



Looking Forward – A Policy Approach to Native Title

The framework of principles presented in chapter 2 of this Report puts the economic and social development of the traditional owner group at the centre of the native title process. It seeks to build the power and capacity of the traditional owner group to direct and achieve its own economic and social development. It sees the native title system as a tool to assist traditional owners in this process. The framework also envisages that other stakeholders in the native title system will assist the group in achieving its goals. In order for this to happen these stakeholders must develop policies that put the economic and social development of the traditional owner group as a goal of the native title process. Governments at all levels have a particularly important role to play in both re-directing the native title process to that goal and in assisting the traditional owner group in realising its development goals.

The framework of principles in this Report was developed and elaborated through a series of consultations with Native Title Representative Bodies (NTRBs), as well as a limited number of peak bodies, government representatives and academic researchers. As a result of this process I am encouraged to think that the principles are sound and bring together, in an integrated way, the essential requirements for achieving economic and social development through the native title system. However I need now to consult more broadly on these issues, particularly with governments and groups who might assist the traditional owner group to achieve its development goals. It is intended that this will occur in the coming reporting period. The questions that I will be exploring through future consultations with government at all levels and with other stakeholders in the native title system is whether economic and social development for traditional owner groups is a goal that they want to achieve from the native title system, and if so, how it can best be done. I will be asking for case studies and models that demonstrate the utility of native title in addressing the economic and social needs of Indigenous communities.

In this chapter I want to flag some of the issues I will be discussing in these consultations. For instance, how can the whole of government approach to Indigenous policy enhance native title policy? How can the Commonwealth and the states work in a more integrated way in the native title system? How



can funding be directed to those things necessary for improving the living conditions of the traditional owner group? To contribute to these future discussions I will draw an outline of the role that governments and other stakeholders might play in addressing the framework of principles discussed in the previous chapter.

The background research to my future work with government is provided in chapters 2 and 3 of the *Native Title Report 2003* which reviewed and evaluated State and Federal native title policies throughout Australia. The review focused on the question of whether, within the policy setting, native title is utilised as a tool for economic and social development. The Report concluded that overall, although there are some exceptions at the state level, native title policy is not sufficiently targeted towards these goals. While a universal theme of native title policies across Australia is to negotiate rather than litigate, the objectives of the negotiation process have not been clearly defined at a policy level. Many governments are not yet clear what they want the native title process to achieve, in terms of meaningful outcomes for either the claimant group or other parties. This means that the native title process takes place largely within a legal framework, with legal tests establishing the threshold for the commencement of negotiations between a traditional owner group and the government, and legal definitions of rights determining the outcomes that may be achieved. In this framework, engagement between government and the traditional owner group ends with the determination of a claim by the Court or through an agreement as to the outcome of the claim.

Constricted by legal tests and processes the native title system does not provide a reliable or effective basis to expand the economic and social development opportunities for Indigenous peoples. Indeed, limiting the search for these opportunities to within the legal system involves a great deal of investment on the part of Indigenous peoples with very little return in terms of outcomes on the ground. Native title needs to move beyond the legal framework into a policy framework that ensures consistent and dependable outcomes for traditional owner groups.

At the Federal level in particular there is a reluctance to see native title as a process which should be utilised to obtain economic and social outcomes for Indigenous peoples. Rather, as the Attorney-General made clear in his speech to the Native Title Representative Bodies Conference in June 2004, the government sees its role as balancing the rights of Indigenous and non-Indigenous parties in the native title system.

If we want meaningful outcomes; if we want effective and sustainable agreements; if we want certainty for all involved, and if we want processes that operate in a reasonable manner and timeframe, then we must all take responsibility and reaffirm our resolve to work with a common purpose and enthusiasm.

Making the system work is something which is in all of our hands.

In this regard, we must recognise that native title involves a balance among the rights of different parties.¹

1 Attorney-General, the Honourable Philip Ruddock, 'The Government's Approach to Native Title', *Native Title Representative Bodies Conference 2004*, 4 June 2004, paras 10-12.



Much has been done by the Federal government to ensure that the rights of non-Indigenous parties are represented and protected in the native title system. The amendments to the *Native Title Act* (NTA) in 1998 were primarily directed to this end. Since then, the High Court has handed down two significant decisions, the *Ward* decision² and the *Yorta Yorta* decision³ which again recast 'the balance' between Indigenous and non-Indigenous interests ensuring that non-Indigenous interests are well and truly protected and that Indigenous interests remain remnant interests in the native title system.⁴ Noel Pearson made this point in the 2003 Mabo lecture:

Native title could never result in anyone losing any legal rights they held in land or in respect of land. Where native title existed in its own right under the common law or where native title co-existed with other tenures – the native title could not result in the extinguishment or any derogation whatsoever of any rights granted by the Crown or by legislation. So why wouldn't non-Indigenous Australians embrace a title which could never dispossess them of their own accrued rights and titles?

We forget this second point too easily. In fact it is probably not even a matter of forgetting, because we have never planted this point in our own heads in the first place – and we have never succeeded in getting Australians to understand this truth: the truth that native title is not about anyone else losing any legal right that they have accumulated in the 200 years since colonisation. We have never convinced anyone of the truth that native title is all about the balance, it is all about the remnants, it is all about what is left over – and no finding of native title can disturb the rights of any other parties other than the Crown.⁵

Given the security that the NTA now provides non-Indigenous interests it is time to look at how native title can be utilised to provide real benefits for Indigenous peoples. This after all was the underlying impulse for the *Mabo* decision,⁶ to redress the injustice of dispossessing Indigenous peoples from their land under the principles of terra nullius. It is now time to start addressing the consequences of dispossession; the economic and social degradation that presently besets many Indigenous peoples. Native title can be a tool available for this purpose.

An opportunity presently exists to reappraise native title policy, its direction and its processes. This opportunity comes out of a combination of two factors. First, the public sector is making significant and radical changes in the way it develops and implements government policy. Native title policy can be reinvigorated by responding to the new processes and concepts that are emerging from public sector reform. Second, these new processes and concepts are being tested in the Indigenous policy arena. Their influence can be seen in the way that Indigenous policy has developed over the past 12 months, since the Federal Government announced its intention to abolish ATSIC. The develop-

2 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002) (Ward).

3 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('Yorta Yorta').

4 See analysis of these decisions in the Introduction to this Report and in *Native Title Report 2002*, chapters 1, 2, and 3.

5 N. Pearson, 'Where We've Come From and Where We're at with the Opportunity that is Koiki Mabo's Legacy to Australia', Mabo Lecture, *Native Title Representative Bodies Conference 2003*, Alice Springs, 3 June 2003.

6 *Mabo and o'rs v Queensland* (No. 2) (1992) 175 CLR 1.



ment of Indigenous policy based on these concepts provides an opportunity to take a fresh look at the way in which native title policy could be reconstructed, consistent with the goals and processes underlying the government's Indigenous policy, in order to provide better economic and social outcomes for Indigenous peoples.

Public sector reform – a whole of government approach

Public sector reform is primarily directed at the underlying concepts and processes on which policy is built. Out of an extensive reappraisal process a new policy concept, described variously as 'whole of government', 'joined up government' and 'connecting government' has emerged. Its aim is to ensure that learning and ideas are shared across departments and organisations, that policy development and implementation are integrated and that the priorities of those affected by policy, the citizen, influences policy development and delivery. In April 2004, the Management Advisory Committee to the Australian Public Service Commission released a report titled *Connecting government: Whole of government responses to Australia's priority challenges*.

Whole of government is defined in this report as:

[P]ublic service agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues. Approaches can be formal and informal. They can focus on policy development, program management and service delivery.⁷

The Secretary of the Department of Prime Minister and Cabinet has described the movement towards a whole of government approach as a 'profound' change which could lead to a 'regeneration' of the public service and the values which underpin it. He states:

Regeneration, it seems to me, goes beyond familiar arguments about the need for public administration to embrace a process of continuous change to improve performance; to raise the productivity of the public sector; to increase the innovativeness of policy development; and to lift the efficiency, effectiveness and quality of service delivery. It is also about breathing new life into the values and virtues of public service... Regeneration... involves restructuring the organisational framework of public service and reviving its leadership culture.⁸

The *Connecting Government* report was launched by the Secretary of the Department of Prime Minister and Cabinet less than a week after the announcement of the abolition of ATSIC on 15 April 2004 and the introduction of the new arrangements for Indigenous affairs. The Secretary acknowledged that the new arrangements for Indigenous affairs constitute 'the biggest test of whether the rhetoric of connectivity can be marshalled into effective action... It is an approach on which my reputation, and many of my colleagues, will hang.'⁹

7 Management Advisory Committee, *Connecting government: Whole-of-Government Responses to Australia's Priority Challenges*, Australian Public Service Commission, Canberra, 2004, p4.

8 P.Shergold, 'Regeneration: New structures, new leaders, new traditions', paper presented at *Institute of Public Administration Australia - National Conference*, Canberra, 11 November 2004, p1.

9 P.Shergold, Speech to launch, *Connecting Government – Whole-of-Government Responses to Australia's Priority Challenges*, Department of Prime Minister and Cabinet, Canberra, 20 April 2004, p1, 5.



He described the new arrangements for the administration of Indigenous affairs as follows:

The vision is of a whole of government approach which can inspire innovative national approaches to the delivery of services to indigenous Australians, but which are responsive to the distinctive needs of particular communities. It requires committed implementation. The approach will not overcome the legacy of disadvantage overnight. Indigenous issues are far too complex for that. But it does have the potential to bring about generational change.¹⁰

Details about the new arrangements have progressively been released¹¹ and are summarised in chapter 3 of the *Social Justice Report 2004*. What are important for the purposes of this Report are the policy principles that underlie the new arrangements and how these can provide a basis for regenerating native title policy consistently with human rights principles.

Whole of government and the administration of Indigenous affairs

There are six policy principles underlying the structures and approaches to be introduced through the new arrangements for the administration of Indigenous Affairs. These principles provide a foundation for redirecting the native title process towards the economic and social development of traditional owner groups. They are:

Collaboration

In facing the challenge of providing comprehensive and strategic policy advice to government, the Secretary of the Department of Prime Minister and Cabinet has made it clear that policy must be developed in a 'joined up way', it must also take account of how it is to be implemented, and it must take account of the needs, priorities and perceptions of those it is likely to affect.¹²

Collaboration in the new arrangements for the administration of Indigenous affairs will be reflected in a framework of cooperative structures that stretches from top to bottom: from the Ministerial Taskforce on Indigenous Affairs and Secretaries' Group in Canberra to a network of regional offices around the nation. The foundation will be negotiated Framework Agreements, through which government and community work as partners at the local, regional and national level to establish their goals and agree on their respective responsibilities in achieving these goals.

The Office of Indigenous Policy Co-ordination (OIPC) is the key agency responsible for coordinating and driving the government's Indigenous policy at the national level; developing new ways of engaging with Indigenous people at the regional and local level; brokering relationships with other levels of government and the private sector; reporting on the performance of government

10 *ibid.*

11 For a detailed overview see: Office of Indigenous Policy Coordination, *New Arrangements in Indigenous Affairs*, Department of Immigration and Multicultural and Indigenous Affairs, Canberra 2004, p4, available at www.oipc.gov.au.

12 Shergold, *Connecting Government*, 2004, *op.cit.*, p1, 2.



programs and services for Indigenous people to inform policy review and development; managing and providing common services to the Indigenous Co-ordination Centre (ICC) network; and advising the Minister and Government on Indigenous issues. ICCs provide Indigenous people and communities with a single point of contact with Australian Government Departments.¹³

A further level of collaboration will occur between governments at the federal, state, territory and local level. The Council of Australian Governments (COAG) and the commitments made through it will remain the main forum for advancing such collaboration.

Participation and engagement of Indigenous peoples

The Commonwealth Government states that 'better ways of representing Indigenous interests at the local level are fundamental to the new arrangements'.¹⁴ They have also stated that:

During 2004–05 the Australian Government will consult with Indigenous people throughout Australia, as well as State and Territory governments, about structures for communicating Indigenous views and concerns to government and ensuring services are delivered in accordance with local priorities and preferred delivery methods.¹⁵

Under the Charter of the Ministerial Taskforce, a key element will be 'testing Indigenous people's aspirations: where do they want their communities (their children, grandchildren and older people) to be in 20–30 years time? What do they want their communities to look like?'¹⁶

The new arrangements recognise that, in order to develop policies that are responsive to the aspirations, priorities and decisions of Indigenous people, there needs to be better community based structures at the local and regional level. As the Minister for Immigration and Multicultural and Indigenous Affairs stated in her address to an executive forum of public servants in South Australia:

It starts with a partnership with the community.

That means listening to the people on the ground.

Hardly rocket science. But for some people in government it turns everything on its head—we're used to doing the talking, setting the priorities and making the decisions.

You're going to have to let go – take a risk and be prepared to make mistakes along the way. Admit those mistakes, learn from them and keep going. That's what we have to do to give Indigenous kids a future.

In a lot of communities good people are working hard. They know what's important and what outcomes they want...¹⁷

13 Office of Indigenous Policy Coordination, *New Arrangements in Indigenous Affairs*, *op.cit.*, p7.

14 *ibid.*, p17.

15 *ibid.*

16 Office of Indigenous Policy Co-ordination, *Australian Government Submission to the Senate Select Committee on the Administration of Indigenous Affairs*, Ministerial Taskforce on Indigenous Affairs Charter, Attachment C, August 2004, p14.

17 Minister for Immigration and Multicultural and Indigenous Affairs, *Address to the Australian Government Executive Forum*, South Australia, 20 February, 2004, p5.



The vehicle for this two way communication between government and communities is Shared Responsibility Agreements (SRAs) and Regional Participation Agreements (RPAs). Shared responsibility or mutual obligation is the philosophy that underpins the COAG trials which are committed to overcoming welfare dependency in Aboriginal communities and promoting self reliance and independence.

This approach 'involves communities negotiating as equal parties with government'¹⁸ and acknowledges that responsibility for the wellbeing of Indigenous communities is shared by individuals, families, communities and government. All parties must work together and build their capacity to support a different approach for the economic, social and cultural development of Indigenous peoples.

Regional and local need

The Report of the Review of ATSIC *In the Hands of the Regions: a New ATSIC* found that regional planning processes, which gave a voice to local communities, were the key to identifying and addressing the needs of Indigenous communities.¹⁹ The new arrangements reflect the importance that the Review team placed on integrated regional planning.

Consistent with this approach, ICCs, working with regional networks of representative Indigenous organisations, must ensure that local needs and priorities are understood by government agencies. ATSIC Regional Councils will be consulted and, over time, ICCs will work in partnership with the representative structures that local Indigenous people decide to put in place. Together they will shape Australian Government engagement and strategies in a region through RPAs and SRAs at the community or family level.

RPAs will contain a broad statement of priorities and principles, but they may also be used to underpin a specific regional strategy agreed between government and the regional Indigenous representative network.²⁰ They will underpin a coherent investment strategy for a region in partnership with local Indigenous representative networks. They will map out both the nature and extent of current funding going into the region and arrangements for stakeholder engagement.²¹

SRAs will be directed at the local level to partnership arrangements between government and community and will set out the priorities, shared responsibilities, agreed outcomes and benchmarks for measuring progress as well as feedback mechanisms. Agreements may be negotiated with family groups through to larger community groups.²²

18 D. Hawgood, Hansard, *House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs*, 13 October 2003, p1294.

19 Hon. John Hannaford, Hon. Bob Collins, Ms Jackie Huggins AM, *In the Hands of the Regions: a New ATSIC*, Report of the Review of ATSIC, Commonwealth of Australia, Canberra 2003, p32.

20 Office of Indigenous Policy Co-ordination, *Australian Government Submission to the Senate Select Committee on the Administration of Indigenous Affairs*, August 2004, p4

21 *ibid.*, p8.

22 *ibid.*, p4.



Together, RPAs and SRAs provide mechanisms for integrated planning at the regional and local levels. Integration policy and planning between the Commonwealth, state/territory and local governments is also fundamental to achieving local and regional outcomes. This is being pursued through bilateral agreements. In all likelihood, there will be different consultative and delivery mechanisms negotiated in different states and territories.

Outcomes focus

A focus on outcomes that can benefit Indigenous people is a hallmark of the current federal government's approach to Indigenous affairs and is consistent with its philosophy of practical reconciliation.

Every institution created under the new arrangements has a goal which can be linked to improving in some concrete way the economic and social conditions under which Indigenous people currently live.

- The Ministerial Taskforce Charter outlines the government's long term agenda for Indigenous policy while at the same time focusing on the strategies to be put in place urgently to improve outcomes.²³ As the Minister for Immigration and Multicultural and Indigenous Affairs, stated 'every dollar spent on Indigenous projects and services must contribute to improved outcomes'.²⁴ The Ministerial Taskforce Charter stresses the urgency of improving social and economic well being for Indigenous Australians focusing on housing, health, education, employment, family violence, increasing economic development, improving community safety, and law and justice.

The Taskforce, through its charter, also recognises 'the importance to Indigenous people of other issues such as cultural identity and heritage, language preservation, traditional law, land and 'community' governance. These are issues on which Indigenous people themselves should take the lead, with government supporting them as appropriate'.²⁵

- The Reconciliation Framework establishes three priority areas for government action:
 - Investing in community leadership initiatives;
 - Reviewing and re-engineering programs and services to ensure that they deliver *practical measures* that support families, children and young people. In particular, governments agreed to look at measures for tackling family violence, drug and alcohol dependency and other symptoms of community dysfunction; and
 - Forging greater links between the business sector and Indigenous communities to *promote greater economic independence*.²⁶

23 Ministerial Taskforce on Indigenous Affairs Charter, *op.cit.*, p14.

24 Minister for Immigration and Multicultural and Indigenous Affairs, *Address to the Australian Government Executive Forum*, *op.cit.*, p10, 2004.

25 Ministerial Taskforce on Indigenous Affairs Charter, *op.cit.*, p14.

26 Council of Australian Governments' Communiqué, 3 November 2000, p6, available at www.coag.gov.au/meetings/031100/index.htm.



- The aim of the COAG community trials is to:
 - ... improve the way governments interact with each other and with communities to deliver more effective responses to the needs of indigenous Australians. The lessons learnt from these cooperative approaches will be able to be applied more broadly. This approach will be flexible in order to reflect the needs of specific communities, build on existing work and improve the compatibility of different State, Territory and Commonwealth approaches *to achieve better outcomes*.²⁷

The Steering Committee for Government Service Provision will report to COAG every two years against the indicators developed in the National Framework for Overcoming Indigenous Disadvantage. This report will guide the Ministerial Taskforce in identifying key priorities for urgent action. The first report, entitled *Overcoming Indigenous Disadvantage*,²⁸ was released on 13 November 2003 and confirms that Indigenous disadvantage is broadly based, with major disparities between Indigenous people and other Australians in most areas. The Report identifies two strategic areas for action: economic participation and development; and functional and resilient families and communities. Indicators used to measure progress in these areas include the proportion of Indigenous peoples with access to their traditional lands, the extent of Indigenous owned and controlled land and case studies in governance arrangements.

Accountability

Performance monitoring and reporting will be built into the Commonwealth's new arrangements. There will be annual reporting on programs against a range of socio-economic indicators designed to test the effectiveness with which practical reconciliation is being delivered.²⁹

The Ministerial Taskforce, advised by the National Indigenous Council, will make recommendations to the Australian Government on priorities and funding for Indigenous Affairs. The Secretaries' Group will prepare a public annual report on the performance of Indigenous programs across government. OIPC will have a strong performance monitoring and evaluation role relating to the new whole of government arrangements.

Departmental Secretaries will be accountable to their portfolio Ministers and the Prime Minister for Indigenous-specific program delivery and cooperation with other parts of the Australian Government, State/Territory governments and Indigenous communities, as part of their performance assessments. Indigenous organisations providing services will be required to deliver on their obligations under reformed funding arrangements that focus on outcomes.

27 Council of Australian Governments' Communique, 5 April 2002, Canberra, p4, available at www.coag.gov.au/meetings/050402/index.htm.

28 Steering Committee for the Review of Government Service Provision, *Overcoming Indigenous Disadvantage: Key Indicators 2003*, Productivity Commission, Canberra, 2003, Overview.

29 Shergold, *Connecting Government*, 2004, *op.cit.*, p4.



Flexibility in policy development, program delivery and fiscal arrangements

Program guidelines will no longer be treated as rigid rules, inhibiting innovation, though flexibility will not be introduced at the expense of due process. As the Minister for Immigration and Multicultural and Indigenous Affairs, stated,

[W]e need to fix up our own backyard. Cut through the red-tape, layers of bureaucracy and stick-in-the-mud attitudes. In 1999, researchers working with the West Australian Balgo community of 400-500 people, found that community leaders would need to meet over 2 times per week just to acquit the requirements of the various government and agency grants.³⁰

At the fiscal level, mechanisms will be developed to allow funds to be moved between agencies and programs, to support good local strategies and whole of government objectives. Each year Ministers will bring forward a single coordinated Budget submission for Indigenous-specific funding that supplements the delivery of programs for all Australians. The single Budget submission will be informed by experience at the regional and local level, advice from Indigenous networks and the professional expertise represented on the National Indigenous Council.

The above principles provide a new basis for addressing disadvantage in Indigenous communities. The government is looking for improved outcomes and processes that will facilitate this. It is trying out new policy concepts and building new structures to try and achieve these goals. Public sector reform is reassessing and improving the policy tools available to government to achieve its goals. In all of this there exists an opportunity to reappraise native title policy, its direction and its processes.

Native Title Policy – A New Direction

The Commonwealth's administration of and participation in the native title system has not been greatly affected by the new arrangements. While some of the program responsibilities that were formerly with ATSIC, including Native Title Representative Body funding, have been moved to the Office of Indigenous Policy Coordination in their Land and Resources section, responsibility for the Commonwealth's participation in the native title system and respondent funding remains with the Attorney-General's Department.

The Commonwealth's participation in native title litigation, either as a party with a property interest in the land affected by the claim or with a policy interest in the Court's interpretation or application of the legislation to the claim before it, is decided within the Attorney-General's Department. As at 3 June 2004, the Commonwealth was a party to 179 of the 620 native title applications filed with the Federal Court.³¹

30 Minister for Immigration and Multicultural and Indigenous Affairs, *Address to the Australian Government Executive Forum*, 2004, *op.cit.*, p7.

31 Attorney-General, the Hon. Philip Ruddock, 'The Government's Approach to Native Title', *Native Title Representative Bodies Conference 2004*, 4 June 2004, para 26.



The Commonwealth also funds other participants in the native title system. In this role it funds Native Title Representative Bodies, the National Native Title Tribunal, the Federal Court and third party respondents in native title claims. It does not see itself as responsible for the funding of Prescribed Bodies Corporate. State governments also play a significant role in the native title system. In most instances they hold the radical title to the land the subject of a native title claim and administer the system that deals with all other property titles. They are invariably respondents to native title claims within their respective State and participate actively in the native title process. In addition they develop policies in relation to land, resource and environmental management and planning. These functions are instrumental to determining the outcomes that Indigenous peoples get from the native title system. Finally, States and Territories administer Indigenous policies, including under land rights legislation (where applicable) economic development policies, health, housing and education.

Prior to its dismantling, ATSIC played a major role in the native title system: in the administration of funds to Indigenous based organisations; as an advocate of the human rights of native title holders, and in the development of native title policy in a way that was consistent with those rights. ATSIC was instrumental in representing Indigenous interests in negotiations over the amendments to the NTA. It continued to advocate on behalf of Indigenous people, both domestically and at international fora, seeking an expansion of their inherent rights under native title law, up until its dismantling in July 2004.

ATSIC also took a policy role in relation to native title. It did this through submissions to all the inquiries conducted by the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, through a number of important reviews of aspects of the native title process, including a review commissioned by ATSIC into Native Title Representative Bodies³² and a review of PBC funding.³³ It also commissioned an important paper in relation to water rights, of which native title was an important part.³⁴ It is not clear whether the policy development role that ATSIC exercised in relation to native title issues has been transferred into the new arrangements and if so, how it is to be developed by the government. This is the policy vacuum that the abolition of ATSIC has created. The question is whether this is going to be filled by the government and if so, is this appropriate and how will it be fulfilled?

One way the government might fill the policy role left vacant by the abolition of ATSIC is to extend the ideas generated, the lessons learned and the outcomes achieved in one policy domain, Indigenous policy, and extend these into another domain, native title policy. Doing this creates new possibilities that need to be discussed and refined. They are created from a process that was seen as integral to the whole of government approach; that of cross-pollinating ideas from one agency to another. As the Secretary of the Department of Prime Minister and Cabinet said in launching the *Connecting Government* report:

32 Senatore, Brennan, Rashid, *Review of Native Title Representative Bodies*, March, 1999.

33 Anthropos Consulting Services, Senatore Brennan and Rashid, *ATSIC Research Project into the issue of Funding for Registered Native Title Bodies Corporate*, October 2002, for ATSIC Native Title and Land Rights Centre, Canberra.

34 Liangari Foundation, *Indigenous Rights to Water*, Report and Recommendations, 30 May 2002.



A collegiate leadership, driving an ethos of cooperation, and bound by effective lines of communication, can achieve outcomes that are far more than the sum of the parts that have been brought together. What emerges is policy which, driven by creative tension between different perspectives, is better informed and argued than could have been provided by a single agency.³⁵

The following section presents some of the possibilities that result from extending the ideas and processes underlying Indigenous policy and applying them to native title policy. As will be seen the effect is to change the relationships on which policy is based: between government agencies; between policy makers and policy drivers within government agencies; and between government agencies and the people affected by their policies. It also affects the approach that Federal, State and Territory governments take to their engagement with Indigenous people, their negotiation of native title agreements, their involvement of Indigenous people in land management and resource planning processes, and their attitude to capacity building and governance within native title groups.

Collaboration

To some extent the Attorney-General's Department is seeking to understand native title from a range of perspectives through its Native Title Consultative Forum. Participating in this Forum are representatives of the Federal Court, Office of Indigenous Policy Coordination, National Native Title Tribunal, the Attorney-General's Department, State and Territory Governments, Human Rights and Equal Opportunity Commission, the Australian Local Government Association, state farming organisations, fishing, mining and petroleum industries and a Native Title Representative Body. At times other guests are invited to attend for part or all of the meeting to discuss a particular topic of general interest. While this Forum advances a whole of government approach, in my view it has three serious shortfalls.

First, the Forum does not give sufficient weight to Indigenous perspectives. By usually having just one NTRB member participating it is unlikely that native title policy will be informed by the aspirations, priorities and decisions of the traditional owners affected by it. Yet this is a key element of the whole of government approach encapsulated in the new arrangements.

Second, the Forum is restricted to those involved in the native title system as it presently exists. Bearing in mind the aims of a whole of government approach as outlined above, native title policy is unlikely to expand its horizons or even test its boundaries if it is only exposed to the ideas and views of those who operate within its confines.

The third criticism is that the Forum tends to focus on the implementation of the native title system rather than the adequacy of its underlying policy. While participants are keen to exchange information and views at the policy level, particularly in the free range discussions that take place in the second part of the Forum agenda, there is no mechanism that enables these views to be integrated into policy development or into policy implementation. Some of the

35 Shergold, *Connecting Government*, 2004, *op.cit.*, p3.



issues that have been nominated for discussion include capacity development for all participants of the system, the COAG trials, the Australian Government's three priorities for Indigenous affairs, and the work of the Cape York Institute. These are important topics with potential to expand the policy horizons of native title. Yet there is no mechanism for the information that is generated by these discussions to be integrated or considered in native title policy formulation. Nor are there any formal mechanisms for the outcomes or discussions to be fed back to NTRBs. If discussions are considered by government, there is no means for the Forum to be informed of these considerations and the decisions that were made with regard to them.

Despite these criticisms the Native Title Consultative Forum represents a step in the right direction towards expanding the policy horizons of native title. It is particularly useful in bringing together state government agencies to enable them to share between themselves and with Commonwealth agencies, their ideas and experiences of the native title process.

The Forum however does not generate the level of collaboration between state and federal governments necessary to achieve real changes to the lives of Indigenous peoples through native title. The level of collaboration necessary to achieve this is demonstrated in the COAG trials directed to addressing Indigenous disadvantage in Indigenous communities. The trials provide an opportunity for state and federal governments to work together with Indigenous communities and develop an agreed structure and process for delivering government programmes that are responsive to local needs. It also provides an opportunity to coordinate the respective roles of State and Commonwealth governments in order to reduce duplication and maximize their capacity to produce outcomes for Indigenous peoples.

There is currently, within COAG's *National Framework for Delivering Services to Indigenous Australians*, a commitment to 'cooperation between jurisdictions on native title, consistent with Commonwealth native title legislation'.³⁶ If adopted within the native title system, this statement of commitment could provide a basis for state and federal governments to work cooperatively towards a shared goal; that of improving the economic and social condition of traditional owner groups. From this shared goal, consultative and delivery mechanisms could be coordinated for maximum effect. The goals and mechanisms could be articulated in an agreement between state and federal governments, similar to those being generated in the COAG trials. They could also be monitored against agreed priorities.

Greater involvement of local government bodies will be critical to the success of engagement with traditional owners in the development of economic and social initiatives.

As I indicated at the outset of this chapter, these ideas will be discussed and developed with governments in a consultation process that will be undertaken in the next reporting period. In this consultation I will be asking governments why, as yet, this commitment to co-operation between the Commonwealth and

36 Council of Australian Governments' Communique, 25 June 2004, p 3, available at www.coag.gov.au/meetings/250604/index.htm.



State governments on native title has not been implemented in any visible way and certainly not in the way that other Indigenous programs have been delivered, as exemplified in the COAG trials.

Participation and engagement of Indigenous peoples

As indicated above a key element of the Charter of the Ministerial Taskforce on Indigenous Affairs is establishing Indigenous people's aspirations by asking: 'where do they want their communities (their children, grandchildren and older people) to be in 20–30 years time? What do they want their communities to look like?'³⁷

These are important questions directed at bringing the aspirations and the priorities of Indigenous people into the process of long term planning. They are questions that are being asked within the context of Indigenous policy development but have not been asked within the context of native title policy development. Questions that could provide long term policy direction to native title include; what is the role of traditional ownership in the cultural identity of the community? How does the recognition of traditional ownership match the long term aspirations of Indigenous communities? Can the recognition of traditional ownership contribute in a sustainable way to the economic and social development of the community?

With answers to these questions, governments can work, in partnership with traditional owners and the communities they live within, towards these shared goals.

The vehicle for this partnership between government and communities under the new arrangements are a series of agreements at different levels that coordinate activities: from the local community level to regional plans and priorities and finally to government policies at the state and federal levels. I have discussed agreements between the state and federal governments, contained in COAG's National Framework, already. The agreements operating at the local and regional level are SRAs and RPAs.

Agreement making is a process familiar to the native title system. It is perceived by many as the only way for the native title system to move beyond the adversarial relationship engendered through a legal approach and for parties to work together with traditional owner groups to obtain outcomes that address their broader economic and social development goals. However, in many instances these opportunities are not pursued by government within the native title system. Far from native title agreements being a vehicle for a partnership between government and the traditional owner group to attempt to break the cycle of Indigenous disadvantage, *they often represent nothing more than a settlement of a legal claim by adversaries.*

Underlying the engagement between Indigenous people and government through agreement making in the new arrangements is the principle of mutual obligation. The agreement identifies the shared goal of the parties and divides the responsibilities and work necessary to achieve it. The long term goal of

37 Ministerial Taskforce on Indigenous Affairs Charter, *op.cit.*, p14.



these agreements is a community that is self reliant and sustaining and capable of directing its own economic and social development. Native title can potentially contribute to this process. It brings with it assets, governance structures, and cultural capital. It is an opportunity to build on what already belongs to Indigenous Australians – their traditional ownership of land. However it needs to be recognised as a tool that can be usefully employed to help achieve the goals which have been given urgent priority by the government in the Indigenous policy arena.

Regional and local need

Shared Responsibility Agreements and Regional Participation Agreements also integrate planning at the local, regional and national levels. The latter identifies the regional strategy agreed between government and a regional Indigenous representative network and the former is directed at partnership arrangements at the local level between government and community. In order for integrated planning to work there must be representative Indigenous structures capable of operating well at the regional and local levels.

The government has indicated that it will look to support Indigenous representative structures at the regional level in place of ATSIC. Such structures may vary between regions. It is anticipated that Indigenous Coordination Centre (ICC) Managers would negotiate a RPA outlining the priorities in that region with the representative body once it is established.

Within the native title system, the government is not concerned with the structures by which Indigenous peoples make decisions either between themselves, or in the communities in which they live, or in the regions of which they are a part. The federal government has made it clear that it will not fund the establishment of Prescribed Bodies Corporate, the native title corporate governance structures prescribed under the NTA. This indifference reflects the fact that once a determination is resolved there is no impetus within the native title system for the government to continue its engagement with traditional owners. Yet it is precisely at this point that traditional owners must face the issues of real concern to their community: how can we exercise our native title rights and improve our economic and social well being and that of the communities we live in?

The development of a hierarchy of local and regional structures under the new arrangements provides an opportunity for the interests of traditional owners to be represented and integrated into a reinvigorated engagement between communities and government. Traditional owners are valued members of Indigenous communities. They live with and are part of communities whose members have a range of interests and concerns. Their representation at the local and regional level would enable their participation in decisions involving matters of general concern to the community as well as matters that pertain to their unique position as owners and custodians of the land. These specific issues may be of a cultural nature or they may relate to the economic value of the land and its resources. They may be relevant only to the traditional owners or they may have implications for the overall well being of the community. But unless traditional owners are represented in the local and regional Indigenous structures being developed in the new arrangements, their interests and



concerns will not be integrated into the plans that will affect the entire community. Nor will the concerns of the community be integrated into the decision making processes of the traditional owner group.

The representation of traditional owner interests in these representative structures is important for another reason. It provides a mechanism for divisions between different interest groups within the community, including between traditional owners and other Indigenous residents with an historical association with the land, to be discussed and resolved. This issue was discussed in chapter 2, section 9, *Engagement between parties*. This section suggests various ways that this issue can be addressed.

The native title system can facilitate the creation of representative structures at the local and regional level that include traditional owner groups. It is a system that already provides processes for the identification of traditional owner groups, although, as indicated in chapter 1, these processes should be streamlined to facilitate identification rather than hinder it. It is also a system that prescribes governance structures for traditional owner groups.

It has been noted in chapter 1 that the native title system does not pay sufficient attention to the capacity of the governance structures established under the NTA to deliver real outcomes for native title holders. Indeed, Justice North has pointed to the absurdity of a system that invests huge sums of money in establishing whether native title can be recognised in a particular instance while neglecting how those rights might be managed or utilised. The Judge expressed his hope that funding would be provided for the PBCs, and observed: 'It would be an absurd outcome if, after the expenditure of such large sums to reach a determination of native title, the proper utilisation of the land was hampered because of lack of a relatively small expenditure for the administration of the PBC'.³⁸

A policy approach that redirected native title to the economic and social development goals of the traditional owner group would ensure that the emphasis of the native title system was upon strengthening the Indigenous structures that can ensure 'proper utilisation of the land'. By adopting the concept found in the government's broader Indigenous policy, of integrated planning at the local and regional level, the traditional owner structures can be integrated into the community and regional tiers of governance. In this way native title can itself be integrated into the economic and social development of the broader communities and regions that traditional owners live in.

Outcomes focus

As I have indicated the native title system has not been effective as a tool for the economic and social development of Indigenous people. This is because its utility in this regard has been determined largely through legal mechanisms rather than policies directed to these goals.

As discussed above, the Ministerial Taskforce Charter, the Reconciliation Framework, the COAG community trials and the National Framework for

38 *Nangkiriny v Western Australia* [2004] FCA 1156 (8 September 2004), at [11].



Delivering Services to Indigenous Australians, all identify the goals of the government's Indigenous policy in terms of improving aspects of the economic and social conditions of Indigenous peoples' lives. These programmes target a range of outcomes which the native title system could contribute to. In some cases, as pointed out above, access to traditional land and traditional law is explicitly recognised as contributing to the achievement of the government's broader policy objectives. Yet native title policy is not integrated with these objectives.

The failure to coordinate the goals of the native title system with the government's strategies to address the economic and social development of Indigenous people not only isolates the native title process from these broader policy objectives; it limits the capacity of the broader policy to achieve its objectives. By disregarding native title the broader policy on Indigenous economic and social development fails to fully understand the importance of filtering development through the cultural values and structures of the community. It fails to see that native title is an important asset in the development process, providing community governance structures, property rights, social and cultural capital and a national network of representative bodies specialised in assisting the group to achieve its goals.

Accountability

Performance monitoring and reporting are built into the new arrangements as set out above. These accountability mechanisms measure whether the government is meeting its short term and long term goals. If, as I suggest, the goals of the native title system were coordinated with the government's broader policy goals, then the native title system could also be monitored in terms of whether it is contributing to meeting these goals.

Flexibility in policy development, program delivery and fiscal arrangements

Flexibility is integral to the whole of government approach. Policy parameters will never be extended or tested if ideas generated in one department or government agency are not imagined as possibilities for others. Imagining what native title policy might look like if it responded to the goals and processes of the government's broader Indigenous policy requires flexibility and innovation.

An innovative approach is encouraged under the new arrangements. Flexibility will also be required at the fiscal level allowing funds to be moved between agencies and programs, in order to support good local strategies and whole of government objectives.

Redirecting native title towards economic and social development goals will encourage flexibility in utilising funds that are presently being absorbed by costly litigation. The amount going to native title agreements can provide a relatively economical way of resolving native title claims and devoting government funds that would otherwise be required to prove native title within the legal system, to tangible outcomes for Indigenous people.

Some of these savings could be directed to NTRBs to enable them to assist traditional owners develop and implement their goals for economic and social



development. In the consultations NTRBs discussed how specific areas of their work could be used to support traditional owners' capacity development and goal setting. NTRBs can use legal, anthropological and environmental reports to advise traditional owners of their opportunities.³⁹

In the above discussion I have shown how the concepts, goals and processes that underpin the government's Indigenous policy can be applied to the native title system. This process of extrapolating ideas from one policy framework and applying them in another is encouraged by a whole of government approach as a way of generating new ideas and finding unexpected synergies in the policy arena. It is my hope that it will reinvigorate native title policy.

In the following section I want to take this process further and consider how the concepts, goals and processes that underpin the government's Indigenous policy can be applied to the principles outlined in chapter 2 that direct the native title system to the economic and social development of the traditional owner groups. The discussion that follows will be further developed in the consultations that I will be conducting with government and other stakeholders in the near future.

The Principles – a whole of government approach

The principles discussed in chapter 2 outline the essential requirements for promoting economic and social development for traditional owner groups through the native title system. It proposes that the native title system should:

1. Respond to the group's goals for economic and social development;
2. Provide for the development of the group's capacity to set, implement and achieve their development goals;
3. Utilise to the fullest extent possible the existing assets and capacities of the group;
4. Build relationships between stakeholders;
5. Integrate activities at various levels to achieve the development goals of the group.

While these principles are not explicitly directed to the government or any other stakeholders in the native title system they envisage these stakeholders will be instrumental in the traditional owner group achieving its goals. Governments at all levels have a particularly important role which can be revealed by considering each of the principles in the light of the concepts, goals and processes that underpin the new arrangements in Indigenous policy.

Before going specifically to the principles it is important to note that the overarching goal of the principles – the economic and social development of the traditional owner group, is consistent with the goals of the broader Indigenous policy which posits a range of economic and social development outcomes as urgent priorities. As discussed above, the Ministerial Taskforce Charter, the

39 See discussion in chapter 1, section 3 *Capacity Development*.



Reconciliation Framework, the COAG community trials and the National Framework for Delivering Services to Indigenous Australians, all identify the goals of the government's Indigenous policy in terms of improving aspects of the economic and social conditions of Indigenous peoples lives. The principles put these goals at the forefront of the native title system.

Empowering traditional owners for economic and social development

First I will consider how the concepts, goals and processes that underpin the government's Indigenous policy can be applied to the first three principles:

Principle 1: The native title system should respond to the group's goals for economic and social development;

Principle 2: The native title system should provide for the development of the group's capacity to set, implement and achieve their development goals; and

Principles 3: The native title system should utilise to the fullest extent possible the existing assets and capacities of the group.

These principles can be considered together because of the interrelationship between the ideas that they represent. That is, the interrelationship between, on the one hand, Indigenous people taking control of their development process and, on the other, Indigenous people having the capacity, structures and assets to do this.

These principles seek to empower the traditional owner group to direct and control their own development process. They are principles that can be seen to correspond directly with the government's broader Indigenous policy as demonstrated by the following objectives of the COAG trials:

- tailoring government action to identified community needs and aspirations;
- work with Indigenous communities to build the capacity of people in those communities to negotiate as genuine partners with government;
- negotiate agreed outcomes, benchmarks for measuring progress and management of responsibilities for achieving those outcomes with the relevant people in Indigenous communities; and
- build the capacity of government employees to be able to meet the challenges of working in this new way with Indigenous communities.⁴⁰

Governments have a key role to play in achieving the COAG objectives as well as the principles I am promoting for the native title system. The COAG trials envisage a partnership between Indigenous communities and government that involves mutual obligations and responsibilities. The principles also require that

⁴⁰ Indigenous Communities Coordination Taskforce, COAG Trial Objectives, available at www.icc.gov.au/communities/objectives/.



governments work in partnership with traditional owner groups to achieve their development goals rather than as adversaries opposing a native title claim.

The partnership approach underlying the COAG trials is formalised in each trial site through the negotiation of a SRA. Agreement making has proved to be a useful way of bringing together the priorities of the community with the resources of governments who are willing to work alongside Indigenous communities in order to improve the coordination and flexibility of programs and service delivery so that they better address the needs and priorities of local communities.

The agreement between the Thamarurr Regional Council in Wadeye, Northern Territory, the Commonwealth and the Northern Territory government provides a model of how traditional ownership and goals for achieving economic and social development within Indigenous communities can be linked.

The Wadeye agreement recognises and respects traditional owner rights and; aims to work towards respect, peace and unity between families and clans. From these principles of recognition, the agreement aims to achieve measurable and sustainable improvements for people living in the region. Among other strategies this will be achieved by strengthening local governance, decision making and accountability and; concentrating on community capacity building and supporting the community's assets, capacities and abilities.⁴¹

Native title agreement making, like the SRAs under COAG, could provide an opportunity for the traditional owner group to bring its agenda for economic and social development to the negotiation table. Through this process, governments can come to understand and respond to the social and cultural context for the development objectives of the group. Native title agreements can then be tailored to the development needs of the claimant group. The respective responsibilities of government and traditional owner community to meet these needs and achieve the economic and social development goals of the group can be articulated in the agreement.

Agreements can also provide for the capacity development of traditional owner groups. As confirmed in the consultations conducted with NTRBs, the current native title system pays very little attention to the capacity of the group to develop and achieve its economic and social development goals. It is equally indifferent to ensuring that the decision-making structures by which the traditional owner group manages its native title rights can facilitate decisions that contribute to the group's economic and social development goals. Yet capacity building and good governance are instrumental in determining whether the recognition of native title results in improvements in the well being of Indigenous people. And the government recognises the importance of capacity building and good governance in its broader Indigenous policy sphere.

This is recognised to a limited extent by the project for NTRB Capacity Building developed by ATSIC and discussed in chapter 1. The funding for this project runs out at the end of the 2004-2005 financial year. Prior to the end of this financial year, an assessment should be made to determine any outstanding capacity needs of NTRBs including corporate and cultural governance,

41 Agreement available at www.icc.gov.au/communities/locations/wadeye.



management and staff development, native title technical training, collaborative relationships, research and applied capacity building. If these capacities have not been fully developed in the last project – further funding for NTRB capacity building should be established.

As discussed in this Report, the capacity of traditional owners to engage effectively, not only in native title agreements but also in any other negotiations or community processes, is fundamental to the success of a project. The government should consider extending the NTRB Capacity Building program in both time and resources, to support traditional owners capacity development. NTRBs need to be able to help traditional owners develop the capacity to engage with the native title and agreement making process and develop skills in areas like strategic planning, business/enterprise development, administration, negotiation skills, community development, leadership, governance, decision-making and dispute resolution. Building on the capacity of NTRBs and traditional owner groups in this way is consistent with the emphasis placed on good governance and capacity building in Indigenous communities under the government's Indigenous policy.

The Shared Responsibility Agreement between the Murudi Paaki Regional Council, the Commonwealth and the State of New South Wales demonstrates the emphasis that both the community and the government put on capacity development and good governance in community development. The parties agreed, *'to work together to support and strengthen local governance, decision making and accountability of all parties'*. A key regional priority was to *'strengthen community and regional governance structures'*.⁴²

The COAG trials exemplify the governments' new approach to Indigenous policy. The trials utilise agreement making as a tool to build the capacity and assets of the traditional owner group. Through the agreement process, governments at the State and Commonwealth levels must respond to the priorities of the Indigenous community. The native title system has within it these same tools.

In the coming consultations I will be exploring with all the major stakeholders in the native title system the role they might play in ensuring meaningful outcomes for traditional owners through the native title process. In addition to conducting consultations with governments I will be discussing with the National Native Title Tribunal how they can encourage players to think beyond legal strictures to broader goals and outcomes for all parties, particularly utilising their power to assist parties to negotiate agreements that consider 'matters other than native title' under sub-sections s86F (1) and (2) of the NTA. I will be discussing with companies how they can provide training, education and employment support to traditional owners.

The first three principles provide guidelines to enable the government to redirect its native title policy to achieving the same goals it has set for its broader Indigenous policy. The following discussion will focus on the second group of principles and how they can be coordinated with the goals and processes already operating in the Indigenous policy domain.

42 Agreement available at www.icc.gov.au/coag_initiative.



Effective relationships

Principle 4: The native title system should build relationships between stakeholders;

Principle 5: The native title system should integrate activities at various levels to achieve the development goals of the group.

Principles 4 and 5 focus on the relationships between a wide range of entities that could have a role in supporting the traditional owner group's development process. In the consultation material set out in chapter 1, discussions under section 8, *Effective Relationships*, focus on those relationships that might benefit traditional owner groups in achieving their development goals including relationships with the private sector and their peak bodies, government agencies, NTRBs, individuals, and the National Native Title Tribunal. Of particular concern in this chapter is the development of a policy framework which facilitates these potentially beneficial relationships.

The government's Indigenous policy emphasises the importance of ensuring that the process of relationship building is done in an integrated way. Principle 5 above also prioritises 'integration' in order to direct the native title system towards economic and social development outcomes. Processes for facilitating this integration have been developed by the government in seeking to improve the economic and social conditions for Indigenous people generally. These processes could be usefully adapted to the native title system.

Shared Responsibility Agreements (SRAs) and Regional Participation Agreements (RPAs) provide a mechanism for integrating planning at the local, regional and national levels, the latter identifying the regional strategy agreed between government and a regional Indigenous representative network and the former directed at the local level to partnership arrangements between government and community. These agreements also provide a mechanism for coordinating the efforts of the three levels of government towards agreed goals. In other words, through these agreements there can be integrated planning in both a bottom up and a top down direction.

In order for integrated planning to work it is recognised there must be representative Indigenous structures capable of operating well at the regional and local levels. The government has indicated that it will look to support Indigenous representative structures at the regional level in place of ATSIC. Such structures may vary between regions. It is anticipated that ICC Managers would negotiate a RPA outlining the priorities in that region with the representative structure chosen by the local Indigenous community. However, the success of regional structures depends on there being strong local governance structures that can participate fully, as Smith points out:

Higher-order regional levels of jurisdictional authority are likely not to be sustainable unless community governance structures and processes are in reasonable order. Problems arise for regionally-based organisations when they lose sight of the fact that their ongoing cultural legitimacy and



regional mandates are grounded, first and foremost, at the community level.⁴³

As indicated above, the development of a hierarchy of local and regional structures under the new arrangements provides an opportunity for the interests of traditional owners to be represented and integrated into a reinvigorated engagement between communities and government and between communities and the region of which they are a part. Formalising the links between traditional owners and the communities that they live in through local and regional structures will provide a framework to consider the issues that arise for traditional owners, both as members of the local community and as part of a larger network of traditional owners in the region. It will also give Indigenous members of the community and the region who are not traditional owners an opportunity to represent their interests and communicate their concerns to traditional owners. Bringing a range of interests together within integrated local and regional structures provides a forum for divisions between different interest groups, including between traditional owners and other residents with an historical association with the land, to be discussed and resolved. It also allows groups with similar interests to share common resources. Both of these aspects are important in ensuring a stable environment for sustainable economic and social development that can benefit the entire community.

The native title system can facilitate the creation of representative structures at the local and regional level that include traditional owner groups. It is a system that prescribes governance structures by which native title holders can exercise their rights. While the discussions in chapters 1 and 2 recommend increasing the governance options available to traditional owners, their capacity to contribute to the economic and social development of the traditional owner group will be expanded by integrating these structures into the local and regional tiers of governance. In this way native title can itself be integrated into the economic and social development of the broader communities that traditional owners live in. This reflects the reality for many traditional owners who operate as part of regional, cultural and economic networks.

Already Indigenous organisations are considering ways in which traditional owners can play a role in local and regional planning. Following is a discussion of three examples of the work being carried out to bring traditional owners into regional planning.

Cape York Model

The paper *Holding Title and Managing Land in Cape York* considers 'there is potential for the collective of land and sea management agencies from each sub-region, insofar as they are representative of traditional owners and native title holders, to become the formal constituents of such regional organisations

43 D. Smith, *Jurisdictional devolution: Towards an effective model for Indigenous community self-determination*, CAEPR Discussion Paper No. 223, 2002, p23.



as the Cape York Land Council and Balkanu'.⁴⁴ One advantage of this approach is the economies of scale that can be generated from bringing together smaller traditional owner groups that in themselves may not viable economic units.

The integration of PBCs and land trusts [established under the Queensland *Aboriginal Land Act 1991*] into single corporate entities for suitable large-scale socio-geographic units (e.g. language-based tribes in the case of the Coen sub-region) would not only simplify arrangements and reduce confusion but also reduce as much as possible administration costs through a more effective (larger) scale of economy. However it should be noted that there will still remain the need for funds for effective, grass-roots consultation on decisions-making with traditional owner and native title holders.⁴⁵

The model proposes that land-related activity in Cape York should be rationalised within a set of sub-regions in line with the NTRB's strategic planning proposals. In this way native title, as a system of Indigenous land tenure can be rationalised with the other forms of Indigenous land tenure that exist in Queensland.⁴⁶ The authors suggest identifying the variety of government and industry agencies that have interests and/or strategies for regional development, and increasing the communication between them and local indigenous strategies that also have a regional focus.

Kimberley Model

In its submission to the Senate Select Committee on the Administration of Indigenous Affairs, inquiring into the administration of Indigenous Affairs (Inquiry into the ATSI Amendment Bill 2004), the Wunan Regional Council, on behalf of Aboriginal people of the East Kimberley, proposes a model of integrated local and regional governance for the Kimberley region.⁴⁷ It proposes that community working parties, working from the grass roots, participate in the development of local plans and priorities. At this level there will be a range of options for representation including Prescribed Bodies Corporate representing traditional owners. The representatives may be chosen through traditional decision making processes or by election. The community working parties will provide a focus for local issues to be identified and channelled into three Regional Councils. This tier is based on the existing ATSI Regional Council structure. It will work with community working parties to produce a regional plan. The apex of the triangle of tiers is the Kimberley Council which will be responsible for developing a strategic plan, identifying regional priorities and proposing responses to address regional needs. It will provide an interface

44 P. Memmott, and S. McDougall, *Holding Title and Managing Land in Cape York, Indigenous Land Management and Native Title*, National Native Title Tribunal, Cape York Land Council and University of Queensland, 2003, Executive Summary, pvii.

45 *ibid.*

46 The *Native Title Report 2003* contains a table of Indigenous land tenures and their characteristics on a state by state basis at pp136-142.

47 Wunan Regional Council, *A New Way Forward – Options for a New Model of Governance in the East Kimberley*, submission to the Select Committee on the Administration of Indigenous Affairs – Inquiry into the Administration of Aboriginal Affairs, January 2005, available at www.aph.gov.au/Senate/committee/indigenousaffairs_ctte/submissions/sublist.htm.



with State and Commonwealth government agencies through which integrated strategies and partnerships can be implemented in line with the strategic plan.

Noongar Nation

A further approach that directly utilises the native title system to develop regional unity between traditional owners is emerging in the south west of Western Australia. The South West Aboriginal Land and Sea Council (SWALSC) is employing a regional approach to manage native title claims in its NTRB area and facilitate engagement between traditional owners and other parties. It represents around 27,000 Noongar Aboriginal people living across a large area of the south west of the state who were divided into opposing small communities and family groups by the native title process, with almost 80 overlapping native title claims lodged in the region after the *Native Title Act* was enacted. In 2002 SWALSC proposed to the traditional owners that these separate claims be amalgamated into a single native title claim, known as the Single Noongar Claim (SNC), to reflect the common culture and language family shared by all Noongars and restore the community unity that the native title process had undermined, as well as to negotiate better outcomes from the native title process with limited NTRB funding. After community consultation demonstrated traditional owner support for this approach, the SNC was filed in the Federal Court in 2003.

As Marcia Langton and others observe, the cultural, social and political reality of Noongar people has made this approach the most feasible basis for negotiating outcomes in the south west.⁴⁸ The internal process of negotiating agreements for representation and decision making about the SNC among the Noongar people has proved to be a vehicle for relationship building within the community. It is also assisting Noongar people to build the skills and capacities needed to manage governance structures through which to pursue their social and economic development goals.

A Noongar regional governance structure is being built through the governance structure of SWALSC itself, allowing the NTRB to share its resources, expertise and experience with traditional owners, before they establish their own regional representative entity. Four subcommittees - the Youth Leadership Council, Women's Council, Older Person's Council and Economic Development Subcommittee - established within the corporate structure of SWALSC, work to advise SWALSC on the different cultural, social and economic elements the Noongar community consider important. This advice is not limited to native title matters but rather, extends to the social and economic development goals of the community. Through this governance structure, SWALSC is able to function as more than a legal services provider for native title claimants. It acts as a regional entity that embodies and represents Noongar cultural, political, social and economic values and goals as a distinctive people, to third parties such as government, developers and non-Indigenous communities.

48 M. Langton, M. Tehan, L. Palmer, K. Shain (eds), *Honour Among Nations? Treaties and Agreements with Indigenous People*, Melbourne University Press, Melbourne 2004.



SWALSC have engaged with the Western Australian Government on behalf of the Noongar people, and the Government has responded with a commitment to negotiate a 'Comprehensive Regional Agreement' through the Department of Indigenous Affairs, not the Office of Native Title. SWALSC propose that the agreement include ongoing dialogue between a Noongar regional representative entity and the State across a range of issues of mutual interest, to give effect to sustainable social and economic outcomes which recognise the interrelationship between native title and the government's broader Indigenous policy objectives. In particular, SWALSC are seeking recognition that Noongar are the traditional owners of the south west region; and economic development opportunities so that Noongar can benefit within the regional economy. SWALSC anticipate that the Economic Development Sub-committee, Older Person's Council, Women's Council and Youth Leadership Council within SWALSC will ultimately become the Noongar regional structure that will be involved in an ongoing engagement with the state government and other parties.

Indigenous organisations are seeing the benefit of integrated regional and local planning in terms of the outcomes it can achieve for their communities. As Patrick Sullivan argues, it is possible to satisfy a range of Indigenous ways of wanting to use the land – such as for residence, hunting, ceremony, conservation, mining, pastoralism, tourism – that may or may not be compatible in respect of any one portion of land, but are certainly compatible so long as land use within *the region* is considered as a whole, with different portions being valued and used in different ways.⁴⁹

Integrating local and regional planning can also provide a number of ways to approach divisions between groups within a community, including divisions between traditional owners and those with historical links to the same land. As Sullivan points out, conflict over use of land may be irreconcilable when the solutions are limited to those that exist within a community but may be resolved when a broader range of options are considered at the regional level. This is important in the context of native title, which, as an entitlement to land that is restricted to a particular section of the Indigenous community, traditional owners, can cause rifts within resource-starved communities.

The proposal in this report to redirect the native title system to economic and social development benefits for the traditional owner group needs to consider the divisions that this might generate if the living conditions for the rest of the community were not also being addressed. Integrating the structures that represent native title holders into broader community and regional structures would enable greater coordination between the economic and social benefits accruing to the various groups within the community, including the traditional owner groups. It would also provide a forum to discuss inequities that might be occurring between interest groups and ways of ensuring a flow on to other members of the community. It may also contain formal dispute resolution mechanisms to facilitate resolution of disputes. Integrating these community structures into a regional tier of Indigenous representation broadens the dialogue

49 P. Sullivan, *Beyond native title: Multiple land use agreements and Aboriginal governance in the Kimberley* CAEPR Discussion Paper 89, 1995.



that is occurring at the local level and may provide alternative solutions to resolve local differences.

The issue of the relationship between traditional owner groups and the rest of the community was raised in the consultations and discussed briefly in chapter 2. It is a complex issue and will be further explored in the consultations I will be conducting in the next reporting period.

The development of strong representative Indigenous structures at the local and regional level are broadly accepted by governments and policy makers as necessary to the success of Indigenous policy in addressing the economic and social conditions of Indigenous communities. Native title is positioned outside this framework. Yet there are mechanisms within the NTA that would facilitate its inclusion within the local and regional tiers of Indigenous representation. Indeed the preamble to the NTA indicates that including native title in a regional approach is consistent with the intention of the Act. The preamble provides:

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

- (a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and
- (b) proposals for the use of such land for economic purposes.

Indeed paragraph (b) above suggests that the goal of a regional approach within the native title system might include addressing the economic utility of the land, rather than just defining the legal rights to land.

Another mechanism provided within the NTA is the Indigenous Land Use Agreement (ILUA) provisions, particularly those in relation to area agreements.⁵⁰ Of particular relevance is section 24CB(c) that provides for ILUAs about 'the relationship between native title rights and interests and other rights and interests in relation to the area'⁵¹ This section envisages native title as part of a range of interests that exist within a region.

The principles presented in chapter 2 of this Report are consistent with the government's goals for Indigenous people. Its difference is that it puts these goals at the centre of the native title process. It seeks to utilise the native title system to build the power and capacity of the traditional owner group to direct and achieve its own economic and social development. It is my goal over the coming year to explore ways in which governments, native title institutions and other stakeholders can contribute to this process in partnership with traditional owners.

50 NTA, s24CA – 24CL.

51 NTA, s24CB.