reducing the level of funding to NTRBs for the year 2005-06. In addition to the limited funding increases made available to NTRBs, these organisations are required to satisfy strict funding guidelines imposed by ATSIS. This is in contrast, to the general funding guidelines for non-claimant financial assistance. The Commonwealth funding support provided to non-claimant and the funding of NTRBs reflects the consistent pattern of inequality within the native title system which fails to provide equal or even adequate support to the rights and interests of native title holders.

The Attorney-General's Department provided information to the Senate Estimates Committee showing some detail of the grants made during the 2002-03 financial year.[154] The Department explained that while it is not possible to provide details of the nature and purpose of individual payments, about 90% were payments for the purpose of negotiated agreements and 10% for the purpose of litigation. This estimate is based on the application for funding rather than the actual use made of the payment.

Information provided by the Attorney-General to the Commonwealth Parliamentary Inquiry into the Land Fund shows the following breakdown in the allocation of funding:

154 This was in response to several Questions on Notice from Senator Ludwig. The available data has not been aggregated in any way. The Attorney-General's Department prepares such tables for the Attorney-General's Native Title Consultative Forum. A similar table was provided for the previous financial year in answer to a previous Question on Notice from Senator Ludwig.

Table 5: Attorney-General's Respondent Funding, 2000-2003[155]

Type of respondent	% total expenditure 2000-01	% total expenditure 2001-02	% total expenditure 2002-03
Local govt organisations	41.68	43.01	16.36
Pastoralists	34.38	28.66	17.22
Fishers	15.85	12.55	36.80
Miners	3.79	5.23	18.86
Other	4.29	10.54	10.76

In 2003, the Attorney-General's Department wrote to all recipients of financial assistance in native title matters, advising that it had made changes to its procedures for dealing with financial assistance. As a result of these changes a number of group recipients were advised that pursuant to s.183 NTA their funding will be terminated unless they are directly involved as a party or future party in proceedings relating to particular native title applications. This resulted in some peak bodies being deprived of funding for information, training and general advice on agreements and agreement-making for their members.

Prescribed Bodies Corporate

When the Federal Court makes a native title determination, the NTA allows the native title holders to specify an organisation to manage the native title interests specified in the determination. These organisations are called Prescribed Bodies Corporate (PBCs). In May 2002, there were 20 PBCs registered on the National Native Title Register, thereby becoming Registered Native Title Bodies Corporate (RNTBCs).[156] In addition to other functions at the general direction of the native title group members the PBCs' work includes:

- managing the native title;
- entering into native title related agreements; and
- holding in trust and investing monies paid to the native title group resulting from dealings in their native title.

PBCs are the parties that manage the outcome of native title determinations. There is no funding for their work. The government has acknowledged that ATSIC grant conditions prohibit NTRBs from assisting the ongoing operating costs of RNTBCs.[157] The Attorney-General's Department, in response to questioning from the Senate Estimates Committee, explained that ATSIC was conducting a research project to obtain data on the structure and projected

155 Letter from the Attorney-General to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 7 October 2003.

156 Source: Senate Estimates Committee Question on Notice No. 244, 31 May 2002. The source of the figures is the Native Title Registrar, National Native Title Tribunal.

157 In answer to questions on notice from Senator McKiernan about funding for RNTBCs, on 31 May 2002 the Attorney-General's Department noted the NTRB assistance restrictions. Source: Senate Estimates Committee Question on Notice No. 244, 31 May 2002.

activity of RNTBCs across Australia. This research report was completed in October 2002.[158] The report noted that as at October 2002 there were 20 RNTBCs on the National Native Title Register, and predicted that there would be at least 58 RNTBCs by the end of 2006 and possibly 75 RNTBCs by 2008. The report explains that the costs associated with establishing and registering RNTBCs are considerable and that the nature and extent of such costs has never been given any detailed consideration. Currently, the establishment costs for most RNTBCs are being met by the NTRBs and by state-funded organisations such as community councils. Even if NTRB funding includes an amount for establishing RNTBCs it is still inadequate. In some cases there are no resources to meet establishment costs for RNTBCs.

The Attorney-General's Department acknowledged that the Native Title Coordinating Committee has discussed the lack of funding for RNTBCs, but that the details of those discussions remain confidential because the NTCC's deliberations and advice are yet to be considered by the Federal Government.

The Indigenous Land Corporation (ILC) has often been asked if it is able to provide assistance to native title holders, especially in relation to their ongoing operating costs for RNTBCs. The ILC points out that it does not fund any of the land holding bodies that may be established to take over land that it has purchased for the benefit of Indigenous people, and that under its current charter it is unable to provide such assistance. However the ILC has provided and will continue to provide assistance to native title holders with land management functions.[159]

Compensation

The Commonwealth has offered to provide financial assistance to the States and Territories for various types of compensation for extinguishment of native title. The extinguishment compensation the Commonwealth proposes to cover is the validation of acts before 1997 and also some government acts permitted since 1997. The Commonwealth has also offered to assist the States and Territories with the cost of administering the native title functions of certain State/Territory tribunals. These arrangements are to be finalised through bilateral agreements with each jurisdiction.

The Attorney-General's Department confirmed that, as at November 2003, no State or Territory has signed an Agreement with the Commonwealth for the provision of financial assistance for native title compensation and the costs associated with tribunals performing native title functions. The Department also confirmed that the Commonwealth's offer was still available should a State or Territory change their mind.

158 Anthropos Consulting Services & o'rs, *Research Project into the issue of Funding of Registered Native Title Bodies Corporate*, ATSIC, October 2002.

159 Indigenous Land Corporation, *Land Acquisition and Land Management Programs Guide 2002-2006*, ILC, Adelaide 2002, 'Frequently asked questions'.

Agency Responsibilities

The current Administrative Arrangements Order[160] identifies the Federal Attorney-General as being responsible for the administration of the Commonwealth's *Native Title Act 1993*, except to the extent administered by the Minister for Immigration and Multicultural and Indigenous Affairs. The Minister for Immigration and Multicultural and Indigenous Affairs is responsible for administering two parts of the Act, being those dealing with:

- the native title functions of prescribed bodies corporate and holding native title in trust; and
- Representative Aboriginal/Torres Strait Islander Bodies or NTRBs.

This means the Attorney-General's Department is responsible for the overall administration of the NTA, including funding for the Federal Court, funding for the National Native Title Tribunal, and financial assistance for respondents to native title determination applications.

In its Budget papers for 2001-02, the Commonwealth set out the framework established by the NTA and the programs funded by the Commonwealth for the administration and management of native title.[161] The Commonwealth's native title system comprises:

- The Federal Court
- The National Native Title Tribunal
- The Native Title Registrar (a statutory position, located in and serviced by the Tribunal)
- Representative Aboriginal and Torres Strait Islander bodies (NTRBs)
- financial assistance in native title cases
- financial assistance to the States and Territories
- compensation for Commonwealth activity
- Commonwealth litigation
- native title policy development

Native Title Coordination Committee

In 2000, the Attorney-General's Department formed the Native Title Coordination Committee. The Committee advises government on the overall operation and resourcing of the native title system. The Committee makes recommendations to government but because these recommendations are not publicly available, it is not possible to know the Committee's position or influence on the overall levels of funding for native title matters or how the funds are divided between the various component parts that comprise the native title system. The Committee meets about four times per year and its membership comprises:

- Attorney-General's Department Legal Services and Native Title Division (formerly Native Title Policy Division);

160 Order of 26 November 2001 amended 20 December 2001 and 8 August 2002. Available at <www.pmc.gov.au/docs/DisplayContents1.cfm?&ID=99> accessed 18 December 2003.

161 *Resourcing of the Native Title System op.cit*.

- Legal Assistance Branch of the Family Law and Legal Assistance Division in the Attorney-General's Department;
- Federal Court;
- Tribunal; and
- Aboriginal and Torres Strait Islander Services (ATSIS).

Attorney-General's Native Title Consultative Forum

The Attorney-General's Department also convenes the Attorney-General's Native Title Consultative Forum. This Forum meets three times per year and brings together representatives of all the key agencies and stakeholders involved in native title, including the Federal Court; the Tribunal; ATSIS; state and territory governments; representatives of the pastoral, mining and fishing industries; local government; NTRBs; and representatives of my Native Title Unit. This Forum has become a useful opportunity for exchange of information and experiences as well as for providing information and advice to the Attorney-General.

Office of Aboriginal and Torres Strait Islander Affairs

An Office of Aboriginal and Torres Strait Islander Affairs (OATSIA) has been established within the Department of Immigration and Multicultural and Indigenous Affairs.[162] The Office succeeds the former Department of Reconciliation and Aboriginal and Torres Strait Islander Affairs. OATSIA's role is to assist the Minister with Parliamentary duties, develop and evaluate policy and promote better outcomes from government programs for Indigenous people.

Aboriginal and Torres Strait Islander Services

Australia's peak Indigenous body, the Aboriginal and Torres Strait Islander Commission has been in existence for over twelve years. On 17 April 2003, the Minister announced the establishment of a new executive agency, Aboriginal and Torres Strait Islander Services, to administer ATSIC's programs and make individual decisions about grant and other funding to Indigenous organisations. In announcing these changes, the Minister said the aim of the establishment of ATSIS is to separate the roles of decision-making about the development of policy (to remain with ATSIC) from that of its implementation (to be undertaken by the new agency). Chapter 2 of my *Social Justice Report 2003*, discusses the ATSIC review and restructure in detail.

Commonwealth-State/Territory relations

Apart from the bilateral meetings between the Commonwealth and each State and Territory over the Commonwealth's offer on compensation for native title extinguishment, and the Attorney-General's Native Title Consultative Forum, there have been no regular policy forums between the Commonwealth and the States and Territories to discuss native title matters at a government-to-government.

162 <www.immi.gov.au/oatsia/index.htm>.