Introduction

This is my fifth report to the Australian parliament on the effect of the *Native Title Act 1993* on the human rights of Aboriginal and Torres Strait Islander Peoples. In these five years of reporting my main focus has been on the legislative and judicial developments in native title law and the effect of these developments on the recognition of Indigenous rights to land. I have also followed the dynamic relationship between the common law and the legislature in defining and then re-defining the principles that have come to govern the recognition of native title as a legal concept. Last year my report focused on the final developments in this process with the High Court handing down two significant decisions, the *Miriuwung Gajerrong*[1] decision and the *Yorta Yorta*[2] decision, which clarified the principles upon which the recognition and extinguishment of native title are determined.

My response to these decisions in last year's *Native Title Report* noted that the concept of native title emerging from the High Court is one not simply of the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather where the law has become a barrier to this enjoyment. I also argued that the extinguishment of native title, as it occurs under Australian law, is racially discriminatory both under domestic law and at international law. To these High Court decisions there has been no legislative response, thus ushering a period of stability and consolidation as far as the law of native title is concerned.

However, native title is more than a legal process. It is also a political process whereby Indigenous people enter a relationship with the state on the basis of their identity as the traditional owner group of an area of land. In some cases native title has provided the first opportunity since British sovereignty for a relationship of this type to be formed. In building its newly formed relationship with traditional owner groups there is an opportunity for the state to move beyond its role as respondents to native title claims and direct its efforts towards achieving what is generally accepted as a critical policy goal of transforming the economic and social conditions in which many Indigenous people live in

1 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002) ('Miriuwung Gajerrong').
2 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('Yorta Yorta').

Australia. This year's report explores native title as a vehicle for social transformation rather than a vehicle for the recognition of legal rights.

This is not to deny that the way in which the legal system defines native title rights and interests provides an important basis for traditional owners' relationship with the state. Where the legal system ensures that the protection given to native title rights is the same as that given to non-Indigenous rights, this equality will be reflected in the traditional owners' relationship with government. For instance, traditional owners are more likely to negotiate agreements with governments in which they can derive benefits from developments that occur on their land and in which they can control the impact of development on their social and cultural capital where the legal construction of the recognition and protection of native title is firmly rooted in the principles of equality and non-discrimination.

However, at present within Australia, the legal system has not constructed native title in this way. Consequently the lever to mobilise governments into building strong and constructive relationships with traditional owner groups directed to economic and social development must come from somewhere else. This year's *Native Title Report* looks at the way in which governments, particularly state and territory governments, are moving beyond the limitations presented by the legal system to lay a foundation for native title claimant groups that enable economic and social development to take place.

In **Chapter 1**, I provide a framework for sustainable economic and social development for Indigenous people based on the right to development defined in the Declaration on the Right to Development and the international discourse on sustainable development. These discourses seek to integrate the ethical principles of equality and respect with the economic and social conditions that dominate our lives. Applying these rights Indigenous peoples are entitled to development that is non-discriminatory in its impact and in its distribution of benefits; involves the effective participation of Indigenous peoples in defining its objectives and the methods used to achieve these objectives; facilitates the enjoyment of Indigenous peoples' cultural identity, and respects the economic, social and political systems through which Indigenous decision-making occurs.

Having discussed a foundation for the economic and social development of Indigenous peoples based on the realisation of their human rights I proceed to explore this notion of development in the context of native title by asking: 'What would a government and a native title claimant group discuss if the agreed aim of the native title process was the realisation of the group's right to sustainable development?'. How would native title negotiations and agreement-making be structured so as to achieve this agreed goal? A central element of my response to these questions is directed to ways in which the capacity of the claimant group can be developed to take control of the development process. The purpose of this approach is to enable traditional owner groups who aspire to achieve sustainable development to determine the process for themselves. This requires that the group establish its own objectives and strategies for achieving them. The government's role in this process is to facilitate the group to achieve its development goals through a partnership approach.

In **Chapters 2 and 3** of the report I examine native title policies at the state and federal levels and their capacity to contribute to Indigenous peoples' sustainable development. A common theme of state native title policies as they currently exist is a willingness to negotiate rather than litigate. A preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title determinations respond as far as possible to the development needs of the native title claimant group rather than just the demands of the legal system.

Unclear in most native title policies, however, are the objectives of the negotiation process. This gap in states' native title policies means that native title negotiations have no consistent goals but change depending on the circumstances of the case. It also means that there has been little policy development around defining the elements of a native title agreement that would best contribute to the sustainable development of the traditional owner group.

Little or no use is made of policy frameworks that have already been developed outside of the native title area to address economic development in Indigenous communities. Native title continues to be positioned outside this broader policy framework.

The failure to co-ordinate the goals of native title negotiations with the State's strategies to address the economic and social development of Indigenous people generally not only isolates the native title process from broader policy objectives; it limits the capacity of those broader policies to achieve their objective of addressing the economic and social conditions of Indigenous people's lives. By disregarding native title the policy fails to understand the importance of filtering development through the cultural values and structures of the group which is the subject of this policy.

The recognition of the distinct identity of Indigenous people and the cultural, economic and political values that characterise this identity are essential to the economic and social development agenda of Indigenous people. While the legal construction of native title in Australia has diminished the extent to which the law will recognise Indigenous laws and customs and decision-making structures, a broader approach to native title can give recognition to Indigenous identity as it manifests in the way of life of a vast array of traditional owner groups throughout this country. Negotiating development within the parameters of this broader understanding of native title provides an inbuilt mechanism for ensuring that many of the elements necessary to ensure the success of development policies are present.

Despite native title providing an ideal location to foster sustainable development for Indigenous people native title negotiations are constrained by the legal tests on which the recognition of native title depends. Within the legal framework, negotiation of native title takes place under pressure of a process in which litigation is either proceeding or pending. Consequently the scope and content of those agreements become directed to addressing the legal issues that define the claim rather than contributing to the development goals of the group.

This is not to say that recognising the legal rights of native title parties is not a necessary element of a native title policy in which the sustainable development

of the group is paramount. Recognition of native title rights and interests could well provide to the group important assets on which development could be built, particularly where these native title rights and interests give the group control of access to the land and the resources that are on the land. However, the assets of the group are just one element of what is needed to achieve the group's development objectives. A broader approach to negotiations within the native title process would complement native title determinations with processes and outcomes that would contribute to sustainable development.

One way of ensuring that development is at the forefront of the native title agreement is through the effective participation of Indigenous people in the formulation of native title policy. Effective participation occurs when Indigenous people are substantially involved in formulating the policy and have given their prior and informed consent to both the policy goals adopted and the way in which these goals are implemented and evaluated.

Chapter 4 raises the question of how native title, land rights, and agreement-making with Indigenous peoples are being handled both at a juridical and policy level in other comparable common law countries. The lens through which these international comparisons are viewed is that of the human right to development and the international discourse on sustainable development. By analysing other approaches to Indigenous rights and economic development the situation in Australia is illuminated.

Sustainable development has emerged as a new paradigm of development, integrating economic growth, social development and environmental protection as interdependent and mutually supportive elements of long-term development. The concept of sustainable development recognises that economic development is not just the exploitation of resources wherever they happen to exist, but also must take account of the relationships in which development occurs, including the cultural values of the community.

The relationship of Indigenous people to their land is widely recognised as a basis for their cultural values and identity and as such must be taken into account in the policies aimed at achieving sustainable economic development. Native title provides an important frame of reference by which economic and social development can transform the conditions of Indigenous people's lives. Yet its capacity to contribute to this process has been hampered, first by the legal system that operates to restrict rather than maximise these outcomes and second by the failure of government to build a relationship with traditional owner groups in which sustainable development is the shared goal.