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# NATIVE TITLE REPORT 2003



## EXECUTIVE SUMMARY

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The *Native Title Report 2003* evaluates native title as a framework for economic and social development for traditional owner groups. While the legal framework for native title restricts its capacity to improve economic and social conditions for Indigenous people, the Report recognises that the native title agreement-making process provides an invaluable opportunity for States and Territories to take a broader policy approach. The approach advocated in the Report is developed in four chapters which deal with the following topics:

- native title and international standards on development and sustainability;
- native title policies and practices of governments throughout Australia;
- evaluating native title policies as a framework for economic and social development; and
- comparative study of legal and policy frameworks in Canada and the United States of America.

### CHAPTER 1 – NATIVE TITLE AND INTERNATIONAL STANDARDS ON DEVELOPMENT

Chapter one of the Report seeks to develop a human rights framework for economic and social development of Indigenous people based on their distinct identity. It notes that the growth and development of the Australian economy throughout our history, culminating in its present stature as one of the wealthiest in the world, has not benefited Indigenous people to the same extent as it has benefited non-Indigenous people. Indeed, as documented in native title cases like the *Yorta Yorta* case and the *Miriuwung Gajerrong* case, economic and social development in Australia has had a disproportionate impact on Indigenous people who have had to sacrifice their land and their community structures to make way for growth and development.

The chapter notes that the recognition of native title has not challenged this inequitable model of development. Native title gives no redress to the negative impact of past development on Indigenous people. Under native title law development which either displaced Indigenous people from their land or prevented them from exercising rights to their land, results in the *extinguishment* of native title. Once Indigenous people are displaced by development, the legal tests for establishing that native title exists provide an insurmountable barrier to Indigenous people obtaining recognition of their right to traditional lands.

Human rights principles build a framework for economic and social development that ensures that Indigenous people are not excluded from its benefits or disproportionately affected by its impact. Within this framework native title could play a key role. Drawn from the principles underlying the right to development defined in the Declaration on the Right to Development and the international discourse on sustainable development the framework outlined in chapter one seeks to integrate the ethical principles of equality and respect with the economic and social forces that direct contemporary societies. Applying this approach Indigenous people are entitled to development that is consistent with their human rights. This includes:

- Development that is non-discriminatory in its impact and in its distribution of benefits,
- Development that involves the effective participation of Indigenous people in defining its objectives and the methods used to achieve these objectives,
- Development that facilitates the enjoyment of Indigenous people's cultural identity,
- Development that realises the economic, social and cultural rights of Indigenous people, and,
- Development that respects the economic, social and political systems through which Indigenous decision-making occurs.

A further set of principles for an alternative approach to economic and social development for Indigenous people discussed in chapter one is that emanating from the discourse on sustainable development. Emphasised in this discourse is the need to integrate 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. It must also take account of the relationships in which development occurs, including the cultural values of the community.

Chapter one notes that 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 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.

Having discussed a foundation for the economic and social development of Indigenous people based on the realisation of their human rights, chapter one proceeds to explore this notion of development in the context of native title. It does so 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 the Report's 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 2003 Report explains how capacity development:

- must be driven by a local agenda;
- must build on the existing capacities of the relevant Indigenous group;
- must allow ongoing learning and adaptation within the group;
- requires long term investments; and
- requires that activities be integrated at various levels to address complex problems.

The native title process must be directed to assist the group to identify and achieve their development goals. The government's primary role in the native title process is to facilitate this process.

## **CHAPTER 2 – NATIVE TITLE POLICIES AND PRACTICES IN AUSTRALIA**

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 will address broader criteria. Chapter two provides a national overview of native title policies as they are presently formulated at the State and Federal level and the bureaucratic structures in which these policies are situated. This is followed in chapter three by an evaluation of whether these policies provide a framework for economic and social development

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 all Native Title Representative Bodies and also various other organisations and people who had relevant experience of the Government's engagement with traditional owner communities. Representatives of the Commissioner and consultants then met with every State Government and, subsequently, the Commonwealth Government. The research and consultations provides the material for a set of policy profiles which form the basis of chapter two of the Report.

## **CHAPTER 3 – EVALUATING THE NATIVE TITLE POLICIES AND PRACTICES IN AUSTRALIA**

This chapter evaluates State and Commonwealth native title policies by reference to whether they direct the native title negotiation process towards the sustainable economic and social development of the claimant group. In order to achieve this goal the policies must aim to build the capacity of the native title group to identify and realise its own development objectives. The following issues emerged from the evaluation of government policies. The chapter discusses each of these issues in relation to particular State, Territory and Commonwealth policies. While Commonwealth policies were assessed separately in the chapter many of the following issues were relevant to that evaluation.

### ***Issue 1: Negotiate Not Litigate***

A common theme of native title policies is a willingness to negotiate rather than litigate. The reasons for this vary from practical concerns about the cost and delays associated with litigation of native title claims to more substantive concerns about the effectiveness and viability of litigated outcomes. Absent from most native title policies however is the identification of the broader policy goals that native title negotiations are seeking to achieve.

This gap in 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 at a State level around defining the elements of a native title

agreement or the processes of negotiation that may be required to contribute to the sustainable development goals of the traditional owner group. Developing policy in this way may consider:

- measures to build the capacity of the group for economic management and governance;
- tailoring the agreement to the development agenda of the group;
- ensuring a cultural match between the terms of the agreement and the values of the group;
- providing or working towards the provision of assets on which economic growth can be built;
- providing a basis for sharing benefits generated from developments that occur on the land; and
- monitoring and evaluating the implementation of the agreement against agreed criteria.

In relation to Commonwealth and many State native title policies this type of policy development has not occurred.

### ***Issue 2: The Relationship between Native Title Policy and Indigenous Policy***

While there is a failure by many governments to fully develop policy objectives for native title negotiations, this policy gap could be filled if they were willing to align native title negotiations with the economic and social development objectives contained in their broader Indigenous policies. However, native title continues to be positioned outside this broader policy framework. In many cases the role of native title is patently absent from policy responses to the reconciliation process. Native title negotiations and agreements are not seen as part of the policy toolbox directed towards transforming the conditions of Indigenous people's lives.

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 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, broader Indigenous 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 chapter urges that firstly native title policy is informed by the broader policy agenda directed to the economic and social development of Indigenous people and that secondly, the legal recognition of inherent rights through native title is seen as a policy tool that contributes to this goal.

### ***Issue 3: Negotiations occur within a Legal Framework***

The failure of many governments to fully develop a policy direction for the negotiation of native title agreements means that the process takes place largely within a legal framework rather than a policy framework. Consequently, the scope and content of these agreements

are predominantly directed to defining the legal rights that will be enshrined in a native title determination.

This is not to deny that recognising the legal rights of native title parties is a necessary element of a native title policy in which the objective is the sustainable development of the group. 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 should complement native title determinations by facilitating processes and outcomes that would lead to sustainable development.

One result of constricting agreements within a litigation model is that it obstructs the negotiation process. For some government's, the legal tests which determine whether the native title rights asserted can be recognised and enforced by a Court determine the threshold for entering negotiations with claimant groups. As a result of applying these tests the opportunity for States to enter a relationship with traditional owner groups and discuss their development objectives is not taken up or is delayed. The Report proposes that once a group has established that it has traditional links with the land, there should be minimal obstacles to negotiations commencing, even though the conduct of these negotiations will be affected by a range of factors. It outlines the approach to negotiation adopted in parallel situations in Canada where the Courts have refused to deal with matters where the government has not pursued negotiation with claimant groups to the greatest extent possible.

#### ***Issue 4: Negotiations occur within Land Management Framework***

The other framework in which native title negotiations are conducted, discussed in chapter three, is where the State, as managers of land and resources, seeks to utilise land or permit the public or private interests to utilise land that is the subject of a native title claim. In these cases the future act provisions of the *Native Title Act* provide processes for the conduct of negotiations between the State and native title claimants and an opportunity for States to negotiate with traditional owner groups as if these groups had legally recognised rights to the land. The State policy profiles show that, as land managers, States invariably adopt a pragmatic approach to these negotiations, finding practical solutions to address the differing interests of the parties. States are realising that the recognition of native title does not necessarily stand in the way of the State's economic development or the public's recreational and conservation needs.

Native title claimants whose land is the subject of future acts are also benefiting from these negotiations. Agreement-making in itself requires a level of organisation and decision-making that builds the capacity of the group for future negotiation and development. The group is treated by the State as an integrated entity with rights and responsibilities to the land, much like the State's role as land managers. In addition, these agreements can provide an important foundation for the ongoing development of the group including employment opportunities, training and skill development, infrastructure investment and utilisation of cultural knowledge. As these agreements multiply, so too the capacity of the group to manage and build upon their successes improves.

The Report acknowledges the benefits that future act negotiations can produce for traditional owner groups. However it also notes two limitations to the generation of agreements through this approach.

The first limitation is that the capacity of this approach to generate benefits for native title claim groups depends on whether the land the subject of the claim happens to also be the subject of the State's land management responsibilities. Indigenous priorities often take second place to the priorities of the State in its land management role. Unless there is a broader policy framework that posits the group's development as a goal in its own right, then development will not occur for those claimant groups whose land has no priority in the State's land management regimes.

The second limitation is that, even where there is an intersection between the State's land management regime and a native title claim, the land management regime may not be capable of providing an economic and social development basis. Many State land management regimes provide for consultation with Indigenous people where developments are proposed on their land, but very few provide Indigenous people with a right to negotiate or share the benefits of that development process. Yet the economic development of traditional owner groups is greatly enhanced by the right of Indigenous people to negotiate with developers over the nature and extent of the development. Based on this right Indigenous people could negotiate partnerships in relation to enterprises in which Indigenous input would be mutually rewarding both for themselves and for developers.

#### ***Issue 5: The Relationship between Native title and Existing Indigenous Land Regimes***

Native title is just one of a range of land regimes aimed at recognising the land rights of Indigenous people. The unique characteristic of native title is that the rights that are recognised emanate from the traditional laws of Indigenous people, not from the laws of non-Indigenous people. However the development of the law of native title through amendments to the Native Title Act and restrictive interpretations by judges has severely limited the extent to which rights and interests arising from Indigenous laws and customs are recognised.

In some States the recognition of native title, even in its limited sense, has caused disruption and division between Indigenous groups which have already been allocated rights to land under State legislation and those entitled to native title rights. This is particularly so where the allocation of rights under the existing State scheme is not based on traditional connection to land but on the people's status as residents of a particular area or their historical connection to that area. The Report criticises the failure of some States to develop policies to address these divisions so as to integrate native title into the system of land distribution regimes that already exist.

#### ***Issue 6: Indigenous Participation in Policy Formulation***

One way of ensuring that development is at the forefront of the native title process 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.

### ***Issue 7: Commonwealth's Participation in the Native Title Process***

The Commonwealth participates in native title litigation either as a party with a property interest in the land affected by a claim, or as the administrator of the Native Title Act with a policy interest in the Court's interpretation or application of the legislation to the claim before it. A further avenue through which Commonwealth policy affects the native title process is the Commonwealth's funding of participants in the native title system. The Commonwealth's performance in each of these roles is discussed in chapter three. Of particular concern is the effect of the Commonwealth's funding of native title system in determining whether the native title process can contribute to the economic and social development of Indigenous peoples.

I note in Chapter 3 how my criticisms of native title funding in previous Native Title Reports have not been addressed. Despite almost unanimous support for further funding to native title representative bodies there are still insufficient funds to allow them to carry out their statutory functions so as to ensure the recognition and protection of native title. Nor has the distribution of funding between the institutions within the native title system been equalised. The system still favours those institutions whose role is to manage the resolution of native title over and above those institutions whose role is to represent the interests of native title holders. The result of this inequity is that the priorities of the former institutions dominate the native title system. The result of the current funding formula is a preference for litigation over a negotiation model, there being insufficient funds for the latter to be fully developed while funds are being devoted to ensure Court proceedings are advanced. This leaves no opportunity for traditional owner groups or governments to pursue development goals through the native title process.

A further worrying aspect of the funding of native title noted in chapter 3 is the failure of the Commonwealth to make provision for Prescribed Bodies Corporate. These are the legal entities that hold or manage native title on behalf of native title holders after a determination by the Federal Court that native title exists. The number of Prescribed Bodies Corporate is expected to grow as the number of determinations of native title increases over time. Yet there is a lack of resources for prescribed bodies corporate. This is a significant flaw in the native title system. It inhibits native title holders from achieving broader social, economic and cultural development for their community despite having a determination that their native title continues to exist.

## **CHAPTER 4 – COMPARATIVE STUDY WITH CANADA AND THE UNITED STATES OF AMERICA**

Chapter four raises the question of how native title, land rights, and agreement-making with Indigenous peoples are being approached both at a juridical and policy level in other comparable developed 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.

Initiatives in the US and Canada provide concrete examples of what is required by principles of sustainable development, human rights and the right to development. In these countries we see an integration of social and economic development policies directed to Indigenous people with the recognition of their distinct identity.

In the US, government programs and policies accept, and work toward, Indigenous self-governance. This is not simply Indigenous involvement in the administration of government programs. Rather, the US initiatives involved Indigenous control of land and its natural, and even in some places, recognition of Indigenous legal and court processes.

The Canadian legal system also provides a broader basis for recognition of Indigenous connection to land than that provided in Australia. The Canadian equivalent of Australia's 'native title' recognises Indigenous rights to resources in land, a right to the land itself (not just to carry out activities on the land), and receives constitutional protection (prohibiting Aboriginal rights from being extinguished without consent). These provide a much stronger basis for reaching economic, social and cultural outcomes in agreements. The Report outlines a recent trend of incremental treaty-making undertaken in British Columbia.

The recognition of the distinct identity of Indigenous people and the cultural, economic and political values that characterise this identity are essential to the 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 policy 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.