

# Native Title Report 2007



*Aboriginal & Torres Strait  
Islander Social Justice  
Commissioner*



*Human Rights and Equal  
Opportunity Commission*  
[humanrights.gov.au](http://humanrights.gov.au)

# *Aboriginal & Torres Strait Islander Social Justice Commissioner*

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The position of Aboriginal and Torres Strait Islander Social Justice Commissioner was established within the Human Rights and Equal Opportunity Commission in 1993 to carry out the following functions:

- Report annually on the enjoyment and exercise of human rights by Aboriginal peoples and Torres Strait Islanders, and recommend where necessary on the action that should be taken to ensure these rights are observed.
- Promote awareness and discussion of human rights in relation to Aboriginal peoples and Torres Strait Islanders.
- Undertake research and educational programs for the purposes of promoting respect for, and enjoyment and exercise of, human rights by Aboriginal peoples and Torres Strait Islanders.
- Examine and report on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal peoples and Torres Strait Islanders.

The Commissioner is also required, under Section 209 of the Native Title Act 1993, to report annually on the operation of the Native Title Act and its effect on the exercise and enjoyment of human rights by Aboriginal peoples and Torres Strait Islanders.

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**For information on the work of the Social Justice Commissioner please visit the HREOC website at:** [http://www.hreoc.gov.au/social\\_justice/index.html](http://www.hreoc.gov.au/social_justice/index.html)

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# **Native Title Report**

# **2007**



*Human Rights and Equal  
Opportunity Commission*

## **This native title report is dedicated to the memory of Eddie (Koiki) Mabo**

'The most significant point to make is that without Eddie, the case would probably never have begun. ... he was truly inspirational.

The case began when Eddie gave a speech at a conference here in Townsville in 1981. He spoke of Murray Island customs and traditions concerning land and urged that something should be done to have those customs recognised in Australian law.

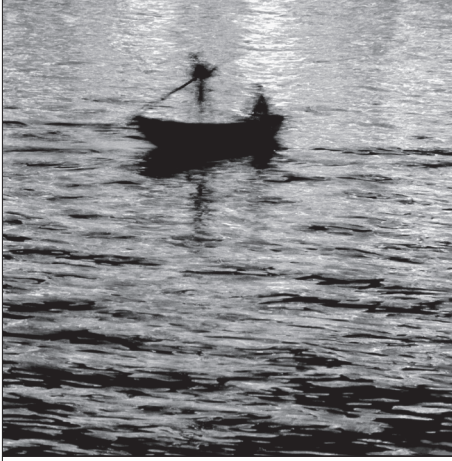
That speech triggered a very long legal saga that changed the lives of many people. Certainly it changed my life and that of my family and may yet bring even greater reforms and hopefully improvements for the lives of all Murray Islanders.

... [I] particularly remember his friendliness and hospitality, his initiative and originality, his courage and quiet determination, his intelligence and astonishing knowledge and memory of his people, his island, its history customs and traditions. Above all I remember his deep commitment to correcting historical wrongs, some very personal, and to achieving recognition of traditional land rights of his family and his people. He was in the best sense a fighter for equal rights, a rebel, a free-thinker, a restless spirit, a reformer who saw far into the future and far into the past.'

BRYAN KEON-COHEN

Bryan Keon-Cohen was one of Eddie Mabo's barristers. This dedication is an extract from Bryan Keon-Cohen's Speech at Eddie Mabo's Funeral, Townsville, February 1992 (Quoted in N Loos & E K Mabo, *Edward Koiki Mabo: His Life and Struggle for Land Rights*, UQP 1996)





# Native Title Report

# 2007

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*Aboriginal & Torres Strait Islander  
Social Justice Commissioner*



*Report of the Aboriginal & Torres Strait Islander Social Justice Commissioner  
to the Attorney-General as required by section 209 Native Title Act 1993.*

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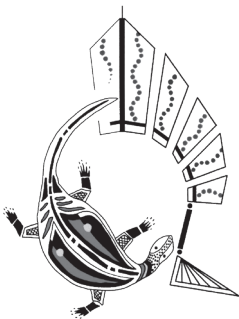
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## **Acknowledgements**

Bonita Mabo gave permission to dedicate this report to the late Eddie (Koiki) Mabo and his struggle to achieve recognition of Aboriginal and Torres Strait Islander land rights at the national level.

Our thanks to Bryan Keon-Cohen for facilitating the dedication text.

The Aboriginal and Torres Strait Islander Social Justice Commissioner acknowledges the work of the Native Title Unit staff and consultants in producing this report: Warwick Baird, Fabienne Balsamo, Laura Beacroft, Sean Brennan, Cecelia Burgman, Deanna Cartledge, Margarita Escartin, Oliver Gilkerson, Jennifer Goedhuys, Katie Kiss, Tim Lamble, Mitchell Lendrum, Stephanie Lind, Hai-Van Nguyen, and David Yarrow.



## **About the Social Justice Commission logo**

The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of the Torres Strait Island people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Commission and the support, strength and unity which it can provide through the pursuit of social justice and human rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice, expressing the hope and expectation that one day we will be treated with full respect and understanding.



**Human Rights and Equal  
Opportunity Commission**

15 February 2008

The Hon Robert McClelland MP  
Attorney-General  
Parliament House  
CANBERRA ACT 2600

Dear Attorney,

I am pleased to present to you the *Native Title Report 2007* which reports on the operation of the *Native Title Act 1993* and its effect on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples in accordance with Section 209 of the *Native Title Act 1993*.

In accordance with Section 46C(1)(a) of the *Human Rights and Equal Opportunity Commission Act 1986*, I have also used this opportunity to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in light of other changes to policy and legislation, made between 1 July 2006 and 30 June 2007, and that affect land and waters.

I look forward to discussing the report with you.

Yours sincerely

Tom Calma  
Aboriginal and Torres Strait Islander  
Social Justice Commissioner



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## **Note – Use of the terms ‘Aboriginal and Torres Strait Islander peoples’ and ‘Indigenous peoples’**

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

Throughout this report, Aborigines and Torres Strait Islanders are referred to as **‘peoples’**. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods.

Throughout this report, Aboriginal and Torres Strait Islander peoples are also referred to as **‘Indigenous peoples’**.

The use of the term ‘indigenous’ has evolved through international law. It acknowledges a particular relationship of aboriginal people to the territory from which they originate. The United Nations High Commissioner for Human Rights has explained the basis for recognising this relationship as follows:

Indigenous or aboriginal peoples are so-called because they were living on their lands before settlers came from elsewhere; they are the descendants – according to one definition – of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived, the new arrivals later becoming dominant through conquest, occupation, settlement or other means ... (I)ndigenous peoples have retained social, cultural, economic and political characteristics which are clearly distinct from those of the other segments of the national populations.

Throughout human history, whenever dominant neighbouring peoples have expanded their territories or settlers from far away have acquired new lands by force, the cultures and livelihoods – even the existence – of indigenous peoples have been endangered. The threats to indigenous peoples’ cultures and lands, to their status and other legal rights as distinct groups and as citizens, do not always take the same forms as in previous times. Although some groups have been relatively successful, in most part of the world indigenous peoples are actively seeking recognition of their identities and ways of life.<sup>1</sup>

In this report the word ‘Indigenous’ appears with an initial capital letter when referring to Aboriginal and Torres Strait Islander peoples. No capital is used when referring to the original inhabitants of other countries.

The Social Justice Commissioner acknowledges that there are differing usages of the terms ‘Aboriginal and Torres Strait Islander’, ‘Aboriginal’ and ‘indigenous’ within government policies and documents. When referring to a government document or policy, we have maintained the government’s language to ensure consistency.

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1 United Nations High Commissioner for Human Rights, *Fact sheet No.9 (Rev.1), The Rights of Indigenous Peoples*, [www.unhcr.ch/html/menu6/2/fs9.htm](http://www.unhcr.ch/html/menu6/2/fs9.htm)



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# **The Commonwealth Native Title Act 1993**

## **An Act about native title in relation to land or waters, and for related purposes**

The *Native Title Act 1993* (Cth) is the primary instrument that affects Indigenous native title. The intent of the parliament and the will of all Australians are contained in preamble to that Act. At any time we contemplate native title, it is the preamble that should guide us. Lest we forget, the introductory paragraphs are reproduced here.

### **Preamble**

“This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution [in 1967] so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms ...”





# The report overview: Native title 15 years on



The year 2007 is the fortieth anniversary of the 1967 constitutional referendum. The referendum changed the Australian Constitution however it didn't specify directions to be taken. In many ways, it could be said that the referendum represented promises to Indigenous Australians for new ways of enjoying human rights, and promises to other Australians that Indigenous citizens could expect a new and equal deal.

Unfortunately, in the last 40 years, the change towards equal rights and equal opportunities for Aboriginal peoples and Torres Strait Islanders has been slow and, some might argue, non-existent. The question therefore is why?

Australia has accepted international standards for the protection of 'human rights and fundamental freedoms' set out in the *Universal Declaration of Human Rights*. Australia has also ratified and agreed to be bound by other instruments of international law including the *International Convention on the Elimination of All Forms of Racial Discrimination*, the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights*.

Additionally, in 2007, the international community moved further to acknowledge fundamental human rights for Indigenous peoples. The *United Nations Declaration on the Rights of Indigenous Peoples* was accepted by the General Assembly of the United Nations and proclaimed as a standard of achievement to be pursued in a spirit of partnership and mutual respect.<sup>1</sup>

How far have we progressed to truly embrace inalienable human equality?

Two thousand and seven was the fifteenth anniversary of *Mabo No 2*, the High Court decision that prompted the government to pass the *Native Title Act 1993*.<sup>2</sup> In passing the Act the Australian Parliament took into account that the Government had acted to protect the rights of all of its citizens, and in particular its Indigenous peoples, by recognising the international standards for the protection of universal human rights and fundamental freedoms.<sup>3</sup> The Act was intended to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders. It was intended to further advance the process of reconciliation among all Australians.<sup>4</sup>

These significant anniversaries make it an appropriate time to ask the big questions of the Native Title Act: Does it deliver on its principal objects? Does it truly provide for the recognition and protection of native title? Has the Australian Parliament given proper weight to following the preamble to the Act? Does it offer real economic and social development opportunities for Indigenous peoples? When



engaging with the systems established under the Act, are Indigenous people able to exercise free and informed consent?

## A deeper look

Not only must a civilised country conduct its affairs by the rule of law, but the law must be just in its compilation and just in its application. Social and economic benefits must not ignore the least advantaged citizens; indeed it is usually argued that the disadvantaged need special attention.

The Israeli philosopher Avishai Margalit has suggested that a society must also be a decent society that can't tolerate humiliation. He talks of '... an old fear that justice may lack compassion and might even express vindictiveness'. He places self-respect ahead of personal freedoms and basic survival because, as a learned observer has pointed out, 'Without the possibility of self-respect, a person's life has no point; pursuit of life's goals is a meaningless exercise'.<sup>5</sup>

This leads us to ask deeper questions of the Native Title Act: is it just in its structure? Is it just in its application? Does it offer real opportunities for building the self-respect of the disadvantaged and marginalised Australia's Indigenous peoples?

The Australian Parliament recognised this need to question the Native Title Act. The Parliament made provision in the Act requiring that I report on its operation and the effect of it on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders. This deeper questioning of the Native Title Act underpins this report.

Having asked these questions this report seeks to answer the question: how can the Native Title Act and the system it establishes, be improved to increase the exercise and enjoyment of human rights of Indigenous peoples?

And it seems especially appropriate to be asking these questions in 2008, with the new government's expressed concern for Australia's Indigenous peoples.

I believe that Australia failed its Indigenous peoples and the rest of its citizens, by not keeping its promises that were implicit in the 1967 referendum. The Native Title Act tends to humiliate the people it should serve; indeed I fear in Margalit's words that its '*justice may lack compassion and might even express vindictiveness*'. It has failed to deliver Burnside's self-respect.<sup>6</sup>

This failure needs to be addressed. There needs to be a rethink of the native title system, with open mind, and free-spirit. There needs to be a rethink of the way native title is determined across the country. This rethink must focus on increasing the recognition of native title and strengthening its protection. Foremost it must answer the questions: how may we make it more just? How may we make the Act deliver on Australia's human rights obligations?

## Landscape

My questioning of the Act takes place in the context of a range of events that happened in the period covered by this report. A close look and analysis of these events forms the body of my report.



Overall, the central conclusion of this report is that the Native Title Act is not delivering fully on its objects. Proper consideration is not being given to the preamble to the Act which encapsulates the reasons Parliament passed the Act in the first place, and the matters it took into consideration.

■ **Changes were made to the native title system** by the most significant amendments to the Native Title Act since 1998 (when the Act was amended in response to the High Court's *Wik* decision<sup>7</sup>). They were the result of the government's intention to change the native title system first announced in 2005. Other non-legislative changes were also made to the system.

■ **The Corporations (Aboriginal and Torres Strait Islander) Act** was passed. It established a new regime for Aboriginal corporations (including 'prescribed bodies corporate', a form of corporation required under the Native Title Act).

■ **A number of significant Federal Court decisions** were handed down. They further showed the difficulties in obtaining recognition of native title under the Act, and the difficulties in obtaining compensation for extinguishment of native title.

■ **Intervention in the Northern Territory** was announced by the government, ostensibly in response to the findings of the *Little Children are Sacred* report. The intervention was given full effect later in 2007.

■ **Commercial fishing and Indigenous rights** became a topical issue with the *Gumana* (Blue Mud Bay) case and the Gundjimarra peoples' native title claim.

■ **Indigenous peoples' initiatives** took place around the country to exercise and enjoy their human rights as a result of or in response to the operation of the Native Title Act. The right to economic and social development (discussed in many of my previous reports) was pursued through innovative projects.

Two such innovative studies I consider in this report:

■ **The Western Arnhem Land project** involves traditional fire management and the generation of income through limiting the release of carbon dioxide greenhouse gas into the atmosphere. It is a promising and timely approach to pursuing economic, environmental, social and cultural outcomes.

■ **A central Queensland local government template agreement** is being finalised. It offers a model that may be of assistance to other Indigenous people seeking to enter into agreements with local councils.

These events, that occurred over the reporting period, affect five areas central to native title, the native title system, and the exercise and enjoyment of human rights of Indigenous peoples.

## 1. The importance of native title

It is vital to Indigenous people and their future that there is recognition of the rights and interests they have in country according to their traditional laws and customs. It is important for the advancement of reconciliation between Australia's past and present, and between Indigenous and non-Indigenous Australians.



The Native Title Act established a system whereby Indigenous people could gain recognition by Australian law of their native title rights and interests in land and waters. Recognition by Australian law brings with it the possibility to assert those rights as against the whole world. The full capacity of the Australian legal system is then, potentially, available to enforce those rights. The native title subsequently recognised may be utilised for economic, social and cultural benefits.

Two reasons stand out why recognition of native title by Australian law is vital to Indigenous peoples.

The first is the recognition of Indigenous people, their society and their laws and customs. This takes place when the Federal Court makes a determination under the Native Title Act, that native title exists and who holds it.

The second is the actual rights and interests recognised. These rights and interests can be a step along the way to achieving economic, social, and cultural outcomes for Indigenous peoples. This requires political will. As Justice Merkel in the *Rubibi* case, pointed out:

the resolution of native title claims as a means to an end, rather than an end in itself. Achieving native title to traditional country can lead to the enhancement of self respect, identity and pride for indigenous communities ... native title can also be seen as a means of indigenous people participating in a more effective way in the economic, social and educational benefits that are available in contemporary Australia. Obtaining a final determination of native title, where that is achievable, can be a stepping-stone to securing those outcomes but cannot, of itself, secure them.<sup>8</sup>

## 2. Operation of the native title system

Any system established to provide for the recognition and protection of native title must do just that. The native title system has been successfully used in many parts of the country. There are registered determinations of native title on the Native Title Register. There is an increasing number of Indigenous land use agreements entered into each year. It is a complex system, involving many interlinked agencies, governments, organisations and people.

Despite these successes I am concerned, after reviewing the events over the reporting period, and from my time as Aboriginal and Torres Strait Social Justice Commissioner, that the system is not delivering full recognition and protection of native title.

Many Aboriginal peoples and Torres Strait Islanders feel the system doesn't deliver. They hold the view that native title delivers little in the way of meaningful recognition of the full range of rights and interests, obligations and responsibilities they have in country under the traditions and customs of their own society.

The 'recognition' that does occur is criticised as mistranslating and transforming Aboriginal 'cultural connection' to land. The whole process is seen by many to exacerbate old conflicts and create new ones, between Aboriginal people and with non-Indigenous Australians.<sup>9</sup>



One *Wati* man from the Western Desert speaking recently to his lawyers spoke of the dispossession happening of his people's land for many years now. 'From his perspective, the Native Title Act has not brought justice and in fact has simply formalized and legalised the dispossession of his people's country.'<sup>10</sup>

There are two overarching constraints on the capacity of the native title system to fully deliver recognition and protection of native title:

- the law, both the Native Title Act, and the common law; and
- the design and operation of the system.

The previous government endeavoured to tackle some of the problems with the system. It began the latest round of reviewing elements of the native title system and made changes in 2005. Some of the changes made as a result of this process may improve the efficiency and effectiveness of the system. That was the intent behind the changes. It also intended to promote agreement-making and negotiated outcomes to native title issues instead of litigation.

Of the recent changes to the system, four main areas are considered in detail in this report:

- the claims resolution process;
- representative Aboriginal and Torres Strait Islander bodies;
- respondent funding; and
- prescribed bodies corporate.

In each area I raise concerns and make recommendations. My consideration of prescribed bodies corporate is also in the context of the new *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth). This legislation offers the potential to significantly improve the governance and operation of Indigenous corporations. The concerns I raise in the report should not detract from the possibilities in this Act and the hard work and dedication that went into its creation.

The focus of the changes to the native title system was really on saving money and reducing the time taken to resolve matters. Cost and time were the 'reform criteria'. The changes ought to have been focused on providing for recognition and protection of native title. This is the main object of the Native Title Act. Saving time and money are important, however, not at the expense of native title.

I am concerned that Indigenous peoples' rights are yet again restricted and curtailed. If not directly then through an increase in the complexity of the system, the bureaucratic hurdles that must be surmounted, and the legal maze that must be wound through. The native title system is too complex. It is too legalistic. And it is too bureaucratic. And it hinders rather than helps Indigenous Australians towards their full realisation of rights.

It must always be remembered that this system was established by an Act passed as a special measure for the benefit of Indigenous peoples. The most disadvantaged people in Australia face one of the most complex pieces of legislation in the country to gain recognition of their native title. They seek to gain recognition of rights and interests in land and waters that they have held for over 40,000 years; over country they have always known was theirs.





### 3. Barriers to recognition of native title

The interpretation by the common law of the Native Title Act has placed great barriers in the way of Indigenous people claiming their native title.

Native title claims are complex, and impose demands on the parties that are unprecedented in adversarial litigation.<sup>11</sup> Evidence is required of the claimant community's connection with the claim area, and the community's observance and acknowledgement of traditional laws and customs since the British asserted sovereignty. This differs around the country. In the eastern states it is back to 1788, in Western Australia to 1829.

In a heavily contested claim, an adversarial process leads those opposing the claim to raise every objection and to contest every point available to them. The onus is on the claimant to prove their case. In the *Wongatha* case Justice Lindgren faced 30 expert reports, to which 1,426 objections were lodged. In the *Jango* case, the Yulara compensation case, certain expert anthropologists' reports were the subject of over 1,000 objections by the respondents.

I consider these cases in this report, along with two others, and the issues they raise in the chapter on selected native title cases. The four selected cases highlight some of the almost insurmountable hurdles that Indigenous people face in the courts, in their endeavours to gain recognition of their native title. To establish the continuity of traditional laws and customs needed for recognition of native title there must be what the courts have termed a 'normative society'. This is a significant hurdle placed by the courts. It is a requirement that is not in the legislation. Rather it has arisen from the court's interpretation of the definition of native title in the Native Title Act.

Since the High Court's decisions in the *Ward* and *Yorta Yorta* cases the first reference for determining what native title is and what is needed for recognition is the Native Title Act. Section 223 defines native title. The courts have interpreted this section in a way that has limited the rights and interests Indigenous people may claim.

### 4. Protection of native title

The Native Title Act establishes a system for future dealings affecting native title. The 'future act regime' is there to protect native title. The federal government announced its intervention in the Northern Territory to tackle sexual abuse of Indigenous children in June 2007. The legislation passed to provide for the intervention measures expressly excludes the operation of the future act regime. In this report I consider this aspect of the intervention. This casual disposal of the protections afforded native title demonstrates an underlying approach to native title that sees it more as an impediment than as an opportunity. It is an approach needing change.

Also set up under the Native Title Act is a scheme for claiming compensation for extinguishment of native title. The criteria for extinguishment laid down by Australian law mean that in large parts of Australia native title has been extinguished. A native title claim may be largely successful only for the claimants to find, as the Yawuru people did, in the *Rubibi* case, that their native title was partially or totally extinguished over significant parts of their claim area.<sup>12</sup>



Compensation for extinguishment of native title is extremely difficult to obtain, despite the statutory scheme for compensation established under the Native Title Act. As the Yankunytjatjara and Pitjantjatjara people found when the Federal Court dismissed their claim for compensation for extinguishment of native title at the town of Yulara, in the shadows of Uluru. The *Jango* case was the first Federal Court trial for compensation under the Native Title Act. If Indigenous people are unable to be compensated for the loss of rights and interests they have in land, under their traditional laws and customs, in the shadows of Uluru, the most iconic of Aboriginal sacred sites, where will they be compensated? This is one of four selected Federal Court decisions I review in detail in this report.

There has been no compensation awarded by the Federal Court. Of the 33 applications for compensation lodged with the court since the Act came into operation, most have been discontinued. The few remaining are not being actively pursued.

The compensation scheme established under the Act must be reviewed. Something is not working.

## 5. Sustainable development and native title

Around the country there are very positive initiatives undertaken by Indigenous people to use their land and their culture, as well as the native title system and native title, to gain economic, social, cultural and environmental outcomes. The particular case of commercially using native title rights to fish is considered in this report. There are also two other studies.

One case study looks at a template Indigenous land use agreement in central Queensland that has been drawn up for agreements involving local government. It may serve as a model for other template agreements involving local government, showing the way in grappling with the complex problems of agreement making under the Native Title Act.

The other study is an innovative use of traditional fire burning practices in Arnhem Land to generate income through reducing carbon in the atmosphere. As adapting to climate change becomes increasingly necessary, projects such as the Western Arnhem Land Fire Management project are breaking ground in their approaches to utilising land, traditional knowledge, and the evolving carbon markets.



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- 1 Although it was opposed by Australia.
  - 2 The High Court handed down its decision in *Mabo v Queensland [No 2]* (1992) 175 CLR 1 on 3 June 1992.
  - 3 It is expressly stated in the preamble to the *Native Title Act 1993* (Cth).
  - 4 Preamble to the *Native Title Act 1993* (Cth).
  - 5 Burnside, J., *Watching Brief: reflections on human rights, law and justice*, Scribe, November 2007, Carlton North, Victoria, p19.
  - 6 Burnside, J., *Watching Brief: reflections on human rights, law and justice*, Scribe, November 2007, Carlton North, Victoria, p19.
  - 7 *Wik Peoples v Queensland* (1996) 187 CLR 1.
  - 8 *Rubibi Community v State of Western Australia (No 7)* (with Corrigendum dated 10 May 2006) [2006] FCA 459 (28 April 2006) per Merkel J, Corrigendum.
  - 9 The Social Effects of Native Title: Recognition, Translation, Coexistence, Benjamin R. Smith and Frances Morphy (Editors), Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, Research Monograph No. 27/2007, page 1.
  - 10 Managing the Western Australian Resource Boom, correspondence from Mr Michael Meegan, Principal Legal Officer, Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, Pilbara Native Title Service, to the Native Title Unit, HREOC, December 2007.
  - 11 *Rubibi Community v State of Western Australia (No 7)*(with Corrigendum dated 10 May 2006) [2006] FCA 459 (28 April 2006) per Merkel J, Corrigendum.
  - 12 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, (28 April 2006), Merkel J, Corrigendum.



# Chapter 1

## Changes to the native title system

Native title is now well established in Australian law. The native title system was set up in 1994 under the *Native Title Act 1993* (Cth) (the Native Title Act). It is for gaining recognition and protection of native title, and for resolving native title matters. It has been successfully used in many parts of the country.

The system has also been used to bring together people who might not otherwise engage. It has provided Indigenous people with a 'seat at the negotiation table'. This has led to an increasing number of Indigenous land use agreements (ILUAs), and to contracts outside of the native title system. These cover a wide range of matters, not just native title.

It has led to registration on the Native Title Register of 68 determinations where native title exists. There have also been 280 Indigenous land use agreements registered on the Register of Indigenous Land Use Agreements (as at 30 June 2007).

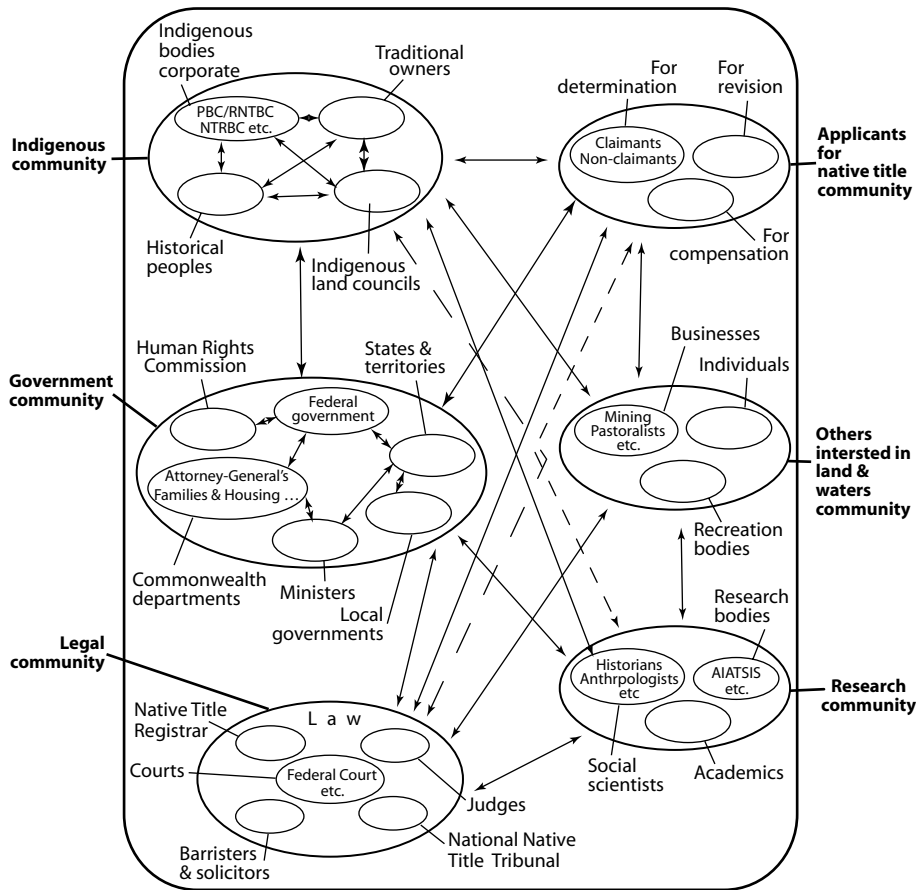
### The native title system

A large number of people and agencies are involved in the native title system, as shown in the simplified diagram on the next page.

### Does the native title system need changing?

Despite the successes of the system, I am concerned that the native title system is not delivering substantial recognition and protection of native title. The operation of the Native Title Act, and the system set up under it, are essentially not fulfilling the objects of the Act in accordance with the reasons the Australian Parliament passed the legislation. These reasons are set out in the preamble to the Native Title Act. The result is that Indigenous people are not able to fully exercise and enjoy human rights.

Much good work is being done. Agreements are being entered into that benefit Indigenous people. Determinations of native title are being made that recognise Indigenous peoples rights and interests in land and waters held under their traditional laws and customs. The native title system is being used to deliver economic, social and cultural outcomes to Indigenous people.



Some of the 'community' of parties involved in native title together with their interactions

However, there are two overarching constraints on the capacity of the native title system to fully deliver recognition and protection of native title:

- the law, both the Native Title Act, and the common law as it has evolved and interpreted the Native Title Act; and
- the design of the system, the way it operates, and the processes established under it.

Both of these are amenable to political solutions.

■ The first constraint is the Native Title Act and the development of the common law. These have not been comprehensively addressed in any of the recent reviews and changes to the native title system undertaken by previous governments. The Native Title Act is too complex. The common law as developed by the courts has placed almost insurmountable barriers in the way of Indigenous people seeking recognition and protection of their native title, and compensation where it has been extinguished (some common law barriers are considered in later chapters of this report). As the Hon. Mary Gaudron QC has pointed out:<sup>1</sup>





[T]o embark on an analysis of native title law is to begin with the strange and unfamiliar. It is to begin with the notion of rights which owe their existence, not to our laws which are strange enough, but to customs and traditions in respect of which we have contrived, by and large, to remain comfortably ignorant. ... It is the Native Title Act that provides the framework by reference to which [the] recognition and protection [of native title rights] are secured. To describe that framework as 'exceedingly complex' ... is, perhaps, a masterful understatement. Yet the statutory framework is necessarily complex. ...The legal practitioner who ventures into this field must know not only the detail of the Native Title Act, but must also have a thorough understanding of the common law system of tenure and its different estates as well as the various statutory schemes by which the several States and Territories have, from time to time, provided for the creation of private interests in and for the use by governments and individuals of public lands. There is, I think, no more demanding or difficult area of law.

This is a piece of legislation that is intended to be a special measure for the benefit of Indigenous people. The most disadvantaged Australians, many of whom may not speak English as a first language, have to contend with one of the most complex pieces of legislation in Australia to gain legal recognition of their native title rights and interests.

■ The second constraint is the system and how it operates. Elements of the system have been the subject of a number of reviews and reports over the years. The system has been subject to significant changes since the previous government announced in 2005 that it was 'reforming' the native title system. The changes have been targeted at the efficiency and effectiveness of the system. I have concerns about both the process by which the changes were undertaken, and the possible outcomes from the changes. It is still too early to assess the impact of the changes. The changes to different elements of the system are dealt with in later chapters of this report.

Some insight into these two constraints may be gained from observations made by a number of Federal Court judges who have long experience dealing with native title cases. Other participants in the native title system also provide insight into the operation of the Native Title Act, the system it establishes, and the development of the common law. Some of these telling insights follow in the next sections of this chapter.

Any assessment of how well the system is working must always refer to:

- the preamble to the Act;
- the purpose of the Native Title Act;
- the main objects of the Act; and
- the reasons the Australian Parliament enacted the legislation (to give effect to the *Mabo* decision).

They must be kept foremost in mind whenever contemplating changing the system, or assessing past changes. The human rights of Indigenous people are inalienably connected to the Act and the reasons the Australian Parliament passed it. This is why the parliament gave me the responsibility of reporting on the operation of the Act, and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.<sup>2</sup>



## Purpose of the Native Title Act

The Commonwealth's major purpose in enacting this legislation [the Native Title Act] is to recognise and protect native title. ...<sup>3</sup>

The purpose of this Bill is to provide a national system for the recognition and protection of native title and for its co-existence with the national land management system.<sup>4</sup>

The purpose of the Native Title Act is clearly set out in the Explanatory Memorandum to the Native Title Bill 1993. The former prime minister, Paul Keating, reinforced this as the purpose when he introduced the Bill into the Australian Parliament. He said that a key aspect of the Bill was:

... ungrudging and unambiguous recognition and protection of native title.<sup>5</sup>

Reasons why the Native Title Act was enacted are set out in the preamble.

At the beginning of this Bill and before the substantive clauses there is a statement which sets out some of the reasons why this legislation is being enacted. The preamble describes the dispossession of the indigenous inhabitants of this country. The preamble notes the making of the decision in *Mabo* and the Australian peoples desire to rectify the injustices of the past. The preamble also refers to the fact that this legislation is intended to be a special measure for the descendants of the original inhabitants of Australia as allowed by s.51(xxvi) of the Constitution and a special measure for the advancement and protection of those peoples in accordance with the International Convention on All Elimination of Forms of Racial Discrimination [sic].<sup>6</sup>

The Australian Government intended that the Native Title Act comply with Australia's international obligations.

The legislation complies with Australia's international obligations, in particular under the International Convention on the Elimination of All Forms of Racial Discrimination. As indicated in the preamble, the legislation constitutes a special measure under the Racial Discrimination Act for the benefit of Aboriginal and Torres Strait Islander people—providing as it does significant benefits such as special processes for determining native title; protection of native title rights; just terms compensation for any extinguishment of native title; a special right of negotiation on grants affecting native title land; designation of Aboriginal and Torres Strait Islander organisations to assist claimants; and establishment of a national land fund.<sup>7</sup>

This is the framework in which to understand the Native Title Act. It is the framework in which any changes to the Native Title Act need to be placed and referred against. Before considering changes, a review of some aspects of the current 'state of play' provides an additional context in which to assess the native title system.

### Native title: the state of play?

That the state of play is tortuous is highlighted by the comments of the judges in the *Rubibi*<sup>8</sup> and *Wongatha*<sup>9</sup> cases.



### ***The Rubibi case***

Under Australian law, the Yawuru peoples commenced their claim for recognition of their traditional connection to, and ownership of, their country on 2 February 1994. After an 'epic struggle' – as described by Justice Merkel (who determined their claim) – the final determination of their claim was made twelve years later in 2006.<sup>10</sup>

The Yawuru claimants were largely successful in their native title claim. That is:<sup>11</sup>

... the claim has succeeded in whole or in part over approximately 4900 sq kms of their traditional country in and around Broome. The Yawuru claimants have established a communal native title entitlement to exclusive possession of their traditional country.

[However]:

... as a result of the criteria laid down under Australian law for extinguishment of native title, the native title of the Yawuru community was partially or totally extinguished in relation to significant parts of the Yawuru claim area. Also, as a native title right to exclusive possession is not recognised under Australian law in respect of the inter-tidal zone and, subject to some exceptions, areas that have been subject to pastoral or mining leases, the native title rights and interests in respect of most of those areas are not exclusive.

The judge went on to describe the native title system as being in a state of gridlock.<sup>12</sup>

The fact remains that there are presently 608 applications in relation to native title awaiting resolution in the Court. Most of those applications have been before the Court a considerable time. Four of those applications are either part heard or are reserved for judgment and only one is fixed for a final hearing this year. It follows that 603 of the 608 applications presently before the Court have no final hearing date fixed in the reasonable foreseeable future. In these circumstances, it is fair to describe native title in Australia as being in a state of gridlock.

Although Justice Merkel made these observations in March 2006, the situation remains much the same at 30 June 2007, the end of the reporting period for this report. At that date there were 532 claimant applications, 35 non-claimant applications, and 11 compensation applications at some stage between filing in the Federal Court and resolution. Difficulties with the law and the process for obtaining a determination of native title continued to be highlighted over 2006 and 2007.

### ***The Wongatha case***

In the *Wongatha* case there were eight overlapping claimant applications before the Federal Court for determinations of native title. The first application claiming native title, which was on behalf of the Wajlen people, was filed in August 1994. The *Wongatha* claim was the consolidation of a number of proceedings (see the chapter later in this report on significant Federal Court cases). It related to some 160,000 square kilometres of land. Possibly half to two-thirds of the land is spinifex country. The rest is characterised by mulga, rock-holes and breakaways. It is used for pastoral activities and mining. The land is generally in the Goldfields region about 85 kms north of Kalgoorlie.<sup>13</sup> The other seven applications overlapped the area of the *Wongatha* claim to some extent.



The judge disposed of the Wongatha claim and one other to finality on 5 February 2007. The other six claims he disposed of to the extent that they overlapped the area of the Wongatha claim. As the judge stated '[T]he case was lengthy'. There were approximately 17,000 pages of transcript of hearings (100 hearing days, often involving extended hours), 34 volumes of experts' reports comprising 2,817 pages, and 97 volumes of submissions comprising 8,087 pages (including appendices and annexures).<sup>14</sup>

After all this, the court found that seven of the claims were not properly authorised. That is, the people who brought the claims were not properly authorised to do so by the Indigenous people placed on the applications as the native title claimants. One wonders how and why the system allowed this to occur.

There was no determination of native title. Whether Australian law would recognise the native title of other native title claimants grouped differently, was not decided. Although the judge did consider all the claims on their merits he did not determine the claims. Rather the possibility that native title might be recognised if claimed by Indigenous people, grouped into different claim groups to those before the judge, was left open.

Hearing and resolving the case exposed the judge to what he considered to be:

an unsatisfactory state of affairs in the native title area. Perhaps the heart of the problem is that the legal issue that the Court is called upon to resolve is really only part of a more fundamental political problem.<sup>15</sup>

The judge in the *Wongatha* case drew attention to some issues relating to native title proceedings generally. These include:

- The creation of expectations (that may not be met).
- The appearance of unequal treatment as between different groups of Indigenous people. This arises because each native title case depends on its own facts and the history of its claimants and their ancestors. The judge gave three examples of this:
  - A difference between the date of sovereignty and the date of European settlement may result in the absence of substantial written records. This will make it harder to prove Indigenous laws and customs as they existed at sovereignty. This problem will not be as evident where the date of European settlement and sovereignty are the same. (The date of sovereignty in the Goldfields is taken to be 1829. The date of European settlement, 1869.)
  - Some native title cases are strongly contested, others are not. The reason relates to the value of land to others, and has nothing to do with the respective merits of the different cases.
  - Migration and population shift, driven by necessity or desire, may result in claimants not being able to prove that their ancestors lived in the area over which native title is claimed. This will differ across Australia.



### ***The tribunal and other commentators***

The National Native Title Tribunal (the tribunal) has also presented a sobering picture of the native title system. The tribunal noted in its 2005-2006 annual report, and again in its 2006-2007 report that:

- At the rate that native title applications have been resolved to date, it will take many years to resolve outstanding applications and many older Indigenous Australians will not see their claims finalised.
- Clients and stakeholders can become frustrated at delays and the high cost of participating in the native title system.
- Native title determinations often deliver few direct benefits to Indigenous Australians and most determinations, in isolation, fall short of claimants' aspirations.<sup>16</sup>

Other criticisms of the system and the law, include:<sup>17</sup>

- that Indigenous people are forced to prove what they already know;
- that Indigenous knowledge is transferred to non-Indigenous experts and then controlled by the 'experts';
- the legal barriers to obtaining recognition of native title make it too difficult;
- the Native Title Act fails to really protect native title;
- it causes conflict between Indigenous people and with non-Indigenous people; and
- involvement in native title claims drains considerable energy away from transferring Indigenous knowledge to the next generation of Indigenous people.

### ***Traditional owners experience***

In my previous report I set out findings from a national survey of traditional owners conducted by the Human Rights and Equal Opportunity Commission: the *National Survey on Land, Sea and Economic Development*.<sup>18</sup> A number of the findings are important in this discussion of the native title system:

- The most important land priority for traditional owners is custodial responsibilities and capacity to either live on, or access the land.
- A majority of traditional owners do not have a good understanding of the agreements on land.

The top three reasons preventing traditional owners from understanding land agreements are (in descending order):

- lack of understanding of native title legal terminology and process;
- the process lacks Indigenous perspective; and
- lack of information.



Native title is at the heart of recognition by Australian law of traditional owners' custodial responsibilities for land and waters. A system that is not delivering fully on recognition and protection of native title is failing Indigenous people by not recognising the most important land priority of traditional owners.

The findings from the survey, that traditional owners do not understand the agreements they are entering into primarily because they lack understanding of native title legal terminology and process, reinforce my concerns regarding the complexity of the Native Title Act and the processes established by it.

### **Native title outcomes**

In the context of the previous comments it is worth reviewing the outcomes of the native title system up until 30 June 2007. As we commemorate the fifteenth anniversary of the *Mabo* decision, which resulted in the Native Title Act, there have been a number of determinations that native title exists, and many more agreements made about access to lands and waters and the use of them.

### ***Native title applications and determinations***

Between the commencement of the Native Title Act on 1 January 1994 (up to 30 June 2007) a total of 1,750 native title applications were made. These comprised claimant, non-claimant, compensation, and revised native title determination applications. The following table shows native title applications since the start of the Native Title Act.<sup>19</sup>

<b>Native title applications since 1993</b>		
<b>Type of application</b>	<b>Applications made</b>	<b>Applications finalised*</b>
Claimant	1,454	922
Non-claimant	262	227
Compensation	33	22
Revised native title determination	1	1
<b>Total</b>	<b>1,750</b>	<b>1,172</b>

\* Finalised includes discontinued, dismissed, withdrawn, rejected, struck-out, combined with other applications or the subject of non-approved or fully-approved native title determinations.

As at 30 June 2007, 532 claimant applications, 35 non-claimant applications, and 11 compensation applications were at some stage between filing and resolution.<sup>20</sup> The following matters were being registered:



- 425 applications on the Register of Native Title Claims;
- 103 determinations were on the Native Title Register, including
  - 68 determinations where native title does exist, and
  - 35 determinations where native title does not exist; and
- 280 agreements were on the Register of Indigenous Land Use Agreements.<sup>21</sup>

Over the reporting period (2006-2007 financial year) there was a total of 16 native title determinations registered. This compares to 21 during the 2005-2006 financial year reporting period. This year's outcomes are comprised of:

- eight consent determinations (including seven that native title exists);
- one litigated determination that native title exists; and
- seven which were unopposed (non-claimant).<sup>22</sup>

Native title applications made and finalised in 2006-2007 are shown in the following table.

<b>Native title applications made and finalised in 2006-2007</b>		
<b>Type of application</b>	<b>Applications made</b>	<b>Applications finalised*</b>
Claimant	30	50
Non-claimant	11	15
Compensation	1	2
<b>Total</b>	<b>42</b>	<b>67</b>

\* Finalised includes discontinued, dismissed, withdrawn, rejected, struck-out, combined with other applications or the subject of non-approved or fully-approved native title determinations.

### ***Indigenous land use agreements***

The 1998 amendments to the Native Title Act extended the agreement-making ability to include Indigenous land use agreements (ILUAs). ILUAs are voluntary agreements between native title groups and others about the use and management of land and waters. According to the President of the National Native Title Tribunal the number of Indigenous land use agreements has doubled over the last two years with more than 300 ILUAs registered across most States and Territories, covering more than 11 percent of the country (as at October 2007).<sup>23</sup> All Indigenous land use agreements are shown in the following table.



<b>Indigenous land use agreements up to October 2007</b>									
<b>Type of Agreement</b>	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	<b>Total</b>
Fully concluded ILUA and use and access agreement negotiations		3		12	6		1		22
Milestone agreements* in ILUA negotiation outside NTDA**				1	24				25
Milestone agreements* in ILUA negotiations with NTDA**		2	6	28	222		1		259
<b>Total</b>		<b>5</b>	<b>6</b>	<b>41</b>	<b>252</b>		<b>2</b>		<b>306</b>

\* Milestone agreements are those agreements leading to a final agreement, where the tribunal provided negotiation assistance.

\*\* native title determination applications

During the 2006-2007 financial year, 22 ILUA negotiations were concluded. This is an increase from the 2005-2006 financial year where 19 ILUAs were concluded.<sup>24</sup>

In accordance with the Native Title Act each registered ILUA has effect as if it were a contract among the parties. All native title holders for the area covered by the terms of the agreement are legally bound, whether or not they are parties to the agreement. Once an ILUA negotiation is concluded, the Native Title Registrar must apply a compliance test to determine that it is ready to be registered and included on the Register of Indigenous Land Use Agreements.

Compliance criteria includes:

- making sure that the registration requirements of the Native Title Act and regulations are met;
- that the public and those who may have an interest in the area of the proposed ILUA have been notified; and
- consider any objections to the registration of the ILUA.<sup>25</sup>

ILUAs lodged or registered in 2006-2007 are shown in the following table.





<b>ILUAs lodged or registered in 2006-2007</b>									
<b>ILUAs</b>	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	<b>Total</b>
ILUAs lodged		3	3	28	6		4	1	45
ILUAs registered			1	14	7		7	2	31

### ***Native title agreements and related agreements***

There are other native title agreements which are not ILUAs. The National Native Title Tribunal describes these agreements as:

- full consent determinations that provide for the recognition of native title for alternative resolutions of claimant applications, as well as other agreements that fully resolve native title determination applications;
- agreements between parties that set the groundwork for more substantive outcomes in the future and may lead to the resolution of native title determination applications, for example agreements on specific issues, process or frameworks; and
- agreements for compensation for the loss or impairment of native title and agreements that allow for, and regulate access by, native title holders to certain areas of land.<sup>26</sup>

The following table shows native title agreements to 30 June 2007.<sup>27</sup>

<b>Native title agreements to 30 June 2007</b>									
<b>Type of agreement</b>	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	<b>Total</b>
Agreements that fully resolve native title determination applications		3	6	2	1		1	5	18
Agreements on issues, leading towards the resolution of native title determination applications		15	10	72	27		1	22	147



Process/ framework agreements		6	6	83	36		14	57	202
<b>Total</b>		<b>24</b>	<b>22</b>	<b>157</b>	<b>64</b>		<b>16</b>	<b>84</b>	<b>367</b>

### ***Future act agreements***

Future act agreements allow activities such as exploration or mining tenements to proceed. They may also be agreements that facilitate the reaching of milestones during the mediation of a future act application and that lead to the final agreement.

The following table shows future act agreements negotiated in 2006-2007.<sup>28</sup>

<b>Future act agreements negotiated in 2006–2007</b>									
<b>Type of agreement</b>	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	<b>Total</b>
Agreements that fully resolve future act applications			7	1				106	114
Milestones in future act mediations			11					53	64
<b>Total</b>			<b>18</b>	<b>1</b>				<b>159</b>	<b>178</b>

There are two types of future act right to negotiate applications:

- Section 35 future act determination application; and
- Section 32(3) expedited procedure objection application.

The tribunal is responsible for making determinations that a future act may or may not go ahead and whether there will be specific conditions placed on parties where it is decided that a future act may be done.<sup>29</sup>

The following table shows future act determination application outcomes in 2006-2007.<sup>30</sup>



<b>Future act determination application outcomes 2006-2007</b>			
<b>Tenement outcome</b>	<b>QLD</b>	<b>WA</b>	<b>Total 2006-07</b>
Application not accepted		1	1
Application withdrawn		6	6
Consent determination – future act can be done		169	169
Consent determination – future act can be done subject to conditions	5		5
Determination – future act can be done		1	1
Dismissed – s148(a) no jurisdiction		6	6
<b>Total</b>	<b>5</b>	<b>183</b>	<b>188</b>

Data are only available for Western Australia and Queensland because they receive the majority of future act right to negotiate applications. All of the determinations in Queensland and the majority of those in Western Australia have been by consent.

Section 237 of the Native Title Act provides for an expedited procedure which is triggered when a government party asserts in a public notification that the expedited procedure applies to a tenement application. Consequently, the right to negotiate does not apply. The Act also provides a mechanism whereby registered native title parties can lodge an objection to this assertion.

Western Australia, the Northern Territory and Queensland use the expedited procedure. Other states have either developed alternative state provisions, which include provisions to process tenements considered to have minimal interference or impact, or they have opted not to use the expedited procedure provisions.<sup>31</sup>

The following table shows objection application outcomes in 2006-2007.<sup>32</sup>



<b>Objection application outcomes 2006-2007</b>				
<b>Tenement outcome</b>	<b>NT</b>	<b>QLD</b>	<b>WA</b>	<b>Total 2006-07</b>
Consent determination – expedited procedure does not apply			6	6
Determination – expedited procedure applies			7	7
Determination – expedited procedure does not apply			7	7
Dismissed – Section 148(a) no jurisdiction		5	47	52
Dismissed – Section 148(a) tenement withdrawn		2	67	69
Dismissed – Section 148(b)			126	126
Expedited procedure statement withdrawn		6	19	25
Expedited procedure statement withdrawn – Section 31 agreement lodged		48		48
Objection not accepted			2	2
Objection withdrawn – agreement	6	28	507	541
Objection withdrawn – external factors			1	1
Objection withdrawn – no agreement		24	36	60
Objection withdrawn prior to acceptance		1	60	61
Tenement withdrawn		11		11
<b>Total</b>	<b>6</b>	<b>125</b>	<b>885</b>	<b>1,016</b>



## Native title: What might be claimed?

The High Court's decision in the *Mabo* case and the enactment of the Native Title Act by the Australian Parliament raised high expectations amongst Indigenous peoples and strong fears amongst some in the non-Indigenous community. From this starting point the land over which native title rights and interests may be claimed and are likely to be recognised has come to be far less than, perhaps, was first imagined. Further, where there is a conflict, native title has been construed as the lesser title, giving way to all other titles. Today the National Native Title Tribunal informs people that:

Native title may exist on:

- vacant (unallocated) crown land;
- some state forests, national parks and public reserves depending on the effect of state or territory legislation establishing those parks and reserves;
- oceans, seas, reefs, lakes and inland waters;
- some leases, such as non-exclusive pastoral and agricultural leases, depending on the state or territory legislation they were issued under; and
- some land held by or for Aboriginal people or Torres Strait Islanders.

Generally speaking, full native title rights resembling something like freehold ownership will only be available over some vacant crown land, certain Aboriginal reserves and some pastoral leases held by native title holders. This means that, for most of the areas where native title is successfully claimed, the country will be shared by the native title holders and other people with rights and interests in the same area. This sharing is sometimes called coexistence.

Native title rights and non-native title rights can be recognised over the same area, but the native title rights cannot interfere with other interest holders.<sup>33</sup>

## And the state of play?

In the last few pages of this chapter I have looked at the native title system today, from different perspectives. A casual reading suggests a system that is functioning. It is producing outcomes for Indigenous peoples. There have been determinations of native title and agreements on the use of and access to land and water. These agreements have provided other economic, social and cultural benefits.

However, the system may rightly be said to be in gridlock. It is moving very slowly, costing a lot in time, energy, emotion and resources. The native title rights and interests Indigenous peoples are obtaining are limited, and the land over which those rights and interests are recognised is very restricted. The common law barriers to recognition are prohibitive – as they are to obtaining compensation through litigation.

The previous government recognised the time it was taking to resolve native title matters and the cost – hence its 'reform' process. What appears to have been absent was a focus on whether the system was meeting the objects of the Native Title Act. The preamble to the Act – the reasons the legislation was passed – seems to have been forgotten.

From the perspective of human rights and equal opportunity, I cannot say that the system is providing effectively for the recognition and protection of native title.



## The changes to the system

The former Commonwealth Attorney-General announced plans for 'reform' to the native title system in 2005.

The areas of the system the government has focused its changes on are:

- the claims resolution process;
- particular Indigenous representative bodies (representative Aboriginal and Torres Strait Islander bodies and prescribed bodies corporate (PBCs));
- the funding of respondents to native title claims; and
- communication between Federal, state and territory governments.

Primarily, the changes have been directed at the problems of delay in resolving native title matters and the cost of doing so. The main changes made to different elements of the system are dealt with in later chapters of this report.

There were six inter-connected aspects to the 'reforms':

**The claims resolution process:** An independent review of the claims resolution process to consider how the tribunal and the Federal Court can work more effectively in managing and resolving native title claims.

**Non-claimants (respondents) funding:** Amending the guidelines to the native title respondents financial assistance program to encourage agreement-making rather than litigation.

**Native title representative bodies:** Measures to improve the effectiveness of representative Aboriginal and Torres Strait Islander bodies (also referred to as native title representative bodies (NTRBs)).

**Prescribed bodies corporate:** An examination of current structures and processes of prescribed bodies corporate (PBCs) including targeted consultation with relevant stakeholders.

**Consultation with state and territory governments:** Increased dialogue and consultation with state and territory governments to promote and encourage more transparent practices in the resolution of native title issues.

**Technical amendments to the Native Title Act:** Preparation of an exposure-draft of legislation for consultation on possible technical amendments to the Native Title Act to improve existing processes for native title litigation and negotiation.

The policy intent underpinning the plans for change, as stated by the Australian Government, was to 'achieve better outcomes for all parties involved in native title' by putting in place 'measures that will ensure native title processes work more effectively and efficiently'.<sup>34</sup> The changes were intended to promote the resolution of native title issues, wherever possible through agreement in preference to litigation.<sup>35</sup> There was the expectation that the cost of native title matters would be reduced and the time taken to resolve them shortened.

Wide-ranging legislative and administrative changes were made during the reporting period to implement the 'reforms'.



Two pieces of legislation were passed by the Australian Parliament during the reporting period to implement parts of the 'reforms': the *Native Title Amendment Act 2007* (Cth) (NTAA) and the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) (Technical Amendments Act).

**Native Title Amendment Act 2007** The majority of the provisions of the NTAA came into effect on the 15 April 2007.<sup>36</sup> They deal mainly with:

- representative Aboriginal/Torres Strait Islander bodies (Schedule 1);
- the claims resolution process (Schedule 2);
- prescribed bodies corporate (Schedule 3); and
- funding under Section 183 of the Native Title Act (respondent funding) (Schedule 4).

**Native Title Amendment (Technical Amendments) Act 2007**<sup>37</sup> The Technical Amendments Act was passed by the Australian Parliament on 20 June 2007 and received Royal Assent on 20 July 2007. The commencement date for the amendments has been staggered. A small number commenced retrospectively on 15 April 2007 while other amendments came into effect on 1 July, 21 July (affecting PBCs and NTRBs), and 1 September 2007. The main areas covered by the Technical Amendments Act are:<sup>38</sup>

- amendments to provisions applying to NTRBs to complement measures in the NTAA; and
- partial implementation of two of the recommendations from the *Report on the Structures and Processes of PBCs*.

Administrative changes made to the native title system are covered more fully in the chapters of this report dealing with changes to different elements of the system.

The changes made by the Technical Amendment Act have only been touched on briefly in this report as they are outside of the reporting period. However, I do have some initial concerns about the process. It appears that some of the amendments are substantial enough that they do not warrant the term technical amendments. I am concerned that by putting these in a technical amendment Bill they may have been the subject of less parliamentary scrutiny than if they were placed, more appropriately, in the NTAA.

## Concerns about the changes

Although it is still too early to determine the effect of the changes, they raise a number of concerns.

### General concerns

There are a number of general concerns I have about the changes:

- Recognition and protection of native title was not placed at the centre of the Australian Government's 'reform' agenda.
- Imperatives of government drive the changes, rather than those of Indigenous people and their human rights.



- A more efficient and effective system may be of benefit to Indigenous people. As may saving time and money in the resolution of matters. However they are not appropriate ends in themselves.
- The previous government did not direct its change process, nor target its changes, toward the protection and recognition of native title. This is the first of the four main objects of the Native Title Act. Nor does it appear to have kept in mind, and been guided by, the preamble to the Native Title Act.
- The efficiency and effectiveness, towards which the changes have been directed, may result in faster, cheaper 'processing' of native title issues and claims. It is not necessarily going to result in greater protection and recognition of native title. The changes to the system have not been directed to that end.

### Specific concerns

I also have specific concerns about some of the changes to the different areas of the system. These are dealt with in the chapters in this report covering each of the elements of the system subject to changes.

The changes have been undertaken by the Australian Government with the stated intent of improving the efficiency and effectiveness of the system and of promoting agreement-making in preference to litigation. They have been undertaken because of widespread concerns at the length of time taken for resolution of native title matters, and the cost of running the system. The changes have not been primarily driven by the intent to ensure that the native title system delivers to Indigenous people recognition and protection of their native title rights and interests.

One of the main objects of the Australian Parliament in passing the Native Title Act in 1993 was to provide for the recognition and protection of native title. Any changes of the system established under that Act must be driven and measured by the extent to which it is delivering on that object. Any increase in the timely, efficient and effective resolution of native title matters may be in the interests of Indigenous people but not if it results in faster, more efficient and effective extinguishment of native title or failure to gain recognition of it.

Timeliness, efficiency and effectiveness must be in the service of recognition and protection of Indigenous peoples' native title.

Promoting agreement in preference to litigation may assist Indigenous people to gain recognition of their native title. However an increase in the number of agreements and a reduction in litigated determinations do not necessarily mean there has been an increase in the ease with which Indigenous people are gaining recognition and protection of their native title rights and interests. It is quite possible to have an efficient and effective system resolving native title matters in a timely, economical manner through agreement-making which delivers little or no recognition of native title to Indigenous people.

The imperatives of government have driven the changes rather than the imperatives of Indigenous people and their exercise and enjoyment of human rights. As the native title system matures, its own operation becomes the focus rather than the outcome it was established to achieve.





The Australian Government, when announcing it was undertaking 'reform' of the native title system, conceptualised the 'reforms' as having six aspects. By doing this many aspects of the system have been left out despite the intent of the government to make the 'reforms' comprehensive. Aspects that are at the very heart of the system and go to the reason for its existence were not central to the change process and were not given much, if any, weight. These include the:

- effectiveness of the system in providing for the protection and recognition of human rights as measured by the nature of the rights and interests that are being recognised by the courts;
- experience of claimants or potential claimants for native title in utilising the system to obtain determinations of their native title or compensation for its extinguishment;
- quality, sustainability and enforceability of the agreements being entered into; and
- removal of impediments to Indigenous people obtaining recognition of their native title rights and interests arising from the interpretation by the courts of the requirements of the Native Title Act.

## Recommendations

- 1.1** That the Australian Government immediately appoint an independent person to conduct a comprehensive review of the whole native title system and report back to the Attorney-General by 30 June 2010. This review is to:
- focus on delivering the objects of the Native Title Act in accordance with the preamble;
  - seek significant simplification of the legislation, and structures so that all is in an easily discernable form; and
  - call for wide input from all stakeholders in native title, especially ensuring that the voice of Indigenous peoples is heard.
- 1.2** That the government convene a national summit on the native title system with extensive representation.
- 1.3** That the Attorney-General monitor the 2007 changes to the Native Title Act and prepare a report to Parliament before the end of 2009, in such a way that it identifies:
- the extent to which Indigenous people are gaining recognition and protection of native title in accord with the preamble to the Native Title Act;
  - the extent, if at all, to which the parties' rights are compromised by the changes; and
  - the extent to which the new powers given to the National Native Title Tribunal are used.



- 1 As quoted in Neate, G., *An overview of native title in Australia – some recent milestones and the way ahead*, paper delivered by the President of the National Native Title Tribunal at 11th Annual Cultural Heritage & Native Title Conference, Brisbane, Queensland, 21 July 2004, available online at: [http://www.nntt.gov.au/metacard/1092114365\\_2688.html](http://www.nntt.gov.au/metacard/1092114365_2688.html). The Hon Mary Gaudron QC was the only High Court justice to have heard and given judgment in relation to every native title case in the High Court from *Mabo v Queensland (No 1)* (1988) 166 CLR 186 to the *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538; 77 ALJR 356.
- 2 *Native Title Act 1993* (Cth), s209.
- 3 *Native Title Bill 1993, Explanatory Memorandum*, Part A, p1.
- 4 *Native Title Bill 1993, Explanatory Memorandum*, Part B, p1.
- 5 *Native Title Bill 1993, Explanatory Memorandum*.
- 6 *Native Title Bill 1993, Explanatory Memorandum*.
- 7 Hon Paul Keating, *Hansard*, House of Representatives, 16 November 1993, p2878, available online at: <http://parlinfoweb.aph.gov.au/piweb/viewdocument.aspx?ID=283806&TABLE=HANSARDR.>>
- 8 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459.
- 9 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (207) 238 ALR 1.
- 10 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 28 April 2006, per Merkel J.
- 11 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 28 April 2006, per Merkel J, corrigendum.
- 12 *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, 28 April 2006, per Merkel J, corrigendum.
- 13 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, summary, p1.
- 14 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, summary, p1.
- 15 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, summary, p2.
- 16 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p25.
- 17 Smith, B., Morphy, F., (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence*, Centre for Aboriginal Economic Policy Research, The Australian National University, Canberra, Research Monograph No. 27 2007. Available online at: [http://epress.anu.edu.au/c27\\_citation.html](http://epress.anu.edu.au/c27_citation.html).
- 18 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission, April 2006, Sydney.
- 19 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p42.
- 20 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p42.
- 21 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p42.
- 22 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p42.
- 23 National Native Title Tribunal, *300 Indigenous land use agreements*, Media Release, 25 October 2007, available online at [http://www.nntt.gov.au/media/1193211263\\_2716.html](http://www.nntt.gov.au/media/1193211263_2716.html), accessed 11 January 2008.
- 24 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p49.
- 25 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p63.
- 26 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p51.
- 27 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p52.
- 28 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p58.
- 29 These decisions or determinations also consider whether negotiations conducted to reach agreement about future act determination applications have occurred in good faith.
- 30 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p66.
- 31 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p67.
- 32 National Native Title Tribunal, *Annual Report 2006-2007*, Commonwealth of Australia, Canberra, 2007, p66.
- 33 National Native Title Tribunal, *What kind of areas can be claimed in a native title application?* NNTT Fact Sheet, available online at [http://www.nntt.gov.au/publications/1036375662\\_1544.html](http://www.nntt.gov.au/publications/1036375662_1544.html), accessed 1 December 2007.
- 34 Ruddock, P., (Attorney-General), *Reforming the Native Title System*, Media Release, 7 September 2005.
- 35 Ruddock, P., (Attorney-General), *Reforming the Native Title System*, Media Release, 7 September 2005.
- 36 The Native Title Amendment Bill 2006 was introduced into the House of Representatives by the Attorney-General on 7 December 2006. It was referred to the Senate Standing Committee on Legal and Constitutional Affairs for inquiry and report by 23 February 2007. It was passed by the Australian Parliament after some amendments and received the Royal Assent on 15 April 2007.
- 37 The *Native Title Amendment (Technical Amendments) Act 2007* (Cth) was passed by the Australian Parliament on 20 June 2007 and received the Royal Assent on 20 July 2007. The commencement date for the amendments has been staggered. A small number commenced retrospectively on 15 April 2007. Other amendments came into effect on 1 July, 21 July (affecting PBCs and NTRBs), and 1 September 2007.
- 38 The changes made by the *Native Title Amendment (Technical Amendments) Act 2007* (Cth) are intended to improve the workability of Native Title Act rather than fundamentally altering the native title system. The government stated that in making the amendment it did not revisit the amendments rejected by the Senate in 1998.



# Chapter 2

## Changes to the claims resolution process

Whether Indigenous peoples are able to gain full recognition and protection of their native title rights and interests, depends significantly on the process by which native title applications are resolved.

If the process is working well, Indigenous peoples will have their native title applications resolved in an equitable, timely, fair and efficient manner. They will face minimal legal, bureaucratic and administrative hurdles. Human rights will govern the implementation of the process, the engagement people have with it, and the outcomes people gain. For Indigenous peoples the exercise and enjoyment of human rights will be increased.

If the process is working poorly Indigenous peoples' applications for recognition of their native title, and for compensation, will be delayed and frustrated. They will be subject to overwhelming legal complexity, convoluted and extensive bureaucratic requirements, and tensions between institutions. The process will inhibit the exercise and enjoyment of human rights of Indigenous peoples.

The process by which native title applications are resolved – referred to as the claims resolution process in this report – was changed during 2007. This was part of the government's wider changes to the native title system.

The changes are based on recommendations of the claims resolution review (*CR Review*). The changes principally deal with the relationship between the Federal Court of Australia (the Federal Court or the court) and the National Native Title Tribunal (the tribunal) and the mediation of native title matters.

Whether the government's changes to the claims resolution process will resolve the problems identified by the *CR Review* will become clearer as the changes take effect.



### Important concerns

- Recognition and protection of native title were not the main focus of the changes.
- Emphasis on efficiency and effectiveness, which is the focus of the changes, may limit Indigenous peoples' ability to fully pursue their native title rights.
- Needs of government to reduce the number of claims in the system drove the changes, rather than the needs of Indigenous people and their human rights.
- Issues identified by the review are the result of deep systemic problems that the review and the changes do not deal with.

Specifically, my main concerns with the changes are:

- the review was limited to the relationship between the Federal Court and the tribunal;
- the review failed to include representatives of native title claimants or holders on the steering committee;
- changes in who may be a party to native title proceedings may not be effective in excluding parties with only a minor interest in the area of a native title claim;
- the tribunal's effectiveness as a mediator may not be increased by its new powers;
- the tribunal's exercise of its new coercive powers to direct attendance and production may have a negative impact on mediation, making it a quasi-judicial process;
- expansion of the tribunal's powers may make the native title system slower, more bureaucratic and more litigious to the detriment of Indigenous people realising their native title;
- the requirement to mediate in 'good faith' could be applied in an unjust way to native title claimants and their representatives;
- exercise by the tribunal of its new inquiry and review powers may significantly increase the amount of time and money spent in the mediation stage of proceedings without resolving issues;
- the Federal Court's powers to dismiss claims lodged in response to future act notices or that do not pass the registration test; and
- problems identified by the claims resolution review have not all been addressed.

The government's changes are an endeavour to tackle some of the issues identified by the *CR Review*. The wider issue of the operation of the whole system, as measured by its capacity to deliver on the objects of the *Native Title Act 1993* (Cth) (the Native Title Act), as understood by reference to the preamble to the Native Title Act, has not been tackled by the government.



It is this wider issue that is a central theme of this report: that the native title system may rightly be said to be gridlocked. It is not delivering fully on its objects as understood by the preamble. This is the basis for my overall recommendations set out in Chapter 1.

## Background to the changes

The changes to the claims resolution process are based on the *CR Review's* recommendations. The *CR Review* considered a wide range of issues about the native title system, despite its restrictive terms of reference. These issues provide a reference point against which to measure the operation of the system. They also provide a reference point to measure the success of changes to the system.

### The claims resolution review

The report of the review and the government response were released on 21 August 2006. The review suggested an option for institutional reform and made 24 recommendations. Most of these were accepted and acted upon by the government.

I am concerned that the *CR Review* was too narrowly focused on the roles of the tribunal and the Federal Court. It focused on measures for more efficient management of native title claims. The review did not focus on recognition and protection of native title. Proper consideration was not given to:

- the impact of the process on native title claimants and their representatives;
- making the process easier for native title claimants to have their native title claims determined in an equitable, fair, just and timely basis; and
- the preamble to the Native Title Act.

The Mineral Council of Australia considers that native title representative bodies 'are *the* fundamental component of the native title system'.<sup>1</sup> They were not given a central role in the review other than to be consulted. For a review of the claims resolution process to be comprehensive the claimants and their representatives needed to play a central part.

### Purpose of the claims resolution review

The purpose of the review was to:

... focus on the process by which native title applications are resolved. It will examine the role of the Native Title Tribunal (NNTT) and the Federal Court of Australia (the court) and inquire into and advise the Government on measures for the more efficient management of native title claims within the existing framework of the Native Title Act 1993 (the Act).

The Review will consider how native title claims can be most efficiently and effectively resolved. The Review will assess how the NNTT and the Court can maximise the potential for native title claims to be resolved in a quicker and less resource-intensive manner, primarily through mediation and agreement-making and where appropriate with a greater degree of consistency in the manner in which claims are handled.<sup>2</sup>



### ***Steering committee***

A steering committee was appointed to advise and oversee the review. The steering committee had a significant role in the final report of the review. The consultants noting:

In addition to receiving oral and written submissions during the course of the Review, we have had the benefit of testing ideas, submissions and our own analysis with the Steering Committee. The Steering Committee has played a significant role in providing feedback and focusing and streamlining the final Report.<sup>3</sup>

The steering committee comprised:

- a representative of the Attorney-General's Department;
- a representative of the Office of Indigenous Policy Coordination;
- the registrar of the Federal Court; and
- a member of the National Native Title Tribunal.

There was no representative from native title representative bodies.

Indigenous peoples claiming native title were not represented by their own organisations. They are the major users of the process in the Federal Court and the tribunal. The people for whom the Native Title Act was intended to be a special measure were given no central role in advising, focusing and providing feedback to the review—other than being offered the opportunity to make submissions.

### ***Main aim of the consultants***

In undertaking the review the consultants understood their main role to be:

... to review the existing NNTT and Federal Court processes and to make recommendations as to how they might be modified in order to resolve outstanding claims more quickly and cheaply, preferably by agreement. We proceed on the basis that the main intent is to dispose of claims made under the NTA by way of determinations made under section 225, preferably consent determinations pursuant to section 87.<sup>4</sup>

This focus on efficiency and effectiveness, on claims being resolved more quickly and cheaply, may benefit Indigenous people peripherally. However it ought not to have been an end in itself. Achievement of the objects of the Native Title Act, in particular providing for the protection and recognition of native title, ought properly to have been the focus.

The consultants did not see their role as making recommendations about how the process might be changed to better provide for the recognition and protection of native title. Nor how they might be changed to better enable the people who are applying to the court to have their legal rights determined. This limited the outcomes from the review.

### ***Findings of the review***

The review found institutional reform was needed to facilitate more effective resolution of claims, particularly in the role of the tribunal.<sup>5</sup> The consultants suggested five options for institutional reform and made 24 recommendations. The options and recommendations, the government's response, and the main legislative changes made to the Native Title Act are set out in an appendix to this report.



The government accepted most of the recommendations. It implemented legislative changes to give effect to them. The Native Title Act has been amended by Schedule 2 (Claims resolution review) of the *Native Title Amendment Act 2007* (Cth) and by the *Native Title (Technical Amendments) Act 2007* (Cth).

The option for institutional reform adopted by the government was to provide the tribunal with an exclusive mediation role, with the Federal Court able to intervene at any time. An alternative option favoured by one of the consultants was to provide the Federal Court with greater flexibility in alternative dispute resolution.

I have concerns about the capacity of the tribunal to adequately perform this expanded mediation role. I am also concerned about the reduced role of the Federal Court in mediation. These concerns are dealt with later in this chapter.

### ***Issues identified by the review***

The review made general observations and identified issues about the claims resolution process. It is useful to set these out in this report. They are indicative of a system struggling to resolve matters. Tackling these issues may improve the system and result in the resolution of matters more quickly and cheaply but this is yet to be proven. My concerns are, however, that tackling these issues in the way the previous government did is really only 'tinkering' with the system.

The issues identified by the review are part of much wider concerns I have about the operation of the whole native title system and its ability to deliver on the object of providing recognition and protection of native title.

Observations made by the review:

- Native title mediation was at the centre of many complaints.<sup>6</sup>
- There was a failure to identify issues required for mediation or for resolution by the court.
- It is often unclear in early stages of a claim whether the claim encompasses a particular area of land. This causes concern to landowners.
- The determination of the tenure history of the land involved was an issue.
- Many applications do not clearly identify the people on whose behalf the claim is made. This creates uncertainty on part of some Indigenous people as to whether or not they are included.
- Many of the informational requirements for proving native title are almost never obtained until the matter is well progressed or is being set down for hearing by the court.
- Finding authoritative information about connection and extinguishment can be very time-consuming and expensive.
- There were suggestions the tribunal and Federal Court perceived themselves as operating in competition with one another.
- The dual management of claims by both court and the tribunal can cause frustration and confusion amongst parties. There is a need for institutions to coordinate their efforts.



From these observations the *CR Review* identified a range of issues with the resolution of claims.

### Issues

- Duplication of mediation by the Federal Court and the tribunal;
- lack of tribunal mediation powers;
- a wide range of matters could be the subject of a tribunal inquiry to assist parties to clarify the issues;
- lack of good faith by parties to mediation;
- poor communications between the Federal Court and the tribunal;
- inefficient litigation process;
- tribunal reporting to the Federal Court;
- uncertainty about the claim;
- the 'connection' issue occupies most of the time and resources;
- delay in conducting tenure research;
- requirement for re-registration of claim after amendment of claim;
- authorisation and inter-Indigenous and intra-Indigenous disputes;
- difficulties caused by notification requirements;
- backlog of claims;
- unregistered claims;
- uncertainty about the law;
- the role of third party (non-government) respondents;
- gathering of evidence;
- retention of tribunal inquiry power under Section 137 of the Native Title Act; and
- need for guidelines, protocols and/or model orders and precedents for use across the country.

The *CR Review* made recommendations dealing with each of these. The *CR Review* also made suggestions, without recommendations, to deal with:

- overlapping claims; and
- lack of resources and adequate funding for claimants.

Other suggestions were:

- greater use of the tribunal's assistance services;
- rigorous case management; and
- use of pleadings.

In submissions to the *CR Review*, suggestions and comments were made on how to improve the system, including:

- relax the laws of evidence; and
- comments on the adversarial nature of the litigation process.





## Changes to the process

The main changes made by the government to the claims resolution process are to the roles of the Federal Court and the tribunal. Changes have also been made to the functions of the Native Title Registrar (the registrar).

Other changes to the native title system also impact on the claims resolution process. These are considered in other chapters of this report. They include changes to:

- representative Aboriginal and Torres Strait Islander bodies;
- respondent funding (under Section 183 of the Native Title Act); and
- prescribed bodies corporate.

## Parties to native title proceedings

The rights of people to become and remain as respondent parties to native title proceedings and compensation applications have been changed.

The changes seek to address concerns that:

Third party respondents are sometimes perceived as seeking unreasonable outcomes in the native title mediation process, which can delay the resolution of a claim that may otherwise be agreed between the major parties. Similarly, some respondent parties (including some self-funded respondents) are perceived as taking a disproportionately active role in a claim, despite having only a minor interest in the area of the claim.<sup>7</sup>

Changes have also been made to respondent funding under Section 183 of the Native Title Act (dealt with in a later chapter of this report). Whether these changes reduce the number and involvement of parties in any significant way will only be seen over time. My concern is that they will not.

Previously a person had a right to become a party if their 'interests' may be affected by a determination in the proceedings. Now, a party's interest must be in 'relation to land or waters'.<sup>8</sup>

The Federal Court previously had the power to join a party to the proceedings whose interest may be affected by a determination (whether or not it is an interest in relation to land or waters). When considering whether to join a party the court is now required to consider whether it is in the interests of justice to do so.<sup>9</sup> This requirement is welcome, however, I have some reservations about the degree to which it will be effective in limiting parties to the proceedings to those who might properly be said to have an interest that warrants becoming a party to the proceedings.

During mediation of an application the tribunal may refer to the Federal Court a question about whether a party should cease to be a party to a proceeding. This is on the basis that the person no longer has a 'relevant interest'.<sup>10</sup> A person has a relevant interest in a proceeding if the person's interests may be affected by a determination in the proceeding.<sup>11</sup> The court may dismiss a party as no longer having an interest affected by a determination in the proceedings.<sup>12</sup>



### **i Native title and compensation applications (Native Title Act, Section 61)**

Applications that may be made under Section 61 of the Native Title Act are:

- native title determination application – for a determination of native title in relation to an area;
- revised native title determination application – for revocation or variation of an approved determination of native title; and
- compensation application – for a determination of compensation.

### **i Affected persons who are parties to native title proceedings**

As well as the applicant, the following are affected persons who are parties to native title proceedings:<sup>13</sup>

- any registered native title claimant in relation to any of the area covered by the application;
- any registered native title body corporate in relation to any of the area covered by the application;
- any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application;
- any person who when the notice is given holds a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory (provided the registrar does not consider that, in the circumstances, it would be unreasonable to give notice to the person);
- persons claiming to hold native title in relation to land or waters in the area covered by the application; and
- persons whose interest, in relation to land or waters, may be affected by a determination in the proceedings.

### **Relationship between the tribunal and the Federal Court**

The review considered there was a need for greater, improved communication between the tribunal and the Federal Court. It recommended that the:

- court should convene regular user-group meetings and regional call-overs involving the tribunal; and
- the tribunal and the court should actively seek new methods of improved institutional communication.

The Federal Court and the tribunal have acted on these recommendations. They have taken actions to improve communication between the two institutions. These are considered later in the chapter. Whether the outcomes of these actions will



assist in the resolution of native title claims in a way that promotes recognition and protection of native title will be seen over time.

While the recommendations may assist, the issues are far deeper systemic ones.

My concern is that there may be tension between the two institutions arising from the enhanced powers and role given to the tribunal in mediations. Differing perceptions of the role to be played by each institution and the effectiveness of the tribunal in exercising its mediation role may be to the detriment of native title claimants seeking recognition of their native title.

The relationship between the Federal Court and the tribunal is crucial from the point of view of Indigenous people using these institutions to gain recognition and protection of their native title. Poor institutional communication, duplication, disharmony and rivalry only add to the great difficulties native title claimants already have in gaining recognition of their native title.

The relationship between the two institutions will be affected by the enhanced powers given to the tribunal and the changes to the Federal Court powers. This is particularly so in the mediation of native title proceedings. The tribunal has been given exclusive powers to mediate where the court has referred native title proceedings to it for mediation. The policy intent behind the changes was to remove duplication and improve claims management between the two bodies. Whether this is achieved will become clearer as the changes take effect.

The effect of the changes may be to create friction in the relationship between the court and the tribunal. The view of the Federal Court is that the changes to the native title system have not changed the underlying principle that native title determination applications are proceedings in the court. Mediation is an adjunct to those proceedings and directed to their prompt resolution. As such, in the view of the court, the changes do not involve a significant departure from the existing roles and responsibilities of the court in the resolution of claims.<sup>14</sup>

Justice French, one of the most experienced Federal Court judges in the area of native title, in a speech titled 'Plus ça change, plus c'est la même chose' (the more things change the more they are the same) observed:

These new provisions may all be regarded as intended to enhance the powers and effectiveness of the Tribunal in the conduct of mediation proceedings. They do not affect the constitutional distinction between the functions of the Court and those of the Tribunal. They do not alter the essential character of the native title proceedings as proceedings in the Court and subject to its supervision and control. Nor do they overcome the inescapable burdens and costs associated with the application of the Mabo rules as transmogrified by the Native Title Act. In their effect upon the role of the Tribunal and the Court the amendments represent a partial return to the pre 1998 Native Title Act in that the Tribunal is again given exclusive authority in relation to mediation while mediation is on foot.<sup>15</sup>

In the National Native Title Tribunal's 2006-2007 annual report the president, Graeme Neate, stated (perhaps in response to Justice French's observations):

It is incumbent on all parties to use the reforms to reach the objectives of a more effective and efficient native title system, so that it cannot be said about these reforms in years to come 'Plus ça change, plus c'est la même chose' – the more things change the more they are the same.



The extent to which the court exercises its power to supervise and control native title proceedings may also create tension with the tribunal exercising its new mediation powers. This may also impact negatively on native title claimants having their applications for native title dealt with efficiently and with minimal bureaucratic constraints.

Perhaps these comments by Justice French and Graeme Neate suggest an underlying concern, throughout the native title system, that the changes are just 'tinkering' with the system. This is the view of this report. The fundamental problems with the system remain.

### ***Action taken by the Federal Court and the tribunal***

In response to the recommendations of the review, the Federal Court and the tribunal have jointly convened Native Title User Group meetings in Western Australia, Victoria and South Australia in July and August 2007. A national protocol addressing the administrative relationships between the court and the tribunal (in place since 2003) has been updated.

The Chief Justice of the Federal Court issued a 'Notice to Practitioners' on 8 June 2007 setting out revised arrangements for the conduct of native title cases. The arrangements reflect a greater emphasis by the court on the regional management of native title cases. This allows the progress of cases to be coordinated and streamlined across a region or regions.

In particular, the notice provides for:

- regional management of the national native title list by Native Title List Judges in each State; and
- identification of priority cases for trial that could act as lead cases for a region by resolving legal questions or factual issues of general application.

It is envisaged that this process will ensure that:

- groups of applications in a particular region be reviewed together regularly;
- a specific and credible mediation timetable on a case specific and/or regional basis is prepared and complied with;
- those cases filed directly in response to future act notices and by which the applicant seeks to gain procedural rights are identified; and
- a timely resolution of cases is pursued.<sup>16</sup>

The tribunal has provided a number of regional mediation progress reports and regional work plans to the court. The Native Title Registrar has provided two quarterly reports to the court under Section 66C of the Native Title Act. Since the legislative changes, the President of the National Native Title Tribunal has issued a series of Procedural Directions relating to specific changes to the claims resolution process. The tribunal is implementing a national case flow management scheme. This has a strong regional focus and involves the creation of three separate lists of claimant applications:



- *The registrar's list:* Applications waiting to undergo, or in the process of undergoing, registration testing, or notification, or awaiting referral by the Federal Court for tribunal mediation. As well as applications filed within three months after the notification day specified in a future act notice.
- *Regional list:* Applications referred to the tribunal for mediation but insufficiently developed for substantive mediation. As well as applications that are likely to be withdrawn, dismissed or struck out or for some other reason should be placed in abeyance.
- *Substantive list:* Applications sufficiently developed for substantive mediation, particularly where negotiations are likely to lead to an outcome within the next 12-24 months.<sup>17</sup>

This new regional approach to the management of native title cases is likely to improve the efficiency and effectiveness of the system.

### **Mediation of native title proceedings**

Mediation of native title claims was one of the main problem areas identified by the review.

The government sought to deal with concerns about mediation by giving additional powers to the tribunal. It is by no means clear that the changes will improve the efficiency and effectiveness of the native title system in reducing the cost and time taken to resolve native title matters, let alone providing for the recognition and protection of native title. The extent of these changes and how they work in practice will be seen over 2007-2008 and subsequent reporting periods.

The Federal Court has expressed concerns about some of the changes to the powers of the court and the new powers proposed for the tribunal.<sup>18</sup> The registrar noted that 'the challenge is to ensure that the roles of the tribunal and the court are complementary and integrated in dealing with the jurisdiction.'<sup>19</sup>

Speaking about the additional powers and functions given to the tribunal the president, Grahame Neate, commented:

... significantly as the additional powers and function are, they alone will not expedite the resolution of native title claims by consent. The Tribunal has contended that any improvement to the processes and practices of the Tribunal and the Federal Court will have a negligible effect on the resolution of native title claims by agreement if the parties to the proceedings are unwilling or unable to participate productively or in a timely manner. Important as the Tribunal and the Court are to the operation of the system, it is the parties that determine whether, what and when any outcomes are agreed.<sup>20</sup>

Given this understanding, it is unfortunate that the claimants or their representative bodies were not more involved in the claims resolution review.



## ***Mediation by the tribunal***

Changes have been made to the mediation of native title claims. The intent is that all native title claims should be referred promptly to the National Native Title Tribunal for mediation, subject to specific exceptions.<sup>21</sup> And that mediation is not to be carried out by both the Federal Court and the tribunal at the same time. The changes reflect the review's recommendation that mediation should not be duplicated.

I am concerned that the tribunal may not be an efficient and effective mediator of native title claims; and that the interests of native title claimants will be adversely affected by the curtailment of the Federal Court's mediation role. I am also concerned that, overall, the increased mediation role and powers given to the tribunal will make the native title system slower, more bureaucratic and more litigious.

Native title proceedings remain Federal Court proceedings and these proceedings are adversarial by their nature. I am concerned that this is at the heart of the problems with the native title system. In order to get recognition of their native title rights, claimants are required to prove in an adversarial context every element of their case. The non-Indigenous respondents in the *Wongatha* case put the claimants to proof of every element of their claim.<sup>22</sup> There were 1,426 objections made by the respondents just to the experts' reports (of which there were 30).<sup>23</sup> In the *Jango* case certain anthropologists' reports were the subject of in excess of 1,000 objections by the respondents.<sup>24</sup> (These cases are considered in detail in a later chapter of this report.)

### **Important concern**

The process is not an inquiry into whether native title exists in an area and who holds it. It is a contest between parties where the onus is on the Indigenous people – to prove they have what is required by the Native Title Act – as understood by the common law.

In this context, mediation by an institution that does not have the power to determine native title is always going to be difficult. Parties undertaking mediations in the tribunal are fully aware of the wider adversarial context in which their claims sit. While the tribunal may use its new coercive powers to make parties attend mediation and produce documents it cannot force parties to mediate.

Decisions of the tribunal exercising its new powers to review and conduct inquiries – are not binding on the parties – nor are they on the Federal Court. Issues considered by the tribunal after review or inquiry may have to be dealt with again in the Federal Court. The overall effect may be that parties lose trust in the tribunal as a mediator. They may approach mediation before the tribunal as if it were a hearing because of the reporting by the tribunal to the Federal Court. Yet because the tribunal's decisions are not binding, parties may choose to raise the matters again in the Federal Court. Native title proceedings may become even more drawn out, more litigious and the subject of more bureaucracy.



The new powers given to the tribunal ‘beef up’ what it can do. It still doesn’t have the power or the gravitas of the Federal Court. Without these I am concerned that mediation by the tribunal will not be as effective as increasing the role of the Federal Court in applying alternative dispute resolution processes to native title proceedings. This was the alternative option for institutional reform preferred by one of the consultants conducting the review.



The changes to the native title process have not altered the general requirement that the Federal Court must refer every application under Section 61 of the Native Title Act to the tribunal for mediation. However, the court no longer has a general discretion not to refer matters to the tribunal for mediation. This is unless it makes an order under Section 86B(3) of the Native Title Act.<sup>25</sup>

Under Section 86B(3) the court must order that there be no mediation by the tribunal if the court considers that:

- any mediation (whether or not by the tribunal) will be unnecessary because of an agreement between the parties about the proceeding or for any other reason;
- there is no likelihood of the parties being able to reach agreement in the course of the mediation by the tribunal on any of the matters that may be mediated under Section 86A of the Native Title Act; and
- the applicant in relation to the application under Section 61 has not provided sufficient detail about certain matters in Section 86A of the Native Title Act.

Factors the court is to take into account when deciding if there is to be no mediation are set out in Section 86B(4) of the Native Title Act.

The tribunal has a right to appear before the Federal Court at a hearing to determine whether to make an order under Section 86B(3) (that there be no mediation by the tribunal) in relation to the proceedings.<sup>26</sup>

If the court orders that there be no mediation by the tribunal this does not appear to preclude the court from referring the matter to a court-appointed mediator or a court registrar.

While a matter is in mediation by the tribunal no aspect of the proceedings is to be mediated by the Federal Court under the *Federal Court of Australia Act 1976* (Cth). Nor is any order to be made by the Federal Court requiring the parties to attend before a registrar of the Federal Court for a conference, with a view to satisfying the registrar that all reasonable steps to achieve a negotiated outcome of the proceeding have been taken.<sup>27</sup>

The Federal Court can order mediation by the tribunal to cease if the court considers that:

- any further mediation (whether or not by the tribunal) will be unnecessary in relation to the proceedings; or



- there is no likelihood of the parties being able to reach agreement in the course of mediation by the tribunal on, or on facts relevant to, any of the matters set out in Section 86A(1) or (2) of the Native Title Act in relation to the proceedings. It may do this of its own motion, at any time in a proceeding.<sup>28</sup>

This suggests the proceeding may be referred to another mediator after the court has ordered the tribunal to cease mediation.

A party to a proceeding may apply to the court for an order that the mediation cease in relation to the whole of the proceeding or a part of the proceeding.<sup>29</sup> A party may do this at any time after three months from the start of mediation. If the party making the application is:

- the applicant in relation to the application under Section 61; or
- the Commonwealth, a State or a Territory;

the court must make an order that mediation by the tribunal is to cease. This is unless the court is satisfied that the mediation is likely to be successful in enabling parties to reach agreement on any of the matters set out in Section 86A(1) or (2).<sup>30</sup>

There have been significant concerns expressed about the tribunal's ability to conduct mediations effectively. A number of submissions made to the *Inquiry into the Native Title Amendment Bill 2006*<sup>31</sup> (by the Standing Committee on Legal and Constitutional Affairs) raised issues about the effectiveness of the tribunal in conducting mediation.<sup>32</sup>

In response to these concerns the committee in its report expressed the view that:

there should be a more focussed approach by the NNTT to mediation, especially given that the amendments in the Bill propose to strengthen the powers of the NNTT in relation to mediation. This could be achieved by enlarging the mediation training provided to members. In the committee's view, the two weeks' training referred to at the hearing, even for people who bring extensive dispute resolution experience to the NNTT, seems inadequate in a specialised area of dispute resolution.<sup>33</sup>

The committee recommended that the tribunal develops an ongoing mediation training program for its members, having particular focus upon the characteristics and requirements of mediating native title matters.<sup>34</sup>

The minority of the committee in their report expressed the view that:

1.41 Fundamentally, the granting of these expanded powers to the NNTT conflates the NNTT's role as a mediator with determinative, quasi-judicial functions. The Office of the Registrar of the Federal Court submitted that these powers involved:

[a] confusion of the mediation role of the NNTT with other functions of a determinative nature, particularly the power to make coercive directions.

1.42 Similarly, the Northern Land Council made the following comments:

... the proposal that the Court's mediation and case management function be curtailed in favour of the Tribunal is extraordinary, cannot be justified, and is a fundamental policy error.





1.43 Labor and the Greens consider that the proposed expansion of the NNTT's powers will make the native title system slower, more bureaucratic, and more litigious. Further, like a majority of stakeholders, Labor and Greens Senators are not convinced that the NNTT is capable of exercising these expanded powers effectively or properly. Labor and the Greens Senators are concerned that the NNTT is not guided by the same standards of impartiality and independence as the courts. While Recommendations 3 to 7 of the majority report offer some piecemeal improvements to the proposals in Schedule 2 of the Bill, they do not fix a fundamentally flawed scheme.<sup>35</sup>

Given these concerns of the minority, government needs to keep a close watch on how the tribunal is exercising its expanded mediation powers. Special attention is needed to determine the extent that mediation is providing for the protection and recognition of native title.

### ***Tribunal given right of appearance in the Federal Court***

The tribunal has been given a right of appearance in the Federal Court at a hearing that relates to any matter currently before the tribunal for mediation. The right of appearance is for the purpose of assisting the court.<sup>36</sup> The *CR Review* recommended this. It reflects the review's assessment that the litigation process could be more efficient if the tribunal played a more active role in court hearings. This change is likely to be beneficial to the resolution of native title proceedings.

### ***Regional mediation progress report and regional work plan***

The Federal Court may request the tribunal to provide reports on the progress of mediations being undertaken by the tribunal. These reports are to 'assist the Court in progressing proceedings.'<sup>37</sup> The reports are:

- *a regional mediation progress report* – on the progress of all mediations conducted by the tribunal for areas of State, Territory or region; and
- *a regional work plan* – setting out the priority given to each mediation being conducted by the tribunal for areas of State, Territory or region.

A regional mediation progress report and a regional work plan may be provided to the Federal Court, without a request, if the president of the tribunal considers that either or both would assist the court in progressing proceedings.<sup>38</sup>

I have concerns about the potential for regional plans to be made, and priorities set, without proper regard to the objectives and priorities of the relevant native title representative body. There is a need for coordination between the court, the tribunal, and the native title representative bodies. This is to ensure that the reports and plans the court requests from the tribunal, will support the objectives and priorities of the relevant representative Aboriginal and Torres Strait Islander body. Including with any strategic and operational plans they may have. (I note that as a result of the changes native title representative bodies are no longer required to have strategic plans. I consider this in the chapter on representative Indigenous bodies in this report).

The establishment by the Federal Court of the native title user's group may alleviate some of these concerns. It is a matter of observing the change over subsequent reporting periods.



### ***Federal Court to have regard to tribunal reports***

When deciding whether to make an order in relation to an application referred to it for mediation, the Federal Court must take into account:

- mediation reports;
- a written report setting out the results of the mediation (it must be provided by the presiding member to the court);
- a written report on the progress of the meditation (it must be provided by the presiding member if the court requests it, or if the presiding member considers it would assist the court in progressing the matter); and
- regional mediation progress reports and regional work plans (regional mediation progress reports and regional work plans must be provided by the tribunal if the court requests them).<sup>39</sup>

#### **i Presiding member**

A presiding member is a member of the National Native Title Tribunal presiding over a mediation conference. The presiding member at a conference may be assisted by another member of the tribunal or by a member of staff of the tribunal.<sup>40</sup>

### ***Tribunal power to direct attendance and production of documents***

The tribunal has been given new powers of direction. Under the changes the presiding member of the tribunal in a mediation conference may:

- direct a person to attend a mediation conference;<sup>41</sup> and
- direct a party to produce to the presiding member, for the purposes of a mediation conference, a document in its possession, custody or control, if the presiding member considers that the document may assist the parties to reach an agreement on any matters<sup>42</sup> they are mediating under the Native Title Act.<sup>43</sup>

The presiding member may report to the Federal Court if the member has given a direction to appear or produce documents and it has not been complied with. The report sets out the details of the direction and the reasons for giving the direction.<sup>44</sup> The Federal Court may make orders in similar terms to the subject of the report.<sup>45</sup> That is, to appear or produce documents.

Failure to comply with the Federal Court order may result in proceedings for contempt of court. This carries a severe penalty. Failure to comply with the direction of the presiding member of the tribunal may amount to contempt of the tribunal which attracts a maximum penalty of 40 penalty units.<sup>46</sup> (A penalty unit is a dollar amount that is adjusted over time.)



These changes give effect to recommendations of the *CR Review*. They seek to address the perception that the tribunal had insufficient legislative powers of compulsion to effectively conduct mediation.

### **Concern**

I am concerned about the place of compulsory powers in the conduct of mediation. Any attempt to compel people to mediate threatens the very nature of mediation. Applicants must be free to pursue whatever mediation strategy they consider is in their interests. These changes, along with the provisions requiring parties to act in good faith in the conduct of mediation, potentially compromise this freedom.

The forced production of evidentiary material in mediation could disadvantage and possibly be prejudicial to an applicant in the event that the matter proceeds to trial. Power to give directions to produce documents may result in mediation becoming unnecessarily formal and even adversarial in character. Giving the tribunal these compulsive powers may prove counter-productive to providing a forum in which parties can explore the settlement of native title claims without being distracted by legalistic argument.

The government should keep a close watch on the exercise of these new powers by the tribunal.

### ***Obligation to mediate in good faith***

A new 'good faith' requirement has been inserted into the Native Title Act. Each party and each person representing a party must act in good faith in relation to the mediation.<sup>47</sup>

The presiding member may report the failure of a person to act in good faith in relation to the conduct of the mediation to:

- the Federal Court;
- the body that funded the party not acting in good faith; and
- the legal professional body (who issued the practising certificate to the legal practitioner considered not to have acted in good faith).

A copy of the report must be provided to the person to whom it relates. The Native Title Act is silent on what the Federal Court is to do with such a report.<sup>48</sup>

Where the tribunal considers that a government party or its representative did not act in good faith in relation to a mediation, it may include that failure in its annual report.<sup>49</sup>

This change gives effect to one of the recommendations of the *CR Review*. It is to address the problem reported to the review of a growing tendency for parties to mediation to exhibit a lack of good faith during mediation. A 'good faith' requirement was perceived to be necessary to ensure 'parties act responsibly'.<sup>50</sup>



In practice, the obligation to act in good faith may not easily be enforced. Some native title representative bodies have expressed concerns about how the good faith provisions will be acted upon and what conduct will be considered to be not in good faith. Concerns have also been expressed about what the Federal Court will do with any report that a party has not acted in good faith. Experience with the 'good faith' requirements in future act negotiations has led some native title representative bodies to be concerned about an added administrative burden on them if they are required to defend an allegation that they did not act in good faith.

Both the President of the National Native Title Tribunal and the Commonwealth Attorney-General's Department have provided guidance to parties on the good faith provisions:

- Procedural Direction No 2 of 2007, 26 September 2007, by the President of the National Native Title Tribunal: Party or party's representative failing to act in good faith in relation to the conduct of mediation.
- *Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal Mediation* put out by the Commonwealth Attorney-General's Department in October 2007.
- Attorneys-General have put together a code of conduct, including commentary.

The government must monitor the implementation of the 'good faith' requirements.

### **The tribunal's reviews and inquiries**

The tribunal has been given a new review function. It has also been given broad powers to conduct a new type of inquiry (in addition to the tribunal's inquiry power under Section 137 of the Native Title Act). I have concerns about both these functions.

#### ***Review by the tribunal***

Under the new review function,<sup>51</sup> the president of the tribunal may refer for review by the tribunal, the issue of whether a native title claim group (who is a party in a proceeding) holds native title rights and interests (as defined in Section 223(1) of the Native Title Act) in relation to land or waters within the area the subject of the proceedings.

The issue may only be referred if:

- it arises in the course of mediation by the tribunal; and
- the member presiding at the mediation conference<sup>52</sup> recommends that the review be conducted. The presiding member may only make the recommendation if the member considers that a review of the issue would assist the parties to reach an agreement on any of the matters required for a determination of native title (under Section 225 of the Native Title Act). This is after consultation with the parties to the proceeding.



### **i Purpose of mediation**

(in proceedings not involving compensation) (Native Title Act, Section 86A(1))

The purpose of mediation by the National Native Title Tribunal (in a proceeding that does not involve a compensation application) is to assist the parties to reach agreement on some or all of the matters required for a determination of native title. These matters are:

- whether native title exists or existed in relation to the area of land or waters covered by the application;
- if native title exists or existed in relation to the area of land or waters covered by the application;
- who holds or held the native title;
- the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
- the nature and extent of any other interest in relation to the area;
- the relationship between the native title rights and interests in relation to the area and any other interest in relation to the area; and
- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.

The tribunal member conducting the review must provide a written report setting out the findings of the review to the presiding member in the mediation and the participating parties.<sup>53</sup> The member may provide a copy to the Federal Court and other parties in the proceedings.<sup>54</sup>

The findings of the review are not binding on any of the participating parties. The findings are not a determination of native title rights and interests. Statements at a review are without prejudice. In proceedings before the court, unless the participating parties otherwise agree, evidence may not be given, and statements may not be made, concerning any word spoken or act done in the course of the review.<sup>55</sup>

The new review power is in response to a recommendation of the *CR Review*. It is arguably broader than the power recommended by the review. The review recommended that the tribunal be given power to 'conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed'.<sup>56</sup>

Reviews do not require the consent of the parties although the presiding member must consult with the parties before recommending to the president of the tribunal that a review be undertaken.



I have a general concern that reviews may increase the time and money spent on the mediation stage of proceedings without resolving the issues between the parties. I refer to my recommendations at the end of this chapter.

### ***Inquiry by the tribunal***

The tribunal has been given a broad power to conduct a new type of inquiry referred to as a *native title application inquiry*. The inquiry relates to a matter or an issue relevant to the determination of native title under Section 225 of the Native Title Act.<sup>57</sup> It is in addition to any inquiry the tribunal may be directed by the Commonwealth Minister to hold under Section 137 of the Native Title Act.

The president of the tribunal may direct the tribunal to hold a native title application inquiry where the Federal Court has referred a proceeding to the tribunal for mediation. This is provided the proceeding raise a matter or an issue relevant to the determination of native title under Section 225.<sup>58</sup>

The president may direct a native title application inquiry:

- on his own initiative; or
- at the request of a party to a proceeding; or
- at the request of the Chief Justice of the Federal Court.

The president of the tribunal may only direct that such an inquiry be held if satisfied that resolution of the matter or issue concerned would be likely to:

- lead to agreement on findings of fact; or
- lead to action that would resolve or amend the application to which the proceeding relates; or
- lead to something being done in relation to the application to which the proceeding relates; and
- the applicant in relation to any application that is affected by the proposed inquiry agrees to participate in the inquiry.<sup>59</sup>

A request for an inquiry may be made before the court refers the proceeding to the tribunal for mediation.<sup>60</sup>

#### **i Determination of native title (Native Title Act, Section 225)**

A determination of native title is a decision of the Federal Court whether or not native title exists in relation to an area of land or waters.

If native title does exist the determination includes:

- who the persons, or each group of persons, holding the common or group rights comprising native title are; and
- the nature and extent of the native title rights and interests in relation to the area; and
- the nature and extent of any other interests in relation to the area; and



- the relationship between the native title rights and interests in relation to the area and the other interest in relation to the area (taking into account the effect of the Native Title Act); and
- to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease-whether; the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.

The changes to the tribunal's powers implement recommendations of the *CR Review*. The review thought a wide range of matters could be the subject of an inquiry by the tribunal. These included overlapping claims, authorisation and other kinds of inter-Indigenous and intra-Indigenous disputes. The review envisaged that '[c]onceivably, an inquiry could be ordered even before a matter is referred for mediation, for example, to attempt to resolve some preliminary issue such as an authorisation question or an overlap'.<sup>61</sup> This is at odds with the intent behind the legislative changes as expressed in the Explanatory Memorandum. That is, while a request may be made prior to referral of an application for mediation, a formal referral by the Federal Court of the relevant proceedings is necessary before the president can direct an inquiry be held.<sup>62</sup>

### Concern

I am concerned that use by the tribunal of its new inquiry and review powers will significantly increase the amount of time and money spent in the mediation stage of proceedings without resolving issues. The results of a review or inquiry will not bind the parties or the Federal Court.

### Consent determination dealing with part of a claim area

The Native Title Act provides for the Federal Court to determine native title to part only of a claim area on the agreement of the parties to the proceedings. (They must be parties to the proceedings at the time of the agreement). The agreement of all of the following parties to native title proceedings is needed for such a determination:

- the applicant; and
- each registered native title claimant in relation to any part of the area over which the determination is being made; and
- each representative Aboriginal/Torres Strait Islander body for any part of the area over which the determination is being made; and



- the Commonwealth Minister; (if the minister is a party to the proceedings at the time the agreement is made, or has intervened in the proceeding at an time before the agreement is made); and
- the relevant State or Territory Minister; and
- any local government body for any part of the area over which the determination is being made.

The changes to the Native Title Act have limited the other parties who must be a party to an agreement to:

- parties who hold an interest in relation to land or waters, at the time the agreement is being made, in any part of the area over which the determination is being made; and
- parties who claim to hold native title in relation to land or waters in the area over which the determination is being made.<sup>63</sup>

It is not necessary to gain the agreement of parties to proceedings whose interests in land or waters is outside of the area over which parties have agreed to a determination of native title (even where the interest is within the wider claim area). Where the native title claim has been registered and the partial determination results in the claim being amended,<sup>64</sup> the amended claim is exempt from having the registration test applied again.<sup>65</sup>

This change could have a positive effect on the resolution of native title claims allowing the partial settling of claims without the agreement of all the parties to the proceedings for the whole claim.

### **Registration test not to apply to some amended claims**

A number of amendments to the Native Title Act have been made reducing the necessity for the registration test to be applied to some amended claims. These are welcome administrative changes.

### **Dismissal of native title applications**

As a result of the changes the Federal Court may dismiss:

- certain classes of application for native title determinations which are lodged in response to future act notices. This is where the question whether the future act can be done is resolved in some way. This is unless there are compelling reasons not to dismiss the application.<sup>66</sup>
- claims the Native Title Registrar refuses to register because they fail the registration test on merit grounds under Section 190B of the Native Title Act.<sup>67</sup>

These changes are targeted at reducing the backlog of claims in the system. The review commented on the backlog and ways to reduce it. They looked at claims lodged in response to future act notices, where they considered there may be a lack of incentive to proceed, and unregistered claims.

I have concerns about the dismissal of native title applications by the Federal Court. Native title proceedings appear to be treated differently from other proceedings in the Federal Court. The standard for dismissal applied to native title proceedings





appears not to be the same as for other cases. The dismissal of applications is prejudicial to the interests of applicants.

### ***Dismissing claims lodged in response to a future act notice***

The Federal Court *must* dismiss an application for a determination of native title in relation to an area, unless ‘there are compelling reasons not to do so’, if:

- the application is for a determination of native title in relation to an area; and
- it is apparent from the time of the application that it is made in response to a future act notice given in relation to land or waters within the area; and
- the future act requirements are satisfied in relation to each future act identified in the future act notice; and

either

- the person fails to produce evidence in support of the application despite a direction by the court to do so, or to take other steps to have the claim sought in the application resolved despite a direction by the court to do so; or
- (in the case where the situation of the person failing to produce evidence above doesn’t apply) the court considers that the person has failed, within a reasonable time, to take steps to have the claim sought in the application resolved.<sup>68</sup>

The legislation sets out when it is considered apparent from the timing of an application that it is made in response to a future act notice. This may also be prescribed by the regulations.<sup>69</sup>

The court must not dismiss the application without first ensuring that the person is given a reasonable opportunity to present a case about why the application should not be dismissed.<sup>70</sup>

The *CR Review* formed the view that about a third of the claims in the system appear to have been lodged in response to future act notices. The *CR Review* expressed the opinion that they are often only lodged to obtain procedural rights.<sup>71</sup>

Once future act claims are registered, there appears to be little incentive for the claimants to seek to progress their claim – indeed there is considerable risk that the claim will not be successful and the claimants will lose the procedural rights conferred by registration of the claim. Registration under the NTA can also confer procedural rights under other legislation, such as the *Aboriginal Cultural Heritage Act 2003* (Qld). Registration also gives claimants a basis for holding themselves out as the traditional owners of the relevant land.

Where there appears to be no desire on the part of the applicant (or anyone else) to proceed with the claim and no real prospect of the claim proceeding any further, there is no point in actively managing the claim towards a determination. The time and resources of the Court, the NTRB [native title representative body], the NNTT and other parties should not be used for claims that the applicants do not wish to progress. Those claims are sometimes placed into an ‘abeyance list’ or otherwise not progressed.



We consider that the Court should be required to dismiss these claims unless satisfied that there are compelling reasons not to do so. We are aware that many parties are reluctant to seek the dismissal of such claims due to their desire to maintain good relations with the applicants.

As well as my general concerns about the provisions allowing for dismissal of native title applications, I am concerned at the lack of discretion given to the Federal Court whether to dismiss claims lodged in response to future act notices. The court is obliged to dismiss such applications.

### ***Dismissing claims that do not pass the registration test***

New provisions have been inserted in the Native Title Act enabling the Federal Court to dismiss applications that do not meet the merit conditions of the registration test (set out in Section 190B of the Native Title Act).<sup>72</sup> The court is not compelled to dismiss these claims.

For the court to be able to dismiss the claim, the claim must not be accepted for registration either because:

- it does not satisfy all of the merit conditions; or
- it is not possible to determine whether all of the merit conditions have been satisfied because of a failure to satisfy the procedural conditions about procedural and other matters (set out in Section 190C of the Native Title Act).

The court must also be satisfied that certain avenues for reconsideration and review (set out in the Native Title Act) have all been exhausted and the claim not registered.

An application for dismissal of a claim may be made by a party or by the court on its own motion and provided:

- the court is satisfied the application has not been amended since consideration by the Native Title Registrar, and is not likely to be amended in a way that would lead to a different outcome once considered by the Native Title Registrar; and
- in the court's opinion there is no other reason why the application should not be dismissed.

These changes are based on proposals (in the *CR Review*) for dealing with unregistered claims. Their proposals centred on giving the Federal Court power to dismiss certain claims that failed to meet the merit conditions of the registration test.

The proposals are aimed at removing at an early stage those applications which appear to have little prospect of success, avoid the cost of notification and the unproductive identification and involvement of respondent parties. These proposals:

- would not result in any loss of procedural rights (as the claimant application is not registered), and
- would not result in any loss of native title rights and interest (as the claimant group could file another, better prepared application).<sup>73</sup>



The *CR Review* also proposed that the Native Title Registrar:

- re-apply the registration test to applications that had previously failed the registration test; and
- apply the test to applications that did not have to undergo the registration test.

The government has acted on these proposals.

I have concerns about using the registration test to dismiss applications. An administrative officer, not a judicial one, applies the test. The considerations in Section 190B are relevant to the merits of a claim, yet they are not the same as the matters the court determines when deciding the native title case. Further the interpretation given to Section 190B by delegates of the Native Title Registrar has varied over time. The provisions for reconsideration and review of the decision that the application does not meet the merit conditions are welcome. However, they are likely to add to the drain on resources of applicants.

## Outstanding issues

The changes have not dealt with a range of issues raised by the *CR Review*. Some of these are central to the operation of the system and the resolution of claims.

### Overlapping claims

Overlapping claims for native title result in extensive delays and make it very difficult for negotiations to proceed, even where the parties are willing to do so. The review made no recommendations, only some suggestions, to dealing with this very important area (see page 27 of the *CR Review*).

### Connection

Connection with country is usually the most controversial issue in a native title matter and therefore occupies most of the time and resources of all participants in the process. To deal with this the *CR Review* recommended that more use should be made of the tribunal's research facilities and, in particular, its ability to produce research reports.

There needs to be detailed consideration of the whole subject of providing connection reports: when they are prepared and by whom, and the level of connection material required by the states and territories before they will engage in serious mediation. This is a matter that needs to be on the agenda when considering Commonwealth-State relationships.

### Delay in conducting tenure research

Early research into tenure may narrow the issues between the parties significantly. It is a fundamental task that should be completed as early as possible.

It would be preferable for this to be done prior to a claim being lodged, but often it is not done until much later. It may be prudent for State and Territory governments to target their resources towards determining the tenure history of the area claimed at an early stage.<sup>74</sup>



The attitude and approach of states and territories to making tenure information available, is crucial to more efficient resolution of native title matters.

The *CR Review's* answer to this was to recommend that consideration be given to assisting the tribunal to continue to develop a database of current tenure material.

### **Lack of resources**

The need for more resources and funding for claimants has been stated over and over by many reviews and reports into the native title system (see the chapter in this report on representative Aboriginal and Torres Strait Islander bodies).

The *CR Review* noted:

Lack of adequate funding, especially for claimants, is a common cited reason for claims not progressing. As claimants must perform much of the preliminary work, resource constraints can limit their ability to carry out such work as quickly and thoroughly as others might wish.<sup>75</sup>

It is essential that NTRBs [Native title representative bodies] are properly resourced so that they can engage experienced lawyers, anthropologists and other experts to ensure that those resources which they do have are efficiently used.

The review also presented other suggestions for dealing with the lack of resources available to claimants including:

- use of tribunal's assistance services;
- rigorous case management; and
- use of pleadings.

### **Uncertainty about the law**

The law is still being developed on important connection issues like:

- the relevant 'society';
- the degree and kind of connection sufficient to sustain a claim; and
- the extent to which traditional laws and customs may change before they cease to be 'traditional'.

There are also legal questions yet to be determined, particularly about extinguishment, because of differences in tenures between states.

In response to these outstanding legal issues the *CR Review* recommended that the tribunal and parties be encouraged to make greater use of the provisions of the Native Title Act and of the Federal Court Rules such as Order 29 rule 2 to refer particular issues of fact and law to the court for determination.



### Concern

Encouragement to make greater use of the law does not address the essence of the problem. The way the common law has evolved and interpreted the Native Title Act has placed almost insurmountable burdens in the way of Indigenous people in their endeavours to obtain protection and recognition of their native title.

In Chapter 1 of this report I have recommended a comprehensive review of the legal issues – and the common law – and their impediments to native title. After that, where necessary, legislative change are needed to reverse the narrowing and constraining of native title that has taken place from the *Wik* amendments in 1998 and through the High Court decisions in *Yorta Yorta*<sup>76</sup> and *Ward*.<sup>77</sup> These matters are considered later in this report in the chapter on significant court decisions.

### Gathering of evidence

Preservation of evidence hearings and limited evidence hearings represent an excellent opportunity for relevant connection evidence to be tendered and examined.

The *CR Review* recommended that the court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolutions. The extent to which this is occurring needs to be assessed by government.

### Section 137 inquiries

There is power under Section 137 of the Native Title Act to require the Commonwealth Minister to give written notice to the tribunal to hold an inquiry (this is separate to the new inquiry power). As I understand it, the Section 137 power has never been invoked. Little thought appears to have been given to using this mechanism, perhaps because it needs to be triggered by the minister. The *CR Review* considered there were many attractive aspects to Section 137 inquiries. The review recommended that the section not be amended. They offered no suggestions for how to promote its use.

### And I commend

This chapter and indeed all of this report make numerous recommendations. All of them, I sincerely believe, can contribute to the improvement to the native title system. There is however no doubt that the native title ship needs to return to port for a major refit. I strongly commend the convening of a national summit on native title that will consider how to reform the Native Title Act and system to ensure that it is simple, understandable, and in accordance with the preamble to the Native Title Act.



## Recommendations

- 2.1** That funding be made available for or through the National Native Title Council to develop plain English guides for Indigenous people to understand the recent changes to the native title system, and how to claim native title after the changes.
- 2.2** I support Recommendation 8 of the Senate Standing Committee on Legal and Constitutional Affairs, in its report on the Native Title Amendment Bill 2006, (February 2007).
- That the Attorney-General monitor the operation of proposed Division 4AA of Part 6 of the Native Title Act (the review power) and prepares a report to Parliament after two years of operation to assess the following:
- the extent to which these measures are used;
  - the effect they have on the cost and time for the resolution claims;
  - the extent, if at all, to which the parties' rights are compromised by this process; and
  - the extent to which there is duplication between the functions of the Federal Court and the National Native Title Tribunal in this area.
- 2.3** That Section 94C of the Native Title Act be amended so that the Federal Court is not obliged to dismiss an application under Section 61 of the Act, in accordance with Section 94C.



- 1 Mineral Council of Australia, *Submission to the Joint Parliamentary Committee on Native Title Representative Bodies*, July 2004.
- 2 Hiley, GH., Levy, K., *Report of the Claims Resolution Review* (terms of reference), 31 March 2006, p11.
- 3 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p13, para 2.7.
- 4 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p12.
- 5 Ruddock, P., (Attorney-General), *Hansard*, House of Representatives, 7 December 2006, p16.
- 6 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p20.
- 7 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p41, para 4.134.
- 8 *Native Title Act 1993* (Cth), s84(3)(a)(iii).
- 9 *Native Title Act 1993* (Cth), s84(5).
- 10 *Native Title Act 1993* (Cth), s136DA.
- 11 *Native Title Act 1993* (Cth), s136DA(6).
- 12 *Native Title Act 1993* (Cth), s84(9)(b).
- 13 *Native Title Act 1993* (Cth), s84(3). A State or Territory may also be a party to the proceedings (*Native Title Act 1993* (Cth), s84(4)). The Commonwealth may intervene in proceedings. If it does so then for the purposes of the institution and prosecution of an appeal from a judgment in the proceedings it is taken to be a party to the proceedings (*Native Title Act 1993* (Cth), s84A).
- 14 Anderson, I., National Registrar, Native Title, Federal Court of Australia, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2007*, 15 October 2007.
- 15 French, J., *Plus ça change, plus c'est la même chose? – The 2007 Amendments to the Native Title Act 1993* (Cth), Address given at the Native Title Representative Bodies Conference in Cairns, 8 June 2007, para 14.
- 16 Anderson, I., National Registrar, Native Title, Federal Court of Australia, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2007*, 15 October 2007.
- 17 Neate, G., President of the National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of Native Title Report 2007*, 11 October 2007.
- 18 Federal Court of Australia, *Submission to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006*, 25 January 2006.
- 19 Federal Court of Australia, *Submission to the inquiry by the Standing Committee on Legal and Constitutional Affairs into the Native Title Amendment Bill 2006*, 25 January 2006.
- 20 Neate, G., *New powers and functions of the National Native Title Tribunal: An overview and analysis*, paper delivered to the Negotiating Native Title Forum, Rendezvous Hotel, Melbourne, 26 February 2007.
- 21 Ruddock, P., (Attorney-General) *Hansard*, House of Representatives, 7 December 2006, p16.
- 22 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9)(2007) 240 ALR 75.
- 23 *Risk v Northern Territory and Quall v Northern Territory* [2006] FCA 404, per Mansfield J. at para 456 referring to *Harrington-Smith on behalf of the Wongatha People v State of Western Australia* (No 9)(2007) 240 ALR 75.
- 24 *Risk v Northern Territory and Quall v Northern Territory* [2006] FCA 404, per Mansfield J. at para 458 referring to *Jango v Northern Territory* (2006) 152 FCR 150.
- 25 *Native Title Act 1993* (Cth), s86B(1).
- 26 *Native Title Act 1993* (Cth), s86BA(1).
- 27 *Native Title Act 1993* (Cth), s86B(6).
- 28 *Native Title Act 1993* (Cth), s86C(1).
- 29 *Native Title Act 1993* (Cth), s86C(2).
- 30 *Native Title Act 1993* (Cth), s86C(3).
- 31 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006*, Commonwealth of Australia, February 2007.
- 32 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006*, Majority report, paras 4.14 to 4.29.
- 33 Standing Committee on Legal and Constitutional Affairs, *Inquiry into the Native Title Amendment Bill 2006*, majority report, para 4.29.
- 34 Senate Standing Committee on Legal and Constitutional Affairs, *Report on Native Title Amendment Bill 2006 [Provisions]*, February 2007, Recommendation 7.
- 35 Standing Committee on Legal and Constitutional Affairs, *Minority report into the Native Title Amendment Bill 2006*, paras 1.41, 1.42, 1.43, p65.
- 36 *Native Title Act 1993* (Cth), s86BA.
- 37 *Native Title Act 1993* (Cth), s86E, s136G(2A).
- 38 *Native Title Act 1993* (Cth), s86E(2), s136G(3A).
- 39 *Native Title Act 1993* (Cth), s136G, s86E and s94B.
- 40 *Native Title Act 1993* (Cth), s136A.
- 41 *Native Title Act 1993* (Cth), s136B(1A).
- 42 The matters are those mentioned in s86A(1) or (2) of the *Native Title Act 1993* (Cth).



- 43 *Native Title Act 1993* (Cth), s136CA, s86A(1), (2).
- 44 *Native Title Act 1993* (Cth), s136G(3B).
- 45 *Native Title Act 1993* (Cth), s86D(3).
- 46 *Native Title Act 1993* (Cth), s177.
- 47 *Native Title Act 1993* (Cth), s136B(4).
- 48 *Native Title Act 1993* (Cth), s136GA.
- 49 *Native Title Act 1993* (Cth), s136GB.
- 50 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p17.
- 51 *Native Title Act 1993* (Cth), s136GC to s136GE.
- 52 Held under s136A of the *Native Title Act 1993* (Cth), in relation to the proceedings.
- 53 *Native Title Act 1993* (Cth), s136GE(1).
- 54 *Native Title Act 1993* (Cth), s136GE(2).
- 55 *Native Title Act 1993* (Cth), s136GC(7).
- 56 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, Recommendation 2.
- 57 *Native Title Act 1993* (Cth), s138A-138G.
- 58 *Native Title Act 1993* (Cth), s225: A determination of native title is a determination whether or not native title exists in relation to a particular area (the determination area) of land or waters and, if it does exist, a determination of:
- (a) who the persons, or each group of persons, holding the common or group rights comprising the native title are; and
  - (b) the nature and extent of the native title rights and interests in relation to the determination area; and
  - (c) the nature and extent of any other interests in relation to the determination area; and
  - (d) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
  - (e) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.’
- 59 *Native Title Act 1993* (Cth), s138B(2)(b).
- 60 *Native Title Act 1993* (Cth), s138B(3).
- 61 Hiley, G., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, para 4.1555.
- 62 Native Title Amendment Bill 2006, *Explanatory Memorandum*, paras 2.162, 2.163.
- 63 *Native Title Act 1993* (Cth), s87A.
- 64 *Native Title Act 1993* (Cth), s87A.
- 65 *Native Title Act 1993* (Cth), s190A(1A).
- 66 *Native Title Act 1993* (Cth), s94C.
- 67 *Native Title Act 1993* (Cth), ss190D(6), (7).
- 68 *Native Title Act 1993* (Cth), s94C.
- 69 *Native Title Act 1993* (Cth), ss94C(1A), (1B).
- 70 *Native Title Act 1993* (Cth), s94C(2).
- 71 Hiley, G., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, para 4.121, 4.122, 4.123.
- 72 *Native Title Act 1993* (Cth), ss190F(5), (6).
- 73 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, para 4.127, p39.
- 74 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p31.
- 75 Hiley, GH., Levy, K., *Report of the Claims Resolution Review*, 31 March 2006, p35, paras 4.105, 4.107.
- 76 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALR 538.
- 77 *Western Australia v Ward* (2002) 191 ALR 1.





# Chapter 3

## Changes to representative Indigenous bodies

It is crucial to the functioning of the native title system that there are organisations representing Indigenous people and assisting them to gain recognition and protection of native title. The *Native Title Act 1993* (Cth) (the Native Title Act) provides for two main types of organisations to assist Indigenous people with native title, and land and water issues:

- representative Aboriginal and Torres Strait Islander bodies (representative bodies or NTRBs); and
- corporate bodies which may hold and manage native title (referred to as prescribed bodies corporate (PBCs) which may become registered native title bodies corporate (RNTBCs)).

As part of its changes to the native title system, the previous government announced changes to representative Aboriginal and Torres Strait Islander bodies that deal with native title, and prescribed bodies corporate. The changes to representative Aboriginal and Torres Strait bodies are considered in this chapter. I consider the changes to prescribed bodies corporate in a later chapter.

Without these organisations the native title system would stop, and Indigenous people would be prevented from accessing their native title rights and interests. Exploration companies and those wishing to mine and develop land may not be able to gain clearance of native title issues. There would be no certainty the agreements they make are with the people recognised to speak for country. Consent determinations of native title would not be reached and there is high potential that Indigenous peoples would be exploited by unscrupulous parties.

Such organisations enable traditional owners to gain protection and recognition of their native title rights. If they work well they assist traditional owners to meet two basic needs:

- to look after their country; and
- to ensure that their country provides a future for them.

When Indigenous people control the organisations they offer the opportunity to provide models of Indigenous participation in decision-making. This allows for the exercise of the right to effective participation and the right to self-determination.



Important points about these organisations include:

- It is imperative that Indigenous corporate bodies be well resourced, including funding, if the native title system is to operate at all. This is essential if the system is to be released from its current gridlock. This has been said by numerous reviews and in previous native title reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner. It cannot be stressed enough.
- Indigenous corporate bodies must be secure, with a solid presence and permanence. They should be respected for the significant statutory bodies they are. Too often they have been treated as secondary organisations in the native title system and subject to high-level discretionary decisions by executive government. In some recent reviews the corporate bodies were not given a central role. This is unacceptable, and was particularly evident in the claims resolution review.
- Transparency, objectivity and predictability in executive decision-making about these corporations are important.
- There is the potential for these organisations to fulfil more of a role in the economic and social development of Indigenous people. It is something I have argued for in my previous reports. In many parts of the country, representative bodies are the main Indigenous organisation responsible for land and sea issues. They are one of the elements of the native title system that could be used beyond their native title claims role. This capacity will only be realised if they are properly resourced and if expertise is developed within them, and retained, to deal with wider responsibilities.

The above points are important if the representative bodies, prescribed bodies corporate, and registered native title bodies corporate are to:

- deliver protection and recognition of native title; and
- assist native title holders to use native title, and the native title system, for economic, social and cultural outcomes.

The points are especially important if representative bodies are to perform a wider function in assisting Indigenous people to fully exercise and enjoy their human rights.

**i** For an organisation to be able to hold native title it must be incorporated and have the characteristics prescribed by regulation. It is known as a prescribed body corporate (PBC). Once the Federal Court has made a determination that it is to hold the native title, it is registered on the Native Title Register held by the National Native Title Tribunal (the tribunal). It is then known as a registered native title body corporate (RNTBC).



## About representative bodies

The main functions of representative bodies are:<sup>1</sup>

- facilitation and assistance;
- certification of applications for determinations of native title, and applications for registration of Indigenous land use agreements;
- dispute resolution;
- notification of people who hold or may hold native title of certain notices relating to land or waters;
- agreement making; and
- internal review: provide a process for registered native title bodies corporate, native title holders, and persons who may hold native title, to seek review by the representative body of its decisions and actions.

A key aspect of exercising these functions is to provide assistance to native title claimants and holders to:

- make applications under the Native Title Act (including claimant and compensation applications);
- respond to proposed activity and development on land or waters that may affect native title rights (known as 'future acts'); and
- negotiate Indigenous land use agreements (ILUAs). (These are voluntary and legally binding agreements that are made between one or more groups, and others, about the use and management of land or waters.)

The Native Title Act also confers other functions on representative bodies under Section 203BJ.

### NTRBs and NTSDAs

Under the Native Title Act the Commonwealth Minister for Families, Housing, Community Services and Indigenous Affairs may recognise certain representative Aboriginal and Torres Strait Islander bodies to perform certain functions under the Act. Those bodies the minister recognises to perform all the functions, are known as native title representative bodies (NTRBs).<sup>2</sup>

The government may also fund other bodies or persons to perform some or all of the functions of a representative body.<sup>3</sup> These are referred to as alternative native title service delivery agencies (NTSDAs or NTS).

The abbreviations NTRB and 'representative body' are used to refer to both NTRBs and NTSDAs throughout this chapter.

There are currently 14 NTRBs and three NTSDAs performing functions of representative bodies under the Native Title Act.<sup>4</sup>

The importance of these organisations to the operation of the native title system cannot be stressed enough. The Attorney-General's Department itself recognises that representative Aboriginal and Torres Strait Islander bodies are the key to Indigenous people accessing their native title rights and interests. They are integral to the operation of the whole native title system:<sup>5</sup>



NTRBs are the primary bodies that represent and assist claimants in achieving native title outcomes related to specified lands or waters. The delivery of native title related services and access to the native title system is not limited to NTRBs and those who hold or may hold native title are not obliged to use their services. However, the Government sees NTRBs as playing a key role in the native title system and funding to assist claimants is primarily allocated to NTRBs.

As indicated, those who hold (or may hold) native title are not obliged to use the services of NTRBs. However, the complexity of the Native Title Act and the claims process, the resources needed to pursue a claim and the length of time claims take to resolve, all make it very difficult to pursue a native title claim without using a representative body.

### Funding of representative bodies

The Australian Government provides funding to NTRBs from an allocation of funds provided for the native title system as a whole. The government also provides operational and strategic support so NTRBs can perform their statutory functions in accordance with their approved strategic and operational plans.<sup>6</sup>

This funding is granted by the Department of Families, Housing, Community Services and Indigenous Affairs – through its Office of Indigenous Policy Coordination (OIPC) – under a Program Funding Agreement.

In the last three years, out of the over \$100 million a year spent on the native title system in Australia, native title representative bodies have received an average of \$51 million a year.

<b>Native title program funding 2006-07<sup>7</sup></b>	<b>\$57,481,968</b>
Aboriginal Legal Rights Movement Inc	3,060,660
Cape York Land Council Aboriginal Corporation	4,063,579
Central Desert Native Title Services Limited	1,012,500
Central Land Council	3,050,797
Central QLD Land Council Aboriginal Corporation	2,450,876
Goldfields Land and Sea Council Aboriginal Corporation	4,133,244
Gurang Land Council (Aboriginal Corporation)	2,322,237
Kimberley Land Council Aboriginal Corporation	94,282
Kimberley Land Council Aboriginal Corporation	4,696,020
Native Title Services Victoria Ltd	3,563,124



New South Wales Native Title Services Limited	4,033,685
Ngaanyatjarra Council Aboriginal Corporation	2,648,721
North Queensland Land Council Native Title Representative Body Aboriginal Corporation	2,745,642
Northern Land Council	2,074,465
Queensland South Native Title Services Ltd	3,374,995
South West Aboriginal Land and Sea Council Aboriginal Corporation	3,507,707
Carpentaria Land Council Aboriginal Corporation (Tony Grieves as Administrator for)	3,679,263
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	6,970,171

<b>Native title program funding 2005-06<sup>8</sup></b>	<b>\$48,107,304</b>
Aboriginal Legal Rights Movement Inc	2,753,647
Cape York Land Council Aboriginal Corporation	3,320,000
Carpentaria Land Council Aboriginal Corporation	3,141,200
Central Land Council	2,565,177
Central Queensland Land Council Aboriginal Corporation	2,525,000
Goldfields Land and Sea Council Aboriginal Corporation	3,447,000
Gurang Land Council (Aboriginal Corporation)	2,191,700
Kimberley Land Council Aboriginal Corporation	3,815,716
Native Title Services Victoria Ltd	2,430,865
New South Wales Native Title Service	3,246,760
Ngaanyatjarra Council Aboriginal Corporation	2,524,583
North Queensland Land Council Native Title Representative Body Aboriginal Corporation	2,483,200
Northern Land Council	2,761,216



Queensland South Native Title Services Ltd	1,922,700
South West Aboriginal Land and Sea Council Aboriginal Corporation	2,926,560
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	6,051,980

<b>Native title program funding 2004-05<sup>9</sup></b>	<b>\$47,406,064</b>
Aboriginal Legal Rights Movement Inc	2,832,700
Cape York Land Council Aboriginal Corporation	3,406,400
Carpentaria Land Council Aboriginal Corporation	2,978,000
Central Land Council	2,563,600
Central Queensland Land Council Aboriginal Corporation	2,630,500
Goldfields Land and Sea Council Aboriginal Corporation	3,209,000
Gurang Land Council (Aboriginal Corporation)	1,958,000
Kimberley Land Council Aboriginal Corporation	3,680,391
Native Title Services Victoria Ltd	2,537,930
New South Wales Native Title Service	3,368,493
Ngaanyatjarra Council Aboriginal Corporation	2,582,750
North Queensland Land Council Native Title Representative Body Aboriginal Corporation	2,274,200
Northern Land Council	2,683,540
Queensland South Representative Body Aboriginal Corporation	1,612,190
South West Aboriginal Land and Sea Council Aboriginal Corporation	3,358,900
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	5,729,470

The government works out the amount of funding each individual NTRB receives, after consideration of a number of factors. The former Minister for Indigenous Affairs stated that the amount of funding NTRBs receive to deliver their services for the 2005-2006 income year was determined on the basis of operational plans



developed by NTRBs (which estimate the cost of implementing their prioritised activities).<sup>10</sup>

In the 2005-2006 year, the Kimberley Land Council (KLC) gave an example of the practical process through which their funding was determined:<sup>11</sup>

In accordance with the provisions of the NTA the KLC Executive Committee and staff are involved in an annual process of selecting and giving priority to all matters arising from its statutory functions. KLC also meets with the National Native Title Tribunal and the Western Australian Office of Native Title to agree to prioritisation of work programs currently before the Federal Court of Australia. Staff and financial resources are allocated and claims are progressed in the reporting period in accordance with the priority assigned. *It should be noted that the requests placed on the KLC for assistance to progress Native Title activities from our members far exceed the resources available.* [emphasis added]

### Amount of funding

NTRBs play an essential role in the native title system. Without these bodies, Indigenous people would not be able to access their native title rights and interests. Without them the system would grind to a halt. Adequate funding of NTRBs to ensure they can fulfil their many and varied functions is essential to the operation of the whole system:<sup>12</sup>

The under-funding of NTRBs means that, in representing the native title claim group, they are compelled to put their scarce resources into the immediate demands of the native title system rather than fully engage in the various levels of negotiation triggered by the native title process. Consequently NTRBs cannot maximise the capacity of native title agreements to lay the foundation for the achievement of Indigenous peoples' human rights...

The inadequate funding of NTRBs relative to their functions has had the cumulative effect of undermining their capacity to fully and effectively engage in the native title process. In addition, the distribution of funds to other institutions and individuals within the native title system also affects the way in which NTRBs must allocate the scarce resources they do receive. Of increasing concern is the way in which the government's allocation of funds to third parties wishing to participate as respondents in the native title claim process is funnelling NTRBs resources towards litigation rather than addressing the needs of the claimant group.

Yet for many years the situation of funding of NTRBs and the inadequacy of funding has been an issue highlighted by all interested in native title, including lawyers, industry representatives, Social Justice Commissioners and NTRBs. Rio Tinto believes:<sup>13</sup>

... the most significant reason for these difficulties [those of delays caused by the limited capacity of some NTRBs and their ability to engage effectively in native title negotiations] and the resulting constraints on the effective operation of the native title system, is the inadequate resourcing of NTRBs.

The Minerals Council of Australia considers that NTRBs are 'chronically under resourced'.<sup>14</sup>

Various reviews of NTRBs have confirmed these statements, recommending that funding of these bodies be reviewed and ultimately increased. The most recent review is by the Parliamentary Joint Committee on Native Title and the Aboriginal



and Torres Strait Islander Land Accounts. The Committee's *Report on the operation of Native Title Representative Bodies* was finalised on 21 March 2006 (the *NTRB Report 2006*). The recommendations in the *NTRB Report 2006* are considered later in this chapter.

## Previous reviews of NTRBs

A summary of reviews that have occurred over the past decade (in 1994, 1998, 2001, 2002, 2003 and 2006) reinforces the message that NTRBs need to be resourced to perform their functions properly. Generally they have not been.<sup>15</sup>

### ***Parker report***<sup>16</sup>

In November 1994, the Parker report was presented to government. This report looked at the effectiveness of NTRBs. It addressed:

- staffing;
- measures to maximise appropriate native title services to Indigenous people; and
- the appropriateness of financial and administrative arrangements then in place for NTRBs.

Even at that early stage of the native title system, the report found that representative bodies had become 'the workhorses of the native title regime'.

The report recommended:

- NTRBs should be the first point of contact for all Indigenous people seeking to have their native title recognised;
- explicit mandatory functions should be established; and
- representative bodies should be adequately resourced.

### ***Love-Rashid report***<sup>17</sup>

Presented to government in 1998, the Love-Rashid report looked at the relationship between funding levels and functions of NTRBs. It assessed their future funding and resource requirements in the light of the 1998 amendments to the Native Title Act. The report found that:

- workloads of representative bodies were significantly higher than allowed for by the level of funding provided;
- many representative bodies were unable to fulfil their core functions and also provide professional management and administrative systems;
- corporate governance within representative bodies was generally deficient; and
- the shortcomings of the representative bodies imposed considerable costs on the wider community.

### ***PJC report on ILUAs***<sup>18</sup>

In September 2001 the Parliamentary Joint Committee on Native Title published its report on Indigenous land use agreements (ILUAs). NTRBs play a critical role in the negotiation of ILUAs. The committee found that they are hampered by significant





shortages of funds. As a result NTRBs have been forced to rely on funding assistance from proponents as well as state and local governments. The report recommended an increase in funding to NTRBs. The committee also noted difficulties that NTRBs have in securing qualified and experienced staff to manage the processes for which the bodies are responsible.

### ***Miller report***<sup>19</sup>

In July 2002 the Miller report reviewed the NTRB system at the request of the minister. The review was to determine whether the minister was meeting his obligations under the Native Title Act for representative bodies. The review considered the quality of NTRBs strategic plans and the system for distributing funds to representative bodies. The report concluded that all the minister's responsibilities under the Act had been met, with the exception of the requirement to table annual reports of representative bodies in both Houses of Parliament. However, the review found:

Neither the strategic plans, funding applications nor annual reports of NTRBs contained sufficient information to enable the then functioning ATSIC to base its funding allocations on quantifiable outputs/outcomes; and

ATSIC funding to NTRBs addressed known native title funding needs but it raised concerns that such funding was not fairly distributed among NTRBs on the basis of relative need.

The report made a number of recommendations to improve the funding process for NTRBs. The recommendations contained a requirement for operational plans to be included in annual funding applications. This was to give effect to strategic plans and to provide much needed performance information.

### ***Prosser report***<sup>20</sup>

In August 2003, the House of Representatives Standing Committee on Industry and Resources report on resource exploration in Australia was tabled in Parliament. The report found that the native title processes were leading to considerable delays, expense and uncertainty in determining mining applications. A significant cause of these problems was competing and overlapping native title claims. The report recommended that NTRBs be provided with additional funding, targeted and limited to support activities that facilitate negotiation processes.

### ***PJC report on the effectiveness of the National Native Title Tribunal***<sup>21</sup>

In December 2003 the Parliamentary Joint Committee on Native Title reported on the effectiveness of the National Native Title Tribunal. The report noted that NTRBs have central responsibility for the resolution of overlapping claims and intra-Indigenous disputes and recommended that a further inquiry be conducted into the work demands and funding of NTRBs.

### ***PJC report on NTRBs***

The Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Accounts reported on the operation of native title representative bodies on 21 March 2006 (the *NTRB Report 2006*). (The reference to the *NTRB Report 2006* includes reference to the dissenting report of the committee.)



## The NTRB Report 2006

The changes to representative Aboriginal and Torres Strait Islander bodies resulting from amendments to the Native Title Act need to be considered in light of the recommendations in the *NTRB Report 2006*. This is the most recent report on NTRBs. It is a comprehensive review of the issues and difficulties faced by NTRBs. The report was released prior to the 2007 amendments to the Native Title Act impacting on NTRBs and PBCs.<sup>22</sup>

The committee looked at the capacity of NTRBs to discharge their responsibilities under the Native Title Act, examining their:

- structure and role;
- funding and staffing; and
- relationships with other organisations.

The committee made 19 recommendations.

I support the recommendations in the majority report. The recommendations must however, be expanded to incorporate the discussion and recommendations made by the minority in their dissenting report, particularly those for funding NTRBs.

From the report I draw the conclusions that:

- in NTRBs, there is a strong need to develop skills, and conduct training in management and corporate governance;
- the chronic under-resourcing of NTRBs must be addressed, particularly for statutory functions like agreement-making.

I note they are still valid. These conclusions are also supported by correspondence received by me from NTRBs in compiling this report.

The previous government commenced implementation of some of the recommendations in the *NTRB Report 2006* through funding the Casten Centre for Human Rights Law and the Aurora project. Particularly, those recommendations concerning staffing and capacity building (recommendations 10, 11, 12, and 14) were addressed through the Aurora project. I commend that action and the work of the Aurora project generally. The Aurora project is currently being reviewed by the government as it is on limited term funding which expires on 30 June 2008.

I also support the dissenting view that a broad interpretation of the agreement-making function should form the basis of any review of NTRB funding levels. Further, this should reflect 'the established scope of Indigenous Land Use Agreements, which have been used to achieve social and economic objectives.'<sup>23</sup> Indigenous land use agreements (ILUAs) are increasingly used for a wide range of matters.

There are however a number of recommendations in the *NTRB Report 2006* that the government did not accept, or accepted in part, which I believe need to be fully acted upon.<sup>24</sup>

The government did not accept recommendation 2, that the Commonwealth establish an independent advisory panel to advise the minister on the re-recognition of NTRBs once their recognition period has expired. I am concerned that this recommendation was not acted upon and recommend such action now be taken. I refer to this again later in this chapter.



The recent changes to the Native Title Act affecting representative bodies increase the discretionary power given to executive government. It is particularly so with recognition of representative bodies. There is a need for an independent advisory panel to have input into the decision by the minister to re-recognise a representative body. It is necessary to ensure that there is at least some check on the minister's decision-making to avoid the perception that it may be influenced by political considerations.

A number of recommendations were made to increase or review funding. The dissenting report was very forceful in driving home the urgent and ongoing need for increased funding for NTRBs.

### **NTRB review's recommendations on funding**

Of the recommendations regarding funding made by the majority of the committee, recommendations five and six were accepted, in part, and recommendation eight was not.

- *Recommendation 5:* The Commonwealth immediately reviews the adequacy of the level of funding provided by the OPIIC to NTRBs for capacity building activities including management and staff development, and information technology.
- *Recommendation 6:* The Commonwealth, in conjunction with industry groups, consider providing additional pooled funding for emergency and unforeseen situations, such as future act matters, litigation or court proceedings; and that the OIPC develop guidelines and procedures that will enable funding to be available in these situations in a timely fashion.
- *Recommendation 8:* The Commonwealth immediately review the level of operational funding provided to NTRBs to ensure that they are adequately resourced and reasonably able to meet their performance standards and fulfil their statutory functions.

Other recommendations supported these by proposing ways to increase the expertise, capacity and retention of NTRB staff. These included seconding expert staff, monitoring salaries, and pooling professional staff.

The government accepted recommendation 5, in part. It is my view that the capacity of NTRBs needs to be significantly increased if they are to fully perform their functions, including new administrative work they will need to do to support PBCs and registered native title body corporates as a result of the changes to the native title scheme.

In its response to recommendation 6, which it accepted in part, the government stated it was 'not aware of any evidence to support the need for additional pooled funding for future acts and is not aware of any evidence of emergency arising'. In preparing this report I have received correspondence from NTRBs that suggests otherwise.

In areas where there is significant mining activity, NTRBs are under increasing pressure to deal quickly with mining companies across the whole range of native title work, including future acts. As one NTRB put it '[I]f we do not give our clients



the time and money to deal with Mining industry demands, our clients will be lost in a process that does not adequately accommodate them.<sup>25</sup>

The stresses this places on NTRBs was brought home to me in communications from Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation, Yamatji Land and Sea Council, and Pilbara Native Title Services. They informed me of the huge workload and stresses placed on NTRB lawyers and staff. They often have to travel very long distances to get to meetings in often very unpleasant conditions. They are often 'yelled at, abused, criticized, ridiculed and in some cases assaulted because of the message they have to deliver. The Traditional Owners receiving this advice are extremely frustrated by a world out of step with their own and often take out their frustrations on the NTRB lawyers.'<sup>26</sup>

To handle these pressures and to continue to perform the valuable functions they are required by law to do, NTRBs require support and resourcing.

The previous government did not accept recommendation 8. It declined to immediately review the level of operational funding provided to NTRBs.

There is little doubt that funding of NTRBs is inadequate – the matter comes up too often in reviews of Indigenous bodies. It doesn't matter whether it is for dealing with future acts, or for supporting PBCs before they become RNTBCs – the funding is inadequate. It is past the time to properly fund NTRBs. The Native Title Coordination Committee, chaired by the Attorney-General's Department is currently reviewing funding of the whole native title system. I refer to the recommendations at the end of this chapter.

## The changes to representative bodies

As part of its widespread changes to the native title system, first announced in 2005, the government said it was going to make changes to Indigenous representative bodies. Its stated aims were to ensure the bodies operate with greater effectiveness and accountability.<sup>27</sup> Amending the Native Title Act in 2007 made the changes. The legislative amendments were largely made by the *Native Title Amendment Act 2007* (Cth), Schedule 1.

The main changes dealt with:

- recognition of representative bodies;
- extending, varying and reducing representative body areas;
- bodies eligible to be representative bodies;
- strategic plans and annual reports;
- native title service providers; and
- funding.

The previous government also considered a reduction in the number of representative bodies.

Any changes to representative bodies can affect their capacity to effectively and independently carry out their functions on behalf on native title claimants and holders. Because the functions include claiming native title and responding to future act notices, the changes impinge on Indigenous peoples' exercise and enjoyment of human rights. The changes should be looked at with the recommendations of both the majority and the dissenting *NTRB Report 2006* in mind.



It is crucial to the operation of the Native Title Act, and the systems underpinning it, that representative bodies are set-up, maintained and resourced properly so that they are able to fully carry out their functions. I have concerns about the changes to representative bodies.

### Concerns

- The possible reduction in the opportunity for Indigenous people to participate fully in decisions that affect their lives. This concern arises from changes allowing non-Indigenous corporations to perform the functions of representative Indigenous bodies.
- The administrative burdens faced by representative bodies when they are not provided with any additional funding to adjust to the changes.
- Erosion of the independence of NTRBs from the executive government arising from the requirements for re-recognition. Representative bodies are often in conflict with government over native title. It is important, therefore, to maintain as much independence of representative bodies from government as possible. NTRBs must be free of perceived or actual pressure from government over how they pursue the recognition and protection of native title. NTRBs are already dependent on government for funding and for recognition. It is important that changes to the native title system increase the autonomy of NTRBs from government interference, not reduce it.
- The erosion of security of status resulting from short fixed term recognition periods.
- The need for transparent, objective and predictable decision-making about representative bodies. This is necessary to ensure administrative fairness, and to ensure representative bodies are not intimidated into not pursuing the interests of their clients for fear of funding cuts or de-recognition.
- The inadequate funding and resourcing of representative bodies.
- The lack of open, full consultation with representative bodies about the changes. Consultation with NTRBs and other stakeholders took place prior to the changes. However, some NTRBs have criticised the past government for a lack of proper consultation, where they felt that the government had already made up its mind about the changes.



## ***Background to the changes***

The changes were designed to:

- enhance the quality of service by broadening the range of organisations that can undertake activities on behalf of claimants;
- streamline the process for withdrawing recognition from poorly-performing representative bodies and appointing a replacement body;
- put a time limit on the recognised status of representative bodies to ensure a focus on outcomes (while ensuring that all existing representative bodies are initially invited to be recognised for between one and six years);
- reduce red-tape by removing the requirement for representative bodies to prepare strategic plans and table their annual reports in Parliament;
- ensure that entities funded to perform representative body functions can provide the same services as representative bodies;
- make it easier to change representative body areas;
- provide representative bodies with multi-year funding to assist their strategic planning; and
- improve accountability for the expenditure of public funds.<sup>28</sup>

## **Recognition of representative bodies**

Representative bodies are now recognised for limited, fixed terms of between one and six years. I am concerned at the degree to which the changes provide for significant ministerial discretion in the recognition of eligible bodies. This opens the way for the perception and possibility of political pressure.

### ***Fixed term recognition***

I am concerned about the introduction of fixed term recognition periods. Prior to the changes, eligible bodies were recognised for an unlimited period. The changes provide for fixed terms of between one and six years.

A minimum period of one year may be granted in certain circumstances, including where the minister is of the opinion that one year would promote the efficient performance of the functions of a representative body (which are set out in Section 203B(1)).<sup>29</sup>

In order to be recognised an eligible body must be invited by the minister to apply for recognition.<sup>30</sup>

Under the changes the minister may invite applications from eligible bodies for recognition as the representative Aboriginal and Torres Strait Islander body for an area. The invitation may specify the period for which an eligible body would be recognised. The minister is not obliged to invite applications for recognition from representative bodies that have already been recognised (other than during the transition period).



A transition period, 15 April 2007 to 30 June 2007, was set under the amendments to allow for the introduction of the changes to representative bodies. Representative bodies that existed at 15 April 2007 were invited by the minister to apply during the transition period to be recognised for their areas.

On 7 June 2007 the former Minister for Families, Community Services and Indigenous affairs announced new recognition periods for NTRBs around Australia. These came into effect on 1 July 2007. These recognition periods are set out in the following table.<sup>31</sup>

<b>Recognition periods for NTRBs</b>		
<b>State</b>	<b>NTRB</b>	<b>Years</b>
WA	Kimberley Land Council	6
	Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	4
	Goldfields Land and Sea Council	3
	South West Aboriginal Land and Sea Council	1
NT	Northern Land Council	6
	Central Land Council	6
SA	Aboriginal Legal Rights Movement (ALRM)*	1
QLD	Cape York Land Council	3
	North Queensland Land Council	6
	Carpentaria Land Council	1
	Gurang Land Council	1
	Central Queensland Land Council	1
	Torres Strait Regional Authority	6

(Victoria, New South Wales and Queensland South are currently served by organisations funded under Section 203FE(1) of the Native Title Act which are not subject to NTRB recognition processes. The area currently covered by Ngaanjatjarra Council (WA) will operate under similar arrangements from 1 July 2007).

\* Under mutually agreed transitional arrangements, the Aboriginal Legal Rights Movement (ALRM of South Australia) will only continue to operate as a NTRB for another year.



In determining the new recognition periods for NTRBs, records of activities, the overall stability of the organisation, and financial management were examined. According to the minister poor performance or governance issues had in the past affected those NTRBs receiving mid-range terms. Major changes were also envisaged to NTRBs in Queensland. Gurang, Central Queensland and Carpentaria Land Councils and Queensland South Native Title Services were in discussion (prior to the change of government) about creating a new larger organisation. A new body was planned to be operating from 1 July 2008.<sup>32</sup>

I am concerned that the imposition of limited fixed term recognition periods can increase the workload of representative bodies. Those who receive a short period may well find that a large amount of their time is taken up applying for re-recognition. A much longer minimum period for recognition, at least three years, increases the stability and standing of representative bodies as long-term organisations. This has ramifications for attracting and retaining staff, a key issue for representative bodies.

The vulnerability to short recognition periods undermines the ability of representative bodies to make medium to long-term plans that are essential if representative bodies are to be effective. Short recognition periods reinforces the perception that representative bodies are insecure, temporary organisations whose existence is dependent upon ministerial discretion and political expediency. Consequentially it is very difficult for them to build a profile and operate as respected, long-term organisations. There are ramifications for all participants in the native title system who deal with Indigenous people and their rights and interests in land and waters.

### ***Recognising***

Following the changes, in recognising an eligible body as a representative body, the minister only needs to be satisfied that the body is, or will be able to, perform the functions of a representative body satisfactorily.<sup>33</sup>

The minister is no longer required to consider:

- whether the body does, or will, satisfactorily represent native title holders and persons who may hold native title in its area; and
- whether the body does, or will, consult effectively with Indigenous peoples living in its area.

The recognition by the minister is by 'legislative instrument'. While this allows for review by the Australian Parliament, it precludes review under the *Administrative Decisions (Judicial Review) Act 1977*. Prior to the amendments the decision had been an administrative decision.

### ***Withdrawing recognition***

As a result of the changes the minister must now withdraw recognition if the body ceases to exist or it makes a written request to the minister for the recognition to be withdrawn.





The minister may withdraw recognition if satisfied either:

- the body is not satisfactorily performing its functions; or
- there are serious or repeated irregularities in the financial affairs of the body.<sup>34</sup>

The *NTRB Report 2006* recommended the Australian Government establish an independent advisory panel to advise the minister on the re-recognition of NTRBs once their recognition period has expired (recommendation 2).<sup>35</sup>

## **Representative body: Operation areas**

### ***Extending, varying and reducing representative body areas***

The minister may extend or vary the area covered by a representative body. This may be on the application of a representative body or bodies, or on the minister's own initiative. Before doing so the minister must give sixty days notice to the body and the public that an extension or variation is being considered, and invite submissions. The minister must consider any resulting submissions. The minister must also consider any reports of audits or investigations into funding.<sup>36</sup>

In extending or varying the area covered by a NTRB, the minister must be satisfied that, after the extension or variation, the representative body will satisfactorily perform its functions<sup>37</sup> in the modified area.

For reducing areas, the minister is required to be satisfied that a representative body is not satisfactorily performing its functions.<sup>38</sup>

## **Bodies that are eligible to be representative bodies**

Under the changes non-Indigenous corporations are eligible to be recognised and funded as a NTRB. The changes have added a company incorporated under the *Corporations Act 2001* (Cth) as a body eligible to be recognised to perform the functions of a representative body.

This was done to meet concerns that restricting NTRBs to Indigenous corporations results in:

- problems with governance;
- inadequate separation of powers; and
- conflicts of interest.

It is important, however, to keep in mind human rights, especially those of self-determination and to control decision-making affecting Indigenous land and institutions. These must be considered when looking at the eligibility of non-Indigenous corporations to be recognised to perform the functions of a representative body. The recognition of non-Indigenous corporate bodies to perform these functions may negatively impact on the credibility of those organisations. This may lead to conflict between directors, members and the NTRBs clients. Concerns about governance of Indigenous corporations ought to be adequately dealt with by application of the provisions of the new *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (the CATSI Act), which deal with adequate funding and capacity and governance building.



## Statutory plans and annual reports

Statutory plans and annual reports are no longer required by NTRBs. However, the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) may continue to insist on planning and reporting as conditions of funding. This was part of the endeavors of the previous government to reduce the red tape the representative bodies had to deal with. It is a worthwhile objective.

However, I have concerns that the removal of the requirements for statutory plans and annual reports will:

- negatively impact on the perception of the decision-making of representative bodies. Statutory plans provide a sound basis on which to make, and be seen to be making, difficult, transparent, fair decisions based on an objective standard.
- reduce the ability of representative bodies to present as credible, professional, long term organisations. Annual reports are a way of presenting to the world the work of an organisation and what it is about. Internally they provide a mechanism whereby people can understand what the organisation they work for does, how it operates, and how it is structured. It also allows clients of the organisation and the public to understand the structure of the organisation and it is a record of the workings of the organisation and its rationale for existence.

Problems with statutory plans such as their perceived lack of usefulness, their quality, and the resources taken to prepare them, are better solved by resourcing representative bodies to engage experts to assist in the preparation of plans, and to guide representative bodies in their use.

I understand the Aurora Project is developing training in this area for supporting representative bodies in the preparation of statutory plans.

Similar arguments are applicable to the preparation of annual reports.

## Changes to funding

The funding of representative bodies has been changed:

- removal from the Native Title Act of certain accountability requirements for funding previously imposed by FaHCSIA;
- expansion of FaHCSIA's discretion to provide funds;
- relaxation of the basis upon which an auditor or investigator may be appointed; and
- funding is now available on a multi-year basis, rather than year by year.

There was no increase in the level at which representative bodies were funded in the 2006-2007 financial year. Inadequate funding of NTRBs has, and continues to, undermine the capacity of NTRBs to provide effective representation and assistance. This diminishes the extent to which Indigenous people have been able to secure recognition and enjoyment of their rights. My concerns about the funding and resourcing of representative bodies are set out earlier in this chapter.



## Kimberley Land Council

The Kimberley Land Council (KLC) – an NTRB from the Kimberley region in Western Australia – commented in their 2005-2006 annual report on a number of resourcing related issues that they face. Their story illustrates the many and varied issues NTRBs face that are exacerbated by inadequate funding.

Over the 2005-2006 income year, the KLC received funds of \$4,215,000 from the government. They received \$413,000 from other sources.<sup>39</sup> This total budget of just over \$4.5 million provided for 47 staff members (15 positions were funded through grants other than the OPIC's NTRB funding). Over \$1 million was spent on consultancy services (legal, anthropological and other consultancy services).<sup>40</sup>

The NTRB operates over approximately 412,451 square kilometres, covering four local government areas, with six major towns, and some 200 Aboriginal communities. This vast region's economy relies heavily on mining, tourism, agriculture and the pastoral, pearling and fishing industries.

The annual report said:<sup>41</sup>

The KLC's 2005–2006 Operational Plan sought to establish a balance between demand and resources. However the resources, human and financial, available to the KLC were limited. The KLC's capacity to progress all claims and to respond to all issues, including land access, was governed by resources. Any reduction in resources affects KLC's performance.

The substantial reduction in staff numbers in the reporting period 2003–2004 continued to affect the amount of work that could be undertaken by the KLC. Ensuring that constituents and third parties have realistic expectations of the KLC's capacity, and understand workload pressures, remains an ongoing issue.

As a result of the reduced staff numbers the KLC's centralisation of service delivery from the KLC's Broome and Kununurra offices has reduced the KLC's ability to service more remote areas. Effectively, each office must service an area in excess of 200,000 square kilometres... As an example, travel between Broome and Kununurra for Executive meetings involves two days' driving. This significantly adds to costs, and has a marked effect on human resources.

While the KLC continues to progress those matters in the litigation stream, the financial and human resources available to progress other matters in mediation, and to respond to future acts, remained limited during the reporting period. The reduction in staffing levels has intensified the demands on remaining staff to respond to the range of statutory functions. This has placed extremely high workload pressure on remaining staff in the organisation.

... An ongoing issue for the KLC is the strong demand on the labour market created by the ongoing growth and development of industries in the Kimberley region, in particular industries associated with the mining and resources boom in Western Australia. The KLC is not in a position to compete in the current labor market with other employers, primarily because it cannot offer salary packages which are commensurate with those offered in both the public and private sectors to experienced and less experienced professional staff. This lack of competitiveness is exacerbated by the high cost of living, including rental accommodation, in the Kimberley.



In the current reporting period, the KLC has continued to experience difficulty recruiting and retaining experienced support staff. The highly competitive labor market, exacerbated by the high cost of living in the Kimberley was again the significant factor. This has had a particular impact on the KLC's capacity to recruit staff.

The KLC's physical office accommodation remains below standards that are conducive to efficiency, safety, and productivity. The inability of KLC to secure capital to upgrade its office accommodation continues to negatively affect the organisation's outputs and performance.

Yet over the 2006-2007 income year the KLC's budget was reduced by \$1,055,097 (20%) from the requested amount.<sup>42</sup>

That level of funding did not allow for the re-opening of its other two offices. The result was that KLC staff had to travel extensively, and the total travel costs exceeded \$1 million – a significant proportion of the KLC's expenditure.<sup>43</sup>

## What is needed?

NTRBs must be perceived by the government and dealt with as the significant statutory corporations they are. They must be:

- made secure and given a sense of permanence and stability;
- fully resourced and funded to perform their functions; and
- free from wide-ranging ministerial exercise of discretionary power.

## Recommendations

- 3.1** That the Australian Government immediately initiate a review that is at arm's length from government, to recommend the level of operational resourcing for NTRBs to ensure that they are well able to meet their performance standards, and fulfil their statutory functions.
- 3.2** That the minimum recognition period for representative bodies be increased to three years.
- 3.3** That the Australian Government establish an independent panel to advise the Minister for Families, Housing, Community Services and Indigenous Affairs on recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.4** That the Native Title Act be amended to specify criteria for the exercise of ministerial discretion in recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.5** That statutory plans, requiring ministerial approval, be reinstated as compulsory, and the Aurora Project be funded to provide training to representative bodies on the preparation of statutory plans.



- 1 *Native Title Act (1993)* (Cth), Division 3 of Part 11.
- 2 The functions are set out in Division 3 of Part 11 of the *Native Title Act (1993)* (Cth).
- 3 *Native Title Act (1993)* (Cth), s203FE.
- 4 See the NTRB website available at [www.ntrb.net/](http://www.ntrb.net/) for a map and the names and details of the 14 NTRBs.
- 5 Attorney-General's Department, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 6 For further information see the Native Title Representative Bodies website, available online at: [www.ntrb.net/](http://www.ntrb.net/).
- 7 Office of Indigenous Policy Coordination, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – request for information in preparation of the Native Title Report 2007*, Email, 15 January 2008.
- 8 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p218.
- 9 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p218.
- 10 Senator Vanstone, *Hansard*, Senate, 8 February 2006, p217.
- 11 Kimberley Land Council, *Annual Report 2006*, Kimberley Land Council, 2006, p9, available online at: [www.klc.org.au/reports.htm](http://www.klc.org.au/reports.htm).
- 12 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, pp159, 161, available online at: [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport03/](http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/).
- 13 Rio Tinto Pty Ltd, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, p3, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 14 Mineral Council of Australia, Submission to the Parliamentary Joint Committee on Native Title Representative Bodies, July 2004, p1, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/submissions/sublist.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/submissions/sublist.htm).
- 15 Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, Report on the Operation of Native Title Representative Bodies, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 16 Parker, G., *Review of Native Title Representative Bodies*, ATSIC, Canberra, 1995, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
- 17 Rashid, S., *Review of Native Title Representative Bodies*, ATSIC, March 1999, as cited in Parliamentary Joint Committee on Native Title and Aboriginal and Torres Strait Islander Land Account, *Report on the Operation of Native Title Representative Bodies*, Commonwealth of Australia, Canberra, 2006, pp1-4, available online at: [http://www.aph.gov.au/senate/committee/ntlf\\_ctte/rep\\_bodies/report/index.htm](http://www.aph.gov.au/senate/committee/ntlf_ctte/rep_bodies/report/index.htm).
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# Chapter 4

## Changes to respondent funding

The Australian Government controls the native title process in a number of ways including:

- it determines and administers the legislative framework; and
- it funds many elements of the native title system – (the administrative framework, the National Native Title Tribunal, the Federal Court, and its own and other’s participation in native title proceedings).

One part of the funding is the ‘respondent funding scheme’ operated by the Attorney-General’s Department. Under this scheme the Attorney-General can grant legal or financial assistance to certain non-claimant parties to enable them to participate in native title proceedings.<sup>1</sup>

Native title claimants are not eligible for assistance under the respondent funding scheme. The parties that are eligible are often referred to as ‘respondents’ or ‘non-claimants’. These terms are used interchangeably throughout this report. The scheme set up under Section 183 is often referred to as the respondent funding scheme. This expression is used throughout this report. The scheme is also sometime known as the non-claimant assistance scheme.

The number of parties to any legal proceeding will necessarily increase the complexity, length, and expense of proceedings for all parties involved. As a result, it is very important that participants have a real and significant legal interest in the proceedings.

Yet this is not always the case in native title proceedings. Various parties have standing to participate, and they may be funded by the Australian Government to participate in the proceedings under Section 183 of the *Native Title Act 1993* (Cth) (the Native Title Act).

It seems that the sui generis [unique] nature of native title (whose identity as a common law proprietary interest is questioned) broadens the base of those who would normally have standing to challenge a claim for land: for respondents do not need to show an interest in land. Thus people who would not have standing in a common law claim relating to protection of their real interest, have standing in native title jurisdiction.<sup>2</sup>

The Australian Government through the respondent funding scheme funds respondent parties in native title proceedings. This funding has a real and direct impact on how proceedings unfold; and ultimately the ability of Indigenous peoples to have their native title rights and interests recognised. Clearly, the implementation



and operation of Section 183 of the Native Title Act must be carefully administered and monitored to ensure it operates in the most appropriate and effective way. This includes who will be assisted to participate, and what they are assisted to do.

### **Native Title Act: Section 183**

Section 183 of the Native Title Act gives power to the Attorney-General to grant legal or financial assistance, to various parties, in proceedings related to native title. The aim is to enable parties to participate. Excluded from the scheme are those who are involved in claiming native title in some way.

The Native Title Act gives some guidance on what the assistance may be for, and who may apply. However, because the details of administering the scheme are not in the Native Title Act itself, Section 183(4) provides that the Attorney-General may determine guidelines to be applied in authorising the provision of assistance under the scheme.<sup>3</sup>

In 2005, the Attorney-General announced that operation of the Section 183 respondent funding scheme would be changed to encourage agreement-making rather than litigation.

The Australian Government considered that one reason for amending the scheme to focus on agreement-making was:<sup>4</sup>

... because the fundamentals of native title are settled, it is not necessary for non-claimant parties to litigate all stages of a legal matter where the law is not in dispute or their interests are already protected under the Native Title Act.

and that<sup>5</sup>

the current funding is still too costly and time consuming.

The policy change was therefore consistent with the Australian Government's overarching policy of preferring to resolve native title matters by negotiation rather than litigation.

Changes to the scheme were brought about by two methods:

- amending Section 183 of the Native Title Act with the purpose of 'amend[ing] the scope of the respondent funding scheme';<sup>6</sup> and
- changing the Attorney-General's guidelines<sup>7</sup> for administering the scheme (which are made under Section 183(4) of the Native Title Act).

### **Claims by whom and for what**

Respondent parties to native title proceedings have historically included a wide range of groups and individuals such as recreationists, pastoralists, miners, local governments and industry bodies, many of whom derive their interest in the land from government. The new guidelines continue to allow the Attorney-General to grant assistance to individuals, a body politic, an incorporated or unincorporated body<sup>8</sup> in order to support their participation.

The following table gives a broad idea of who received assistance over the period of the scheme.





<b>Respondent scheme grants<sup>9</sup></b>	
Pastoralists	469
Local government	375
Fishermen	319
Others	286
Miners	91
Recreational users	8
Non-claimants	7
No details available	15

### **Provisions in Section 183**

Following is a broad outline of the provisions in Section 183 (prior to the amendments).

#### ***Assistance in relation to inquiries, mediations, or proceedings may be applied for:***

- by a person who is a party (or who intends to apply to be a party) to an inquiry, mediation, or proceeding related to native title. (Section 183(1))

#### ***Assistance in relation to agreements, and disputes may be applied for by:***

- a person who is (or intends to become a party) to an Indigenous land use agreement (ILUA) or an agreement about certain rights, or who is in dispute about those rights (Section 183(2));
- a person who is (or intends to become a party) to develop or review a 'standard form agreement' to facilitate negotiation over a future act relating to mining rights. (Section 183(2A)). This was inserted in the Native Title Act by the amendments.

#### ***Attorney-General power to grant assistance***

The Attorney-General may only grant assistance when satisfied that:

- the applicant is not eligible to receive assistance in relation to the matter concerned from any other source (including from a representative Aboriginal and Torres Strait Islander body); and
- the provision of assistance to the applicant in relation to the matter concerned is in accordance with the guidelines (if any) determined under subsection(4); and
- in all the circumstances, it is reasonable that the application be granted. (Section 183(3)).

#### ***Attorney-General may determine guidelines***

The Attorney-General may, in writing, determine guidelines that are to be applied in authorising the provision of assistance under Section 183. (Section 183(4)).



### ***Restriction on assistance***

Assistance may not be granted to native title claimants, or to a minister of the Crown. (Section 183(5)).

### **Amendments to Section 183**

Section 183 was amended in 2007 to include a new category of party<sup>10</sup> who may apply for assistance from the Attorney-General. These are certain parties who are involved in specific negotiations between a government (Commonwealth, state or territory) and a native title claimant or prescribed body corporate over a future act that concerns a right to mine. Assistance may now be granted for the development or improvement of a 'standard form agreement' to facilitate smoother negotiation.<sup>11</sup>

This amendment increases the scope for the Australian Government to assist respondent parties (but not for litigation).

New guidelines for providing assistance, made under Section 183(4) of the Native Title Act, do not provide any direction on how this new provision is to be administered. The only limitation to providing assistance is Section 183(3) which requires that the party is not eligible to receive assistance from another source, and that providing assistance is, in all the circumstances, 'reasonable'. Without guidance, this could be interpreted very broadly and could be a cause for concern if, for instance, a large corporation's financial resources are not taken into account.

### **Attorney-General's guidelines**

The *Guidelines on the Provision of Financial Assistance by the Attorney-General* (the new guidelines) regulate the circumstances under which the Attorney-General will grant assistance to respondent parties.<sup>12</sup> They are issued under Section 183(4) of the Native Title Act. The old guidelines, called the *Provision of Financial Assistance by the Attorney-General in Native Title Cases* (the old guidelines) started in 1998.<sup>13</sup> The current new guidelines took effect on 1 January 2007.

It is important to remember that the Attorney-General is required to grant assistance, only when it is 'reasonable' to do so (see above in *Provisions in Section 183*). How 'reasonable' is assessed is outlined in the new guidelines.

### **The old guidelines**

The old guidelines provided for how 'reasonableness' was determined in granting assistance. However, they did not effectively limit the range of parties that could receive assistance. Consequently there were reports of native title proceedings being unnecessarily and substantially protracted and complicated by the participation of parties who had no real or substantive interest in the proceedings, or whose interest was already being represented by a government party.<sup>14</sup>

The old guidelines included a list of considerations that was not exhaustive, and there was no guidance on whether any consideration should be given more weight than another. The list included a large range of broadly-phrased and ill-defined considerations such as 'the benefits which the parties will gain' and 'the benefit the



general public will gain'. Consequently, interpretation of who it was 'reasonable' to fund could vary greatly.

Under the old guidelines, a wide variety of parties were being assisted to participate in native title proceedings – even those without a legal interest in the land being considered. The North Queensland Land Council gave an example where a person who walked their dog on the beach acted as a respondent party to a native title proceeding. Similarly, they referred to an Australian Court that stated that, even if fisherman were illegally fishing in the affected area, the fact that they had been doing so for a number of years would be sufficient to enable them to participate as respondent parties.<sup>15</sup>

The Australian National Audit Office found when it audited the respondent funding scheme in the 2006-2007 year<sup>16</sup> (under the old guidelines), there was a concerning lack of data about how the scheme is being administered and a resulting lack of analysis on its effectiveness and necessity.

### **The new guidelines**

The new guidelines are an improvement on the old. They provide increased clarity on what considerations must be made by the Attorney-General when granting assistance, and provide stricter requirements for how that assistance will be given and on what conditions. The reporting requirements are more rigorous for parties receiving assistance.

The new guidelines also attempt to address some issues associated with the complex and resource-intensive legal framework under which native title claims are determined. They do this by going some way towards limiting the involvement of respondent parties.

Two important issues stand out. These are:

- eligibility for assistance
- funding of litigation.

#### ***Eligibility for assistance***

The number of parties involved in any native title proceedings adds to the complexity and time taken. Consequently there is an increase in the resources required by all parties in what is already a very lengthy and resource-intensive process. It is very important that the parties who are funded to participate have a legitimate interest in the land affected by native title. If parties are funded who have less substantial (and at times quite questionable) interests in the land, then the proceedings will suffer. The outcome may also be negatively effected.

■ **Eligibility** The new guidelines restrict who will be eligible to receive assistance. They do so by defining the factors the Attorney-General will take into account when considering whether 'in all the circumstances, it is reasonable that the application be granted'.<sup>17</sup>

There is a list of how 'reasonableness' will be determined<sup>18</sup> before assistance will be granted. Division 5.2 of the new guidelines provide that the Attorney-General must consider:<sup>19</sup>



- (a) if the applicant is not represented by a group representative – whether the applicant has sufficient financial resources;<sup>20</sup>
- (b) the nature of the applicant’s interest in the inquiry, mediation or proceeding and the nature of the native title rights being claimed;
- (c) if the applicant’s interest does not extinguish native title as a matter of law<sup>21</sup> – whether the applicant’s interest is likely to be adversely affected in a real and significant way if the native title claim were to be recognised;
- (d) whether the applicant’s interest is protected or capable of being protected under the regime for future acts in the Act;
- (e) the number of claims that directly affect the applicant;
- (f) the likely benefit to the applicant of participating in the inquiry, mediation or proceeding relative to the likely cost of assistance;
- (g) whether a group representative is acting as an agent of a party in the inquiry, mediation or proceeding;
- (h) whether the applicant’s interest is appropriately protected having regard to the identity and interests of other parties to the inquiry, mediation or proceeding;
- (i) if assistance is sought for legal services to participate in a trial or preliminary or interlocutory proceeding, whether:
  - (i) the applicant’s case has reasonable prospects of success; or
  - (ii) the applicant’s participation will enhance the prospect of a mediated outcome.

■ **Safeguards** The new guidelines provide greater safeguards to the native title process. In particular:

- there are requirements to consider the applicant’s interest and whether it is affected in a real and significant way;
- there must be consideration of whether the interest is protected elsewhere (either through the law or by another party); and
- the broadly worded consideration of ‘the benefit to the general public’ has been removed.

These changes will go some way to ensure native title proceedings are not prolonged by the unnecessary inclusion of parties who are not substantively affected by the proceedings, or who already have their interests represented.

Nevertheless, the question still remains whether the guidelines go far enough to ensure support is only available to those with recognisable interests in the land and water.



A number of broadly-worded competing considerations may still be taken into account by the Attorney-General in determining the ‘reasonableness’ of assistance. It remains distinctly possible that some parties will continue to gain support for participating in native title proceedings where their interest is not clearly recognised by law. This arguably exploits the native title process, and can substantially add to the delays and resources involved in proceedings.



In the Attorney-General's consideration of whether the applicant has sufficient financial resources, it is not clear why only individual applicants are mentioned, and not representative bodies (such as peak organisations).

The North Queensland Land Council has expressed concern that the new guidelines don't go far enough to limit unnecessary participation of respondent parties. They have submitted that:

in order to be a respondent party, the party should have a real and proprietary interest that is to be affected by a determination of native title, that is to say they should be a landholder, a leaseholder or a statutory organisation that may have a real interest that is potentially affected by a native title determination.<sup>22</sup>

The guidelines should go further to ensure taxpayers do not fund unnecessary participation by respondent parties.

### ***Funding of litigation***

The Australian Government said clearly that the main reason for amending the guidelines was to 'focus on resolution of native title issues through agreement making, in preference to litigation'. The new guidelines therefore introduce additional limitations on the circumstances in which funding will be provided for a party to participate in litigation.

The old guidelines provided that financial assistance would be provided for litigation, once the prospect of success was considered. If the party was responding to a native title claim, then this generally included a consideration of whether the party had a good case to argue or whether they would be likely to be able to protect their interests through mediation. If the party was actually applying for a respondent determination, this included a consideration of whether it was necessary to have a native title determination made. Additional considerations included the importance of the case and the question of law to be resolved by the case.<sup>23</sup>

The new guidelines now clearly start from the premise that assistance to participate in litigation will *not* be considered reasonable (and therefore not provided). Exceptions are where the party applying for assistance can show that either:<sup>24</sup>

- the proceedings raise a new and significant question of law directly relevant to the respondent's interest;
- the court requires the respondent's participation; or
- the proceedings will affect the respondent's interests in a real and significant way and mediation has failed for reasons beyond the applicant's control.

It is a positive move that the new guidelines reduce the scope for funding of parties to participate in native title litigation quite significantly, ensuring that the party must effectively prove that their participation is absolutely necessary.



## The Section 183 assistance scheme now

It is necessary to consider how the respondent funding scheme (outlined in Section 183 of the Native Title Act) has in fact impacted on proceedings. Has it introduced inefficiencies or inequitably prevented Indigenous peoples from gaining recognition of their native title? Or has the scheme operated fairly to enable parties who have a real interest in the land, and who would not have otherwise been able to participate, to have their rights and interests represented?

Like any government policy, it is essential for the Australian Government to collect the information necessary to evaluate and monitor the necessity and effectiveness of the programme.

Beside anecdotal evidence (such as that given by the North Queensland Land Council<sup>25</sup>), the effect of the scheme is difficult, if not impossible, to ascertain.

The Australian National Audit Office (ANAO) found when it audited the funding scheme in the 2006-2007 (before the new guidelines):

- The parties that received assistance were effectively only required to report on expenditure once they received funding.<sup>26</sup>
- The parties that received funding were quite often not required to report on deliverables, and usually not in a regular and timely manner. This prevented the Attorney-General from being able to monitor whether any progress was being made in the proceeding or whether individual objectives were being met.<sup>27</sup>
- The Attorney-General's Department only considered the outputs of the scheme through the narrow quantifiable lens of the number of grants in progress, the number of grants finalised and the number of new applications.<sup>28</sup>
- The Attorney-General's Department was not comprehensively monitoring the progress of cases to consider whether assistance was still required.<sup>29</sup>
- The Attorney-General's Department was not comprehensively monitoring the type of proceeding or what stage the proceeding was at. This means that there is no benchmark information from which to analyse whether the new guidelines and legislative amendment will have any impact. Further, with no data it was difficult for the Attorney-General to look at the history of proceedings and the impact of different parties on the proceeding.<sup>30</sup>

The ANAO observed:<sup>31</sup>

[Attorney-General's Department] is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome.

Some of these concerns have been addressed in the new guidelines – particularly those around regular and more thorough reporting. Some are being addressed through internal changes in the Attorney-General's Department itself.

However, the observations of the ANAO and the lack of data about the scheme are particularly relevant for a number of reasons.



- It is difficult for the government to assess the impact of participation, and whether parties should continue to be assisted.
- With no reflection on the behaviour of respondent parties, the contribution or impact they have, or the nature of the interest they hold, then it is very difficult to determine whether the policy is an efficient use of taxpayer's money. I must wonder if in fact the behaviour undermines Indigenous peoples native title rights and interests – and frustrates the intent of the law.
- Even before amendments were made to the system, the government did not know how much of the scheme was assisting mediation as opposed to litigation. Thus, I can't know whether these amendments have any real impact:<sup>32</sup>

The ANAO reviewed [the Attorney-General's Department's] existing and proposed measures and found that they did not allow for an assessment of the extent to which the [scheme] is meeting the Government's objective to promote agreement making rather than litigation.

The ANAO recommended that:

- the Attorney-General have more appropriate and relevant performance measures in order to evaluate the scheme; and
- performance indicators for the programme at least include reporting on the division of funds given to assist litigation and to mediation.

With these quite significant oversights in the monitoring and assessment of the scheme, the changes to the guidelines and administrative practices should go further.



Currently the perspective of Indigenous people is omitted altogether from the funding framework of native title, including this scheme. The Attorney-General's decision to grant assistance, in no way considers whether the scheme furthers the intent of the law as set out in the preamble to the Native Title Act. In the preamble it is stated that the Australian Parliament took into consideration, when passing the Native Title Act, that the people of Australia intend to rectify the consequences of past injustices by the special measures contained in the Native Title Act for securing 'adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders'. Further 'the people of Australia intend to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which their prior rights and interests ... entitle them to aspire.'<sup>33</sup>

Yet, as one commentator has pointed out:<sup>34</sup>

Nowhere in the guidelines is there any mention of recognition or protection of native title. There is no indication of any burden of proof on the applicant to establish an interest in the land claimed.



The Australian Government's decision to strengthen the native title respondent funding scheme to 'focus on resolution of native title issues through agreement making, in preference to litigation' has resulted in some positive changes to the guidelines.



Overall, the amendments to the new guidelines should prove to be beneficial to the operation of the native title system, somewhat refining the circumstances under which a respondent party can receive financial support for their involvement in native title proceedings.

However, the guidelines should be amended further to specifically deal with the primary concern – that some parties with unrecognised and insignificant interests can be funded to participate in native title proceedings. This can prolong the time it takes for Indigenous peoples to have their rights to land recognised, and make it more difficult and expensive for everyone involved. It may prevent Indigenous peoples from gaining recognition of their native title altogether.

Instead of tweaking around the question of who it is ‘reasonable’ to assist, there needs to be an assessment of the impact of respondent parties on the proceedings. Continuing to avoid effectively evaluating the scheme, guarantees that it can continue to contribute to the existing insurmountable procedural hurdles that Indigenous people face in having their native title rights and interests recognised.

## Recommendations

- 4.1** That the Australian Government amend the Native Title Act and the Attorney-General’s Guidelines (for provision of financial assistance pursuant to Section 183(4) of the Act), to ensure that funding is provided to assist only a party with a legal interest in proceedings where:
- the party’s legal rights are not protected under the Native Title Act, or common law; and
  - the party is not represented in the proceedings by a government party that is also party to the proceedings.
- 4.2** That the Attorney-General (as part of the department’s annual reporting) monitor, assess, and report on the respondent funding scheme to determine the extent to which it meets the objects of the Native Title Act and how (if at all) it furthers the intent of the law as set out in the preamble. The reporting should consider:
- whether litigation or mediation is being supported by the scheme;
  - the impact of the respondent party’s participation in the proceeding itself and on the other parties involved;
  - the types of interests the assisted party has in the proceeding;
  - all parties’ views of the contribution of the non-claimant party’s participation; and
  - an evaluation of the additional costs to all parties from having the non-claimant party participate.





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- 2 Galloway, K., *Is Native Title Law Destroying Native Title?* Paper delivered as part of the Native Title Seminar Series for the Native Title Studies Centre, James Cook University, 26 April 2006.
- 3 Section 183(4) of the *Native Title Act 1993* (Cth) states that the Attorney-General may, in writing, determine guidelines that are to be applied in authorising the provision of assistance under this section.
- 4 Australian Government Attorney-General's Department, *Assistance to respondents in native title claims*, 6 August 2007, available online at: [www.ag.gov.au](http://www.ag.gov.au), accessed 27 September 2007.
- 5 Ruddock, P., (Attorney-General) and Vanstone, A., (Minister for Immigration, Multicultural and Indigenous Affairs), *Delivering Better outcomes in native title – update on Government's plan for practical reform*, Press Release, 23 November 2005.
- 6 Australian Government Attorney-General's Department, *Native title reform*, 16 August 2007, available online at: [www.ag.gov.au](http://www.ag.gov.au), accessed 27 September 2007.
- 7 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.
- 8 See the definition of 'person' in Part 3 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.
- 9 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007, p69.
- 10 *Native Title Act 1993* (Cth), s183(2A).
- 11 That is, *Native Title Act 1993* (Cth), s83(2A) states that assistance can be granted if it will facilitate negotiation in good faith under s31(1)(b) of the *Native Title Act 1993* (Cth) or make it more likely that the Government will consider it an act attracting the expedited procedure for future act approval under s32(2) of the *Native Title Act 1993* (Cth).
- 12 *Native Title Act 1993* (Cth), s183.
- 13 The 1998 Attorney-General guidelines were called *Provision of Financial Assistance by the Attorney-General in Native Title Cases*.
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- 15 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
- 16 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007, pp19-21.
- 17 As required by *Native Title Act 1993* (Cth), s183(3).
- 18 The *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* provide for what will be considered 'reasonable' separately for assistance granted under the *Native Title Act 1993* (Cth), s183(1) or s183(2), through Division 5.2 and Division 5.3 of the Guidelines respectively. In order to keep this analysis simple, only Division 5.2 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* will be examined.
- 19 Separate but similar tests for reasonableness of providing assistance to a potential grantee party in relation to a future act are given in the Guidelines. See Division 5.3 of the *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*.
- 20 The 1998 *Provision of Financial Assistance by the Attorney-General in Native Title Cases* guidelines did provide for a consideration of the applicant's financial circumstances 'where appropriate' when determining whether assistance will be granted. See Division 6.5 of the 1998 *Provision of Financial Assistance by the Attorney-General in Native Title Cases* guidelines.
- 21 Under Division 18 of the new *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* assistance will not be given to parties whose interest extinguished native title according to law.
- 22 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
- 23 *Provision of Financial Assistance by the Attorney-General in Native Title Cases*, Divisions 6.13 and 6.14. The prospect of success of the litigation formed part of whether the assistance would be considered 'reasonable'.
- 24 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993*, Division 19.
- 25 Northern Land Council, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, letter, 5 October 2007.
- 26 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, p52, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
- 27 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, p126, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
- 28 Australian National Audit Office, *Administration of the Native Title Respondents Scheme, Audit Report No 1 2006-2007*, p56, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.



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- 29 Australian National Audit Office, *Administration of the Native Title Respondents Scheme*, Audit Report No.1 2006-2007, p126, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
  - 30 Australian National Audit Office, *Administration of the Native Title Respondents Scheme*, Audit Report No.1 2006-2007, p92, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
  - 31 Australian National Audit Office, *Administration of the Native Title Respondents Scheme*, Audit Report No.1 2006-2007, p133, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
  - 32 Australian National Audit Office, *Administration of the Native Title Respondents Scheme*, Audit Report No.1 2006-2007, p64, available online at: [www.anao.gov.au](http://www.anao.gov.au), accessed September 2007.
  - 33 Preamble to the *Native Title Act 1993* (Cth).
  - 34 Galloway, K., *Is Native Title Law Destroying Native Title?* Paper delivered as part of the Native Title Seminar Series for the Native Title Studies Centre, James Cook University, 26 April 2006.



# Chapter 5

## Changes to prescribed bodies corporate

PBCs find themselves, for the most part, without income or readily available assets, and without the necessary skills to be able to generate them.<sup>1</sup>

Good functioning of prescribed bodies corporate (PBC)<sup>2</sup> is essential to native title. Recognition of native title rights only goes part of the way to redress the historical injustice of land dispossession. Without appropriate means to make decisions about land, the existence of native title makes minimal appreciable difference to Indigenous people.

Native title holders require the means to engage with non-Indigenous interests to exercise all of their rights and obligations to land. Article 1 of both the *International Covenant on Economic, Social and Cultural Rights*, and the *International Covenant on Civil and Political Rights* is clear:

... all peoples have the right to self determination; by virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

Prescribed bodies corporate contribute to Indigenous self-directed development for the future, and provide a mechanism which can facilitate the exercise and enjoyment of Indigenous peoples' human rights.

To ensure Indigenous peoples' human rights are protected, I believe there is a need to review the impact of the 2007 changes to the *Native Title Act 1993* (Cth) (the Native Title Act) on Indigenous native title holders and their corporations that hold native title. I consider the changes in the context of the *Structures and Processes of Prescribed Bodies Corporate (PBC Report)*.<sup>3</sup> The changes implemented the findings and recommendations of that report. Changes affecting other representative Indigenous bodies, principally, native title representative bodies (NTRBs), I consider in an earlier chapter in this report.

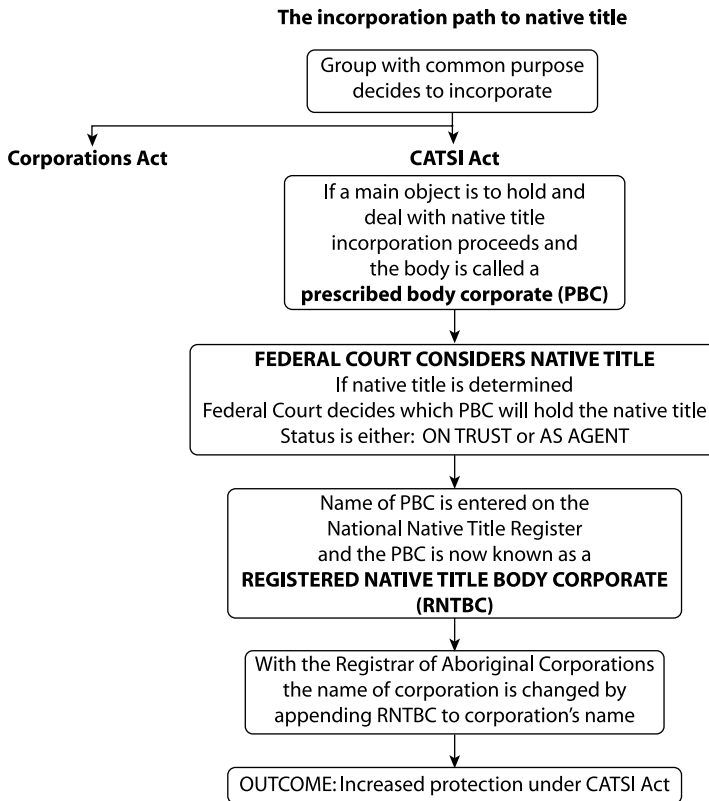
### PBCs?

A prescribed body corporate is an Indigenous incorporated body created under the Native Title Act. The prime object of a PBC is to hold native title on trust or as agent for the native title holders. Upon incorporation under the *Corporations (Aboriginal and Torres Strait Islander) Act 2007* (Cth) (the CATSI Act) the PBC is entered on the Register of Aboriginal and Torres Strait Islander Corporations. When the Federal Court determines that native title exists it goes on to determine which PBC is to hold it. The PBC will be added to the National Native Title Register as a registered



native title body corporate (RNTBC). Its name is then changed to include the letters 'RNTBC'. RNTBCs denotes that it is a registered native title body corporate. RNTBCs gain increased protection under the CATSI Act (see the chapter on the CATSI Act later in the report).

Despite the technical difference in terminology, this chapter discusses the *PBC Report*, and thus I follow its use of the term 'PBC' to cover both PBCs and RNTBCs.



The primary roles of PBCs are to:

- protect and manage determined native title, in accordance with the native title holders' wishes; and
- provide a legal entity through which native title holders can conduct business with government, and others, interested in accessing or regulating native title lands and waters.<sup>4</sup>

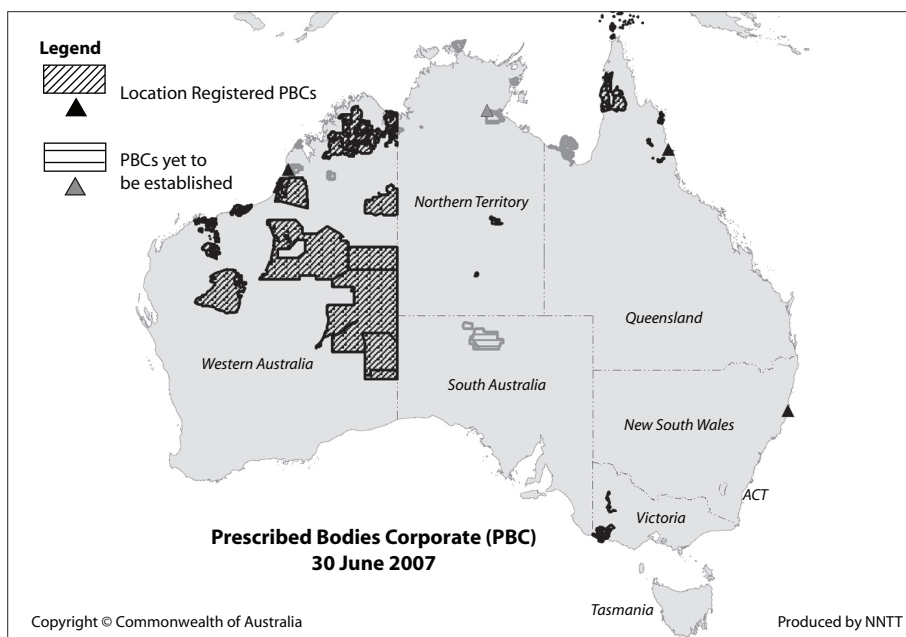
### **Scale**

As an indication of scale:

- On 30 May 2007: of the 69 claimant determinations recognising native title, there were 49 RNTBCs determined, and 11 RNTBCs still waiting to be determined.<sup>5</sup> (The imbalance occurs because some RNTBCs hold more than one determination.)



- The changes to the Native Title Act allow native title representative bodies (NTRBs) to provide support to RNTBCs through their operational funds. There are currently 10 NTRBs that have RNTBCs within their representative boundary.



The following table shows RNTBCs supported by NTRBs.<sup>6</sup>

<b>RNTBCs supported by NTRBs</b>		
<b>NTRB area</b>	<b>State</b>	<b>No</b>
New South Wales Native Title Services	NSW	1
Central Land Council	NT	2
Northern Land Council	NT	1
Cape York Land Council	QLD	4
North Queensland Land Council	QLD	4
Torres Strait Regional Authority	QLD	20
Native Title Services Victoria	VIC	2



Kimberley Land Council	WA	5
Nganyatjarra Council (now Central Desert Native Title Services)	WA	5
Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation	WA	5
	<b>Total</b>	<b>49</b>

## Background to the changes

In October 2006, the Australian Government released the *PBC Report* examining the structures and processes of PBCs. The *PBC Report* led directly to amendments to the Native Title Act, that relate specifically to PBCs.<sup>7</sup> The amendments were passed in 2007.

The report was developed by a steering committee made up of representatives of three Australian Government departments.

The committee consulted a range of stakeholders about the functions and governance models of PBCs. Included were PBCs, native title representative bodies (NTRBs), state and territory governments, and industry bodies.

The *PBC Report* examined the structures and processes of PBCs, and included 15 recommendations that aim to achieve the following outcomes:

- improve the ability of PBCs to access and utilise existing sources of assistance, including from NTRBs;
- improve the flexibility of PBC governance to accommodate the specific interests and circumstances of the native title holders;
- better align existing sources of potential assistance with PBC needs; and
- encourage state and territory government involvement in serving PBC needs.<sup>8</sup>

I have to agree with the then Attorney-General that the report found:

there was considerable scope to improve the flexibility of the governance regime for the performance of native title functions.<sup>9</sup>

A key finding of the *PBC Report* was that the needs of PBCs differ greatly, depending on factors such as location and potential for future act activity within PBCs. Further there needed to be better coordination of existing resources for PBCs.

The government committed to implement all 15 recommendations of the *PBC Report* – they are summarised in an Appendix to this report.

## Effects of changes on PBCs

The changes I refer to are those made by amendments to the Native Title Act by the *Native Title Amendment Act 2007* (Cth) (the NTAA) and the *Native Title (Technical Amendments) Act 2007* (Cth) (the Technical Amendments Act). There have also been changes to policy, processes and programs.



The changes impact on:

- support for PBCs;
- PBCs charging a fee for service;
- consultation and consent; and
- default, replacement, and subsequent PBCs.

### **Support for PBCs**

PBCs need support in financial and other ways. The *PBC Report* suggested that, of the PBCs established, most struggle to meet obligations.<sup>10</sup>

The extent to which PBCs need support depends on the capacity of the PBC and the environment in which they operate. However, even those PBCs that are considered good examples also find it difficult to meet their native title functions and ongoing administration. To remain operational when support is inadequate, native title holders can be forced to compromise their future native title rights and responsibilities. For example, Lhere Artepe had to sell lands acquired through native title negotiations to cover administrative costs.<sup>11</sup>

The National Native Title Council was concerned about the significant amount of work officers of PBCs are responsible for, and the level of understanding required to undertake their responsibilities.<sup>12</sup> For example:

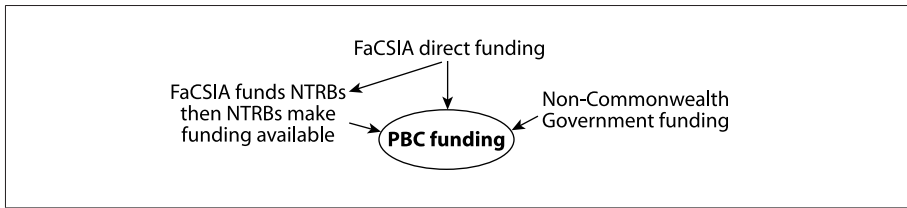
- all official correspondence and dealings with the native title holding group must go through the PBC;
- they need a detailed understanding of the future act regime and the rights of native title holders; and
- there are general administrative requirements like membership records and minutes of meetings.

### **Financial support**

There is no doubt of the need for unfettered baseline establishment and operational funding to enable PBCs to make their initial applications for funding.<sup>13</sup> While legislative changes have been made to ensure that NTRBs<sup>14</sup> can apply on behalf of PBCs for establishment and operational funds as part of their annual funding submissions, PBCs are also able to apply independently.<sup>15</sup>

FaCSIA issued *Guidelines for Support of Prescribed Bodies Corporate (PBCs)* (the *PBC Guidelines*) on how they will deal with funding. (After the 2007 election FaCSIA was changed to the Department of Housing, Community Services, and Indigenous Affairs (FaHCSIA). FaHCSIA now administer the guidelines.) FaHCSIA is to ensure that NTRBs give appropriate priority to assisting PBCs when funding NTRBs under their program funding agreements by:

- FaHCSIA allowing NTRBs to use their native title program funding to assist PBCs with their day-to-day operations (with FaHCSIA's prior approval); and
- FaHCSIA may consider direct funding for PBCs (ie. funding provided other than through NTRBs) to assist with day-to-day operating costs in limited circumstances.<sup>16</sup>



While the Commonwealth's preferred option is for PBCs to be supported by NTRBs, independent funding would ensure a greater degree of autonomy or self determination for the PBC and the native title holders, after determination.

However, PBCs and NTRBs were informed that:

Under the draft guidelines, funding will not be provided for more than one financial year. FaCSIA's existing priority of funding NTRBs/NTSPs for claims processing will remain, and that there will be *no additional funding* in the native title system specifically for PBCs – at least in the next financial year.<sup>17</sup>

Information and procedures for PBCs to make application for funding independent of the NTRB/NTSP<sup>18</sup> is provided in the *PBC Guidelines*.<sup>19</sup> Such applications would be considered in exceptional circumstances and PBCs would have to seek agreement from the Land Branch of the Office of Indigenous Policy Coordination within FaHCSIA. Exceptional circumstances may include:

- that the original claim was not handled by the NTRB/NTSP in the area;
- that there is a significant conflict of interest between the PBC and the NTRB/NTSP;
- circumstances precluding funding being provided via the NTRB/NTSP such as unworkable relationships;
- demonstrated good governance; and
- demonstrated ability to administer and account for the funding.

The Attorney-General promoted the changes acknowledging:

... that the current processes remains expensive and slow. The proposed measures are intended to ensure that the existing processes work more effectively and efficiently in securing outcomes.

The government has expressed views, and made conditions, about the funding of PBCs. These include:

- It is a condition of applications direct from PBCs that, where the reasons for direct application include reference to an NTRB/NTSP, a copy will be forwarded to the NTRB/NTSP for comment.<sup>20</sup>
- The opinion that:  
The Native Title Act provides for NTRBs/NTSPs to assist PBCs in the exercise of their statutory functions and suggested that it would be illegal for FaCSIA to fund PBCs to carry out these function as the Native Title Act clearly gives these functions to NTRBs/NTSPs, and the Native Title Act provides that a PBC cannot be recognised as an NTRB.<sup>21</sup>





- The view:
  - that it is not solely responsible for funding PBCs, and that it is appropriate that the States and Territories and proponents of activity, who are the primary beneficiaries of land development, contribute to the costs of such development, including the costs of bodies corporate with whom they negotiate.<sup>22</sup>

These views, as well as the new guidelines raise concerns. It is not possible at this stage to assess how successful the new funding arrangements will be. The government needs to give close attention to dealing with these concerns when administering the funding and implementing the guidelines. This is necessary to ensure the effective functioning of the native title system. As measured by the extent to which the Native Title Act is delivering on its objects, taking into consideration the matters set out in the preamble.

### Concerns

- The potential for intra-Indigenous disputes that may result from a copy of an application for direct funding being forwarded to the NTRB/NTSP for comment. This may lead to the denial of subsequent applications by a PBC for NTRB/NTSP assistance.
- Where PBCs apply directly for funding from the Land Branch of the Office of Indigenous Policy Coordination, FaHCSIA, there is no provision for internal review of the decision, which presumably is final. (This is unlike NTRB/NTSP requests.)
- Free, prior and informed consent of Indigenous people may be restricted because of the amount of discretion that the Land Branch Manager, FaHCSIA, can exercise.
- There may be a lack of confidentiality, certainty and stability, and redress for disputed decisions.
- PBCs do not have adequate resources to perform their functions. This is the primary concern of native title holders in relation to the operation of PBCs, rather than any problem inherent in the functions of PBCs themselves.<sup>23</sup>
- Shifting of responsibility for funding from Federal to state and territory governments, and proponents of activities, may result in PBCs not being properly funded from any source or unduly pressured by the non-government (proponents of activities) funder.

### ***Non-financial support***

The Australian Government does not directly provide non-financial resources such as governance training and capacity building to PBCs. Instead it funds the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC)<sup>24</sup> to provide programs that assist PBCs with such requirements.



The government's Indigenous economic development policy must also consider the limitations of PBCs and acknowledge that, without the capacity to operate effectively, the ability to meet their native title responsibilities and economic and community development aspirations are neutered. This was a significant frustration arising from stakeholders who participated in the 2006 National Survey.<sup>25</sup>

In policy and planning, there is potential for high-level interaction between native title bodies and government service providers through decision-making processes which incorporate the whole of government. I endorse the recommendations of the *PBC Report*, that government actively promote measures for providing support to PBCs through SRAs and RPAs. Shared Responsibility Agreements (SRAs) and Regional Participation Agreements (RPAs) may be ideal instruments through which to negotiate resources and support for native title projects. It is important to make the distinction that SRAs will support PBC projects, though they will not directly resource PBC entities.

SRA negotiations may be useful for assessing and agreeing to a range of collaborative projects as well as giving the respective bodies an understanding of resource requirements and resource availability. In using them this way we must be conscious of creating extra burdens on under-resourced PBCs. These burdens may result from partnerships and joint ventures, particularly where the government requires mutual responsibility.

### **Fee for service**

The *PBC Report* examines the ability of PBCs to charge a third party to a negotiation for costs and disbursements reasonably incurred in performing its statutory functions.

The *PBC Report* found that:

Under the existing legislative regime, PBCs are not able to seek reimbursement from or charge third parties for cost and disbursements expended or incurred (or estimated to be expended or incurred) by the PBC in performing its functions under the NTA or the PBC Regulations. Essentially, this is because a fee may only be charged for the performance of a statutory duty or function if the statute provides for such a charge either expressly or by necessary implication.<sup>26</sup>

The *PBC Report* argues that:

While [the existing legislative regime] would probably not prevent the PBC from applying moneys obtained through an agreement to offset its negotiation costs, it would be preferable to provide clear authority for PBCs to recover the costs incurred in performing its functions.<sup>27</sup>

The government responded positively by amending the Native Title Act, to allow PBCs to charge a fee for service.<sup>28</sup> Division 7 of the Native Title Act (due to commence on 1 July 2008) includes provisions relating to:

- fees for services provided by PBCs in performing certain functions; and
- opinions of the Registrar of Aboriginal and Torres Strait Islander Corporations.

The National Native Title Council (NNTC) raised concerns during the consultation process, that over-regulation of the regime would restrict, rather than enable, PBCs' ability to charge fees.



In particular, they were concerned that additional discretionary powers would allow the Registrar of Aboriginal and Torres Strait Islander Corporations:

- to make binding opinions about whether fees are or not payable; and
- to advise that payment be withheld where an opinion is sought.

Amendments to the PBC Regulations to provide for procedures related to PBCs recovering costs were not finalised in 2007. I understand they are currently in the process of drafting.

The NNTC considered that if the amended regulations do not provide a clear framework then:

- fees which are properly owed to a PBC may remain outstanding for an unlimited period of time, pending a decision from the registrar;
- no right of redress by the PBC to either compel the assessment of the application in a timely manner, or the payment of the fees owing; and
- there may be no opportunity afforded to a PBC to make submissions to the registrar on the reasonableness of the fee charged.<sup>29</sup>

Amended regulations need to make provision for a process for seeking an opinion of the registrar, that is consistent with the principles of natural justice. The process needs to ensure that the PBC affected by the decision has the opportunity to be heard and to present their argument on the reasonableness of the fee charged. Also, as the opinion of the Registrar is binding, there should be some internal or external appeal mechanism if either party does not agree with the opinion of the registrar.

The Minister for Families, Housing, Community Services and Indigenous Affairs<sup>30</sup> and the Attorney-General should ensure that processes developed for requesting the opinion of the registrar do not further limit or disadvantage PBCs in their attempts to recover costs from other parties. I refer to my recommendations at the end of the chapter.

### **Consultation and consent**

The Native Title Act prior to amendment included provisions for consultation and consent which provided an additional level of protection for recognised native title rights and interests. This was achieved by ensuring that the entity charged with the management of the title conscientiously ascertained:

- what and whose interests may be affected by a future act; and
- who those interests are held by, according to the customary law of the native title holders.

The amendments to the Native Title Act<sup>31</sup> have removed the legal protection that ensured that PBCs have an obligation to consult native title holders about future acts. Thus, native title holders may not be properly informed about future acts, and will have no opportunity to give their specific consent.

This has been done by:

- limiting the circumstances where a PBC has to consult with native title holders about future acts (by amending Section 58 of the Native



Title Act, and allowing for 'standing authorisations' in accordance with Recommendation 6 of the *PBC Report*); and

- proposed amendments to the definition of 'native title decisions' (as contained in the *Native Title (Prescribed Bodies Corporate) Regulations 1999*) as detailed in the *PBC Report*, but yet to be finalised in the amendments to the Regulations.

### ***Native title decisions***

As it currently stands, Regulation 8(1) of the PBC Regulations defines a 'native title decision' as:

... a decision:

- (a) to surrender native title rights and interests in relation to land or waters;
- or
- (b) to do, or agree to do, any other act that would *affect* the native title rights or interests of the common law holders. (emphasis added)

The proposed changes to the PBC regulations provide that the requirements for PBCs to consult with and obtain the consent of native title holders on native title decisions are limited to decisions to surrender native title rights and interests in relation to land and waters.<sup>32</sup>

This proposal is based on the argument that compulsory consultation imposes a:

... very significant burden on some PBCs and that compulsory consultation should only be applied to decisions to surrender native title rights and interests in land or waters.<sup>33</sup>

Section 227 of the Native Title Act sets out when an act *affects* native title:

An act ***affects*** native title if it extinguishes the native title rights and interests or if it is otherwise wholly or partly inconsistent with their continued existence, enjoyment or exercise.

In addition to being a 'native title decision' for the purposes of the PBC consultation and consent provisions an act affecting native title, but not necessarily extinguishing it, is also a future act.

In effect, the proposed amendments will limit the kinds of future acts that PBCs are required to consult native title holders about, and obtain consent for – to only those decisions whereby native title is *surrendered*.<sup>34</sup>

The mere giving of notice of a future act to a PBC, without an obligation on the PBC to consult about that act, means that native title holders will not be appropriately informed about that act or the effect of it on their native title rights and interests, and will have no opportunity to give their specific consent to it.<sup>35</sup>

Consultation with, and the consent of, native title holders to activity on native title land is critical to:

- the validity of future act agreements;
- the ability of native title holders to protect their native title rights and interests, in order to regulate the use of and activity on native title land; and



- the legitimacy of future acts, in the sense that they represent the discharge of the state's obligations to Indigenous peoples, most relevantly, the right to prior informed consent.

### ***Standing authorisations***

Native title holders are required to authorise the doing of acts that affect native title rights and interests. Currently, Regulation 9(2) of the PBC Regulations allows native title holders to issue 'standing authorisations'<sup>36</sup> to PBCs to certify their compliance with the consultation and consent requirements:

- (a) the common law holders have been consulted about, and have consented to, the proposed decisions; or
- (b) that:
  - (i) the proposed decision is of a kind about which the common law holders have been consulted; and
  - (ii) the common law holders have decided that decisions of that kind can be made by the body corporate.<sup>37</sup>

In accordance with Regulation 9(3), such authorisations must also be signed by five members of the PBC whose native title rights and interests are affected by the proposed decision.

The *PBC Report* argued that these provisions 'undermine the efficiency of process and required streamlining as they are complicated and difficult to implement in practice'.

Proposed amendments to the PBC regulations, aim to clarify the circumstances in which 'standing authorisations' are issued to a PBC, and make provision that only one certificate need be provided in connection with *each* decision which is the subject of a standing authorisation.

In practice, this means that where, for example there are low impact cultural heritage matters, the PBC gains authorisation from the native title group to approve that act *on all future occasions*. The PBC would not be required to notify, consult with, or obtain consent from, the native title group except in the first instance.

One reading of the current Regulation 9(2) allows a PBC to certify their compliance with the consultation and consent functions by engaging with the whole native title holding group in relation to a particular future act. It also allows a PBC to obtain an authority from the native title holding group to consult and obtain consent in a particular way. For example, the group could authorise the PBC to consult with particular individuals regarding a particular class of future acts proposed in a particular area of the determination area.

The recommendation put forward by the *PBC Report* would suggest that the proposed amendment would authorise the doing of a certain class of future act by the PBC without consulting the native title holders in each instance. This would allow the native title holders to issue a broad executive authority to a PBC to make native title decisions on its behalf. Such an interpretation is at odds with overall purpose of the consultation and consent provisions.



As I have previously identified in my submissions in regard to the changes to the native title system,<sup>38</sup> the real problem lies with the requirement of five signatures of members of the PBC whose rights and interests are affected by the future act.

Not all native title holders identified in a native title determination must become members of the PBC. It may be that relevant 'affected common law holders' are not members of the PBC. Sub-regulation 9(4) provides that where this is the case, the authority must be signed by five members and all of those PBC members whose rights are affected. This does not, however, cover the situation where no 'affected common law holders' are current members of the PBC. It also highlights the problem of how an 'affected common law holder' can be identified (and signature obtained) in the absence of a particular proposed future act/native title decision.

In order to maintain the integrity of the consultation and consent provisions and ensure that they do not negate traditional law and custom, any amendments to Regulation 9 must ensure that consultation and consent requirements have been discharged pursuant to a 'procedural' authorisation. Certification of such discharge should be issued by the PBC together with the 'affected common law holders', whether or not they are members of the PBC. Such an approach would:

- be consistent with other authorisation procedures<sup>39</sup> in the Native Title Act, which distinguish, for example, between the native title holding group and the named applicants;
- allow non-compliance with authorised procedures to be enforceable as part of the statutory scheme and therefore affect the validity of agreements not complying with them; and
- provide for adequate and appropriate consultation with native title holders in relation to decisions affecting their land, in terms of both the procedure adopted and decision itself.

The *PBC Report* argued that the proposed amendments would be counteracted by the ability of native title holders to impose additional consultation and consent requirements on their PBC, through the PBC's constitution. This is provided for under the CATSI Act.<sup>40</sup>

However, the government must take into account that many PBCs may not have the capacity, or access to legal advice to ensure that these protections are included in the PBC's constitution to ensure it complies with statutory obligations and traditional law and custom. Under the CATSI Act the inclusion of these protections in the constitution of a PBC is subject to the registrar's discretion to approve the constitution.

Without legislative support, the proposed amendments will not guarantee the rights that are currently protected by the consultation and consent provisions, and there will be no consistent standard against which they can be measured.

Consequently, the proposed amendments to the Native Title (Prescribed Bodies Corporate) Regulations 1999 places the responsibility to protect interests heavily on Indigenous people and, in particular, the PBC officers. I am concerned that the proposed changes tend to ensure the protection of the interests held by others, such as future acts (which are predominantly the interests of non-Indigenous stakeholders), over those of the native title holders.



The legislative and proposed regulatory amendments relating to PBCs, impose a process that potentially conflicts with the decision-making processes of native title holders. In accordance with the Native Title Act, PBCs must consult with and obtain the consent of ‘common law holders’ of native title before making a ‘native title decision’.

I believe that there should be maximum participation in decisions, and free, prior and informed consent.

## **Default, replacement, and subsequent PBCs**

### ***Default PBCs now***

Prior to the Native Title Act amendments, there were no provisions for prescribing default PBCs.

The *PBC Report* notes:

There have been several occasions where the Federal Court has allowed a delay between a determination of native title and the establishment of a PBC, and in some cases it has been several years. This has resulted in considerable uncertainty for third parties in relation to dealings concerning relevant land.<sup>41</sup>

To deal with this problem, and in response to recommendations in the *PBC Report*, the amendments were made to provide for default PBCs.

The Federal Court can, as a result of the amendments, determine a ‘default PBC’ in circumstances:

- where the common law holders fail to nominate a PBC in conjunction with a native title determination;<sup>42</sup>
- where a liquidator is appointed to a PBC;<sup>43</sup> and
- at the initiation of the common law holders.<sup>44</sup>

Situations where the common law holders may initiate the nomination of a default PBC can include:

- the common law holder requests that a trust be terminated;
- the Federal Court determines that a PBC holds the rights and interests from time to time comprising the native title in trust for the common law holders; and
- the common law holders require the replacement of a PBC.<sup>45</sup>

A number of concerns were raised (in submissions to the change process) about allowing regulations to prescribe not only the kinds of body corporate that may be determined (as a trust-PBC or an agent-PBC) but also the actual body corporate that will be the trust or agent-PBC. It was considered “to be a ‘radical shift’ in the current legislative policy – that regulations may be used to ‘dictate’ to native title holders, which body will hold their native title, and/or act as their exclusive agent for the protection and management of their native title.”<sup>46</sup>

The intention was that the amended Section 60 of the Native Title Act would provide for the court to determine a ‘default PBC’. The Explanatory Memorandum to the Bill stated that a default-PBC must be an agent-PBC.<sup>47</sup> However this is not made clear in the new legislation, and it could be suggested that the court would determine the kind of PBC, but does not state specifically that it is to be an agent-PBC. This



decision will have an affect on how the native title holders are represented, and will determine the functions that a PBC will be required to undertake.

A crucial element, for the appropriate conduct of a default PBC, is the inclusion of specific requirements for native title holders to ensure the extra consultation and consent measures that would normally be available to them in the constitution of their PBC. This would provide added certainty that decisions about native title rights and interests made on behalf of the native title holders can not be made without appropriate free, prior and informed consent.

The *PBC Report* asserted:

That the use of a default PBC should be an option of last resort, and should serve as an interim measure to provide a point of contact for third parties pending the establishment or re-establishment, of a PBC nominated by the native title holders. The default PBC functions should be limited to exercising the procedural rights attached to the native title under the Native Title Act ...

It is particularly important with regard to Indigenous self-governance that default PBCs are an interim measure only which is called upon as a last resort. To ensure this, in the lead up to making a determination of native title, the CATSI Act requires evidence that the corporation is ready to incorporate.<sup>48</sup> This is to facilitate sustainability. The Federal Court also may play a more assertive role. The court could ensure that a PBC has been nominated and is fully prepared to take on their statutory obligations to hold or manage native title rights and interests at the time of the determination.

### ***Default PBCs under review***

At the time of this report the government was drafting legislative and regulatory amendments that provide for default PBCs. It is recommended that the concerns raised in submissions to the change process that relate to this matter are seriously considered when drafting.

Other issues that require consideration include:

- the inclusion of specified default time period;
- whether the appointment of a default PBC is renewable;
- the inclusion of review processes for the default period and determinations made by the Court;
- where a liquidator has been appointed, and a default PBC determined by the Federal Court: what support will be provided to assist the native title holders to develop an appropriate structure to suit their needs and capacity to ensure its successful operation;
- where a liquidator has been appointed and native title holders wish to regain control of the protection and management of their native title: a process that facilitates the transition from the default PBC to a structure that is appropriate and nominated by the native title holders;
- that the proposed legislative and regulatory amendments providing for default PBCs, are considered together with the amendments already made to the Native Title Act and the PBC Regulations;





- that default PBCs are an interim measure to be used only as a last resort; and
- that the Federal Court play a more assertive role in ensuring that a PBC has been nominated and is fully prepared to take on its statutory obligations to hold or manage the native title rights and interests at the time of the determination.

### ***Replacement PBCs***

Section 60 of the Native Title Act has been amended to strengthen the provisions allowing the replacement of an agent-PBC.

It was argued that this provision restricted the capacity of PBCs by not allowing an agent-PBC to be replaced by a trust-PBC, or a trust-PBC to be replaced by an agent-PBC.<sup>49</sup>

The amendments to the Native Title Act aim to remedy the deficiencies by providing that regulations allow for the replacement of PBCs at the initiation of the common law holders. This will be particularly useful in cases where the common law holders wish to replace the original PBC with a more appropriate structure. The replacement provisions are also applied where a liquidator is appointed for the original PBC and the Federal Court has determined the replacement PBC.<sup>50</sup>

### ***PBCs for subsequent determinations***

The Native Title Act<sup>51</sup> and PBC Regulations<sup>52</sup> have been amended to allow an existing PBC to be determined as a PBC for subsequent determinations of native title. These changes respond to recommendations of the *PBC Report*.<sup>53</sup>

The intent of the changes was to allow PBC infrastructure and resources to be used by more than one group of native title holders, thereby encouraging economies of scale and better use of the limited resources available to the PBC sector. It may also enable a more coordinated management of native title on a regional basis.<sup>54</sup>

Prior to the changes the PBC Regulations<sup>55</sup> only allowed this to occur in circumstances where all the members of the existing PBC were also the native title holders in relation to the subsequent determination.<sup>56</sup>

The changes to the PBC Regulations allow an existing PBC to be determined by the court as a PBC for subsequent native title determinations if *all* common law holders agree. For example, the Kunin (Native Title) Aboriginal Corporation could have been approached to become the subsequent PBC for the Rubibi community who are waiting to have their PBC determined.

However, in the instance of a PBC for subsequent determinations, an existing trust-PBC could only be determined as a subsequent trust-PBC (not an agent-PBC) and vice versa.<sup>57</sup>

Section 59A(3) of the Native Title Act allows regulations to prescribe how the consent may be obtained of both the common law holders for the existing PBC, and the common law holders proposing to use the existing PBC.



According to Regulation 4 of the PBC Regulations, a PBC is an Aboriginal and Torres Strait Islander corporation where all its members are people:

- who, at the time of making the native title determination – and at all times after the determination is made – are included or proposed to be included in the native title determination as native title holder; and
- have native title rights and interests in relation to the land or waters to which the native title determination relates.

Therefore as it currently stands, it appears that the changes may be contradictory to the definition of a PBC in Regulation 4. My concern is that in order for the changed regulation to operate effectively Regulation 4, which is integral to ensuring the right people constitute the membership of the PBC, will need to be amended in the future.

If this future amendment removes the requirement for members of PBCs to be holders of native title rights and interests in *that* land, it allows PBCs to negate the traditional law and custom for that area by not ensuring the right people are consulted and making decisions for their country.

### Looking forward

Dysfunctional or under-resourced PBCs jeopardise the capacity of native title holders to exercise their rights and make informed decisions about their country. This can lead to extinguishment by stealth and/or instability and uncertainty, not only for native title holders, but also for government and third parties.<sup>58</sup>

Significant time and resources have been given to the amendments and recommendations for PBCs. Such commitment shows the importance of PBCs to the success of the native title system. And there is also commitment of both government and Indigenous people, and their representatives, to ensure the successful operation of PBCs. Successful operation of PBCs must focus on maximising the needs and aspirations of native title holders.

It is important to acknowledge the government's willingness to work with Indigenous expertise such as the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), NTRBs and PBCs to this end. All seek to identify the challenges they face, and to develop solutions that best support the exercise and enjoyment of Indigenous peoples' human rights.

### Ongoing concerns

Looking back on this chapter, my overarching concern relates to consultation and consent. For native title, the most dangerous changes are reflected in the removal of legislative protection which ensured that PBCs have an obligation to consult with native title holders about decisions concerning their lands.

Other concerns, but none the less important, are:

- The need for financial and non-financial support for PBCs.
- The manner of regulation of the charging of fees for services provided by PBCs, including the registrar's discretionary decision-making powers.



The status of PBCs deserve a watchful eye – the creation of default PBCs, and the replacement and subsequent use of PBCs in particular. This is necessary to ensure that not only the human right of free, prior and informed consent is being satisfied, but also that traditional law and custom is adhered to and the right people are speaking for country.



Not all matters affecting PBCs could be mentioned in this chapter principally because the amendments have not been bedded in yet and PBCs have yet to experience the post-implementation effects. There are other matters that call for monitoring that I will undertake over the coming year but there is a need for more timely scrutiny of the implementation of the amendments.

## Recommendations

- 5.1** That the Minister for Families, Housing, Community Services and Indigenous Affairs and the Attorney-General ensure that regulations which make provision for the development of a process – whereby requests to the registrar for an opinion about fees are made and considered – include a clear framework that:
- specifies a time period during which the registrar must give an opinion on whether a fee is to be paid;
  - requires that the registrar’s opinion about fees be accompanied by the reasons for the decision;
  - when the registrar is to give an opinion about fees, PBCs may make submissions;
  - provides for an appeal mechanism where there is disagreement with the registrar’s opinion, or where the procedures in the regulations have not been complied with.
- 5.2** That the Native Title Act and Regulations be changed to specify default times and review processes for default PBCs.
- 5.3** That efficient use of resources and infrastructure be fostered by allowing an existing PBC to be determined as a PBC for subsequent determinations of native title.
- 5.4** That AIATSIS (with the support of ORATSIC) monitor the changes to PBC legislation as part of its Prescribed Bodies Corporate Project, and report on the effectiveness of the changes relating to PBCs.



- 1 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p14.
- 2 For further discussion regarding Prescribed Bodies Corporate (PBC), also referred to as Registered Native Title Bodies Corporate (RNTBC), see the chapter on the CATSI Act.
- 3 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 4 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 5 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Registered Native Title Bodies Corporate National Overview*, June 2007, p15, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/nationaloverview\(may\).pdf](http://ntru.aiatsis.gov.au/major_projects/nationaloverview(may).pdf), accessed 12 October 2007.
- 6 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p4, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 7 Australian Government Attorney-General's Department, *Structures and Processes of Prescribed Bodies Corporate*, 27 October 2007.
- 8 Attorney-General's Department and the Department of Families, Community Services and Indigenous Affairs, *Submission to the Senate Standing Committee on Legal and Constitutional Affairs, Inquiry into the Native Title Amendment Bill 2006*, p11.
- 9 Ruddock, P., (Attorney-General), Keynote address to the Examining the reforms to the Native Title System Negotiating Native Title Forum, 22 February 2007, p3, available online at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/RWP453BC16E321F9CEBCA2572AC0081C55D>, accessed on 18 October 2007.
- 10 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p6.
- 11 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p13, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 12 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p14.
- 13 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to Land Branch, Commonwealth Department of Families, Community Services and Indigenous Affairs (FaCSIA) on the Draft Guidelines for Support of Prescribed Bodies Corporate (PBC)*, 1 June 2007, p3.
- 14 The conditions on funding of NTRBs are set out in s203CA of the Native Title Act.
- 15 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)*, Land Branch, Canberra, 2007, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/psc\\_rntbc.html](http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html), accessed 24 October 2007.
- 16 Roche, G., Department of Families, Community Services and Indigenous Affairs, *Resources and PBCs*, Presentation delivered at the First National Meeting of PBCs, AIATSIS, Canberra, 12 April 2007 as cited in, Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p21, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007. Also see Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)*, Land Branch, Canberra, 2007, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/psc\\_rntbc.html](http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html), accessed 24 October 2007.
- 17 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p22, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 18 Native Title Service Providers (NTSPs) provide similar professional services to NTRBs in accordance with the *Native Title Act 1993*.
- 19 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)*, Land Branch, Canberra, 2007, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/psc\\_rntbc.html](http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html), accessed 24 October 2007.
- 20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to Land Branch, Commonwealth Department of Families, Community Services and Indigenous Affairs (FaCSIA) on the Draft Guidelines for Support of Prescribed Bodies Corporate (PBC)*, 1 June 2007, p8.



- 21 Roche, G., Department of Families, Community Services and Indigenous Affairs, *Resources and PBCs*, Presentation delivered at the First National Meeting of PBCs, AIATSIS, Canberra, 12 April 2007 as cited in, Bauman, T., Tran, T., First National Prescribed Bodies Corporate Meeting: Issues and Outcomes, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p22, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 22 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p11.
- 23 Seiwart, R. (Senator, Greens), *Minority Report to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Account*, Report on the Operation of Native Title Representative Bodies (March 2006).
- 24 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p23, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 25 HREOC National Survey on Land, Sea and Economic Development 2006.
- 26 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p25.
- 27 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p25.
- 28 *Native Title Act 1993* (Cth), Part 2, Division 7, s60AB, s60AC, not yet included in the *Native Title Act 1993*. As cited in *Native Title (Technical Amendments) Act 2007*, Schedule 3, Item 7, commences on 1 July 2008.
- 29 National Native Title Council, Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment (Technical Amendments) Bill 2006, p5.
- 30 Now the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA).
- 31 Section 58(e)(1) of the Native Title Act previously provided for regulations to make provision that 'the common law holders have been consulted about, and have authorised, the agreements'.
- 32 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006.
- 33 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p73. See also Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p19.
- 34 'Surrender' is not defined in the Native Title Act. However, it is understood in the common law of native title to mean the voluntary giving up of native title or any right to claim native title and therefore it is assumed that the 'surrender' of native title extinguishes the title.
- 35 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Senate Committee on Legal and Constitutional Affairs on the Inquiry into the Native Title Amendment Bill 2006*, 25 January 2007, para 158, p41.
- 36 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p20.
- 37 *Native Title (Prescribed Bodies Corporate) Regulations 1999*, Regulation 9(2).
- 38 Aboriginal and Torres Strait Islander Social Justice Commissioner (on behalf of the Human Rights and Equal Opportunity Commission), *Submission to the Senate Committee On Legal and Constitutional Affairs on the Inquiry into the Native Title [Amendment] Bill 2006*, 25 January 2007, pp43-44.
- 39 *Native Title Act 1993*, (Cth), s203BE and s251A.
- 40 PBCs are required to register under the CATSI Act as an Aboriginal and Torres Strait Islander corporation prescribed for s59 of the *Native Title Act 1993* if it is registered for the purpose of being the subject of a s56 or s57 determination. See *Native Title (Prescribed Bodies Corporate) Regulations 1999*, Regulation 4(1). For more information about the CATSI Act and PBCs see the relevant chapters of this report.
- 41 Australian Government Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p28.
- 42 See s59(2) of the *Native Title Act 1993* (Cth).
- 43 See s56(4)(d)(ii) of the *Native Title Act 1993* (Cth).
- 44 See s56(4)(d)(i), s56(7)(a), and (60)(a)(i) of the *Native Title Act 1993* (Cth).
- 45 See s56(4)(d)(i), s56(7)(a), and (60)(a)(i) of the *Native Title Act 1993* (Cth).
- 46 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Submission to the Senate Committee of Legal and Constitutional Affairs on the Inquiry into the Native Title Amendment (Technical Amendments) Bill 2007*, 26 April 2007, pp8-9 as cited in the Senate, Standing Committee on Legal and Constitutional Affairs Native Title Amendment (Technical Amendments) Bill 2007 [Provisions], May 2007, pp16-17.



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- 47 Native Title Amendment (Technical Amendments Bill 2007, *Explanatory Memorandum*, p78.
- 48 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum*, p22, available online at: [http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0F4275A53180E60DC A25702F008122FE/\\$file/test05104EM.doc](http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/0/0F4275A53180E60DC A25702F008122FE/$file/test05104EM.doc), accessed 7 November 2007.
- 49 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p74, as cited in: The Senate, Standing Committee on Legal and Constitutional Affairs, *Native Title Amendment (Technical Amendments) Bill 2007 [Provisions]*, May 2007, p8.
- 50 See s60 of the *Native Title Act 1993* (Cth).
- 51 See s59A of the *Native Title Act 1993* (Cth).
- 52 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 5.
- 53 Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p22.
- 54 Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p21.
- 55 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 4.
- 56 For example, the Karajarri People's claim was the subject of two separate determinations, although one PBC manages the native title for both determinations, as cited in Attorney-General's Department, *Structures and Process of Prescribed Bodies Corporate*, 27 October 2006, p21.
- 57 See s59A(1) and s59A(2) of the *Native Title Act 1993* (Cth).
- 58 National Native Title Council, *Submission to Senate Legal and Constitutional Affairs Committee Inquiry into the Native Title Amendment Bill 2006*, p15.



# Chapter 6

## The CATSI Act 2006

I am concerned about the effects of the new CATSI Act on the exercise and enjoyment of Indigenous people's human rights.

'CATSI' is an acronym for the *Commonwealth's Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), which came into effect on 1 July 2007. The Act 'primarily provides for the incorporation and regulation of Aboriginal and Torres Strait Islander Corporations'. It replaces the *Aboriginal Councils and Associations Act 1976* (Cth) (the ACA Act).

The CATSI Act significantly changes the law governing Indigenous corporations compared with the repealed ACA Act. We will have to wait to see how Indigenous corporations will experience the changes over the next year or so given the Act has just been enacted.

Notwithstanding, I am concerned about its effects on:

- Indigenous bodies or corporations that hold native title;
- Indigenous corporations that hold or manage other interests in land and sea; and
- interplay between the *Native Title Act 1993* (Cth) (the Native Title Act) and the CATSI Act.

More specifically, my main concerns are:

- that necessary support and resources are provided to Indigenous corporations auspiced by the CATSI Act;
- whether the CATSI Act adequately addresses the incorporation and governance needs of Indigenous people;
- whether the CATSI Act imposes extra administrative burden on Indigenous people (for example, the requirement to amend constitutions);
- that proper funding and guidance be made available for changes to constitutions;
- that there be free, prior and informed consent of members before accepting any changes to constitutions;
- that corporations are able to fulfil their obligations, especially where incorporation is compulsory and obligations are imposed. Examples are native title and corporations established by the Indigenous Land Corporation (the ILC);



- that safeguards included in the CATSI Act are adequate for the protection and exercise of rights, through the attainment of the corporations' objectives; and
- that the CATSI Act does not undermine community control or confine Indigenous self-governance.

## About the CATSI Act

The CATSI Act is deemed in its preamble to be a special measure providing for the advancement and protection of Indigenous peoples in accordance with the Racial Discrimination Act 1975 (Cth) and international law (see the appendixes for details of 'special measures').

The CATSI Act provides for:

- the incorporation, operation and regulation of bodies registered under the Act and for duties of officers and their regulation; and
- incorporation of bodies incorporated for the purpose of becoming a registered native title body corporate (RNTBC).<sup>1</sup>

The legislation is complex and lengthy and to its credit, the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC) has developed educational resources to assist understanding of the legislation and its obligations.<sup>2</sup> The challenge will be to deliver the education resources in a timely and linguistically and culturally appropriate way and to deliver the education materials to new corporations as they are registered.

The CATSI Act arose out of a review of the *Aboriginal Councils and Associations Act 1976* (ACA Act). The review's report, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act, Final Report of the Review of the Aboriginal Councils and Associations Act 1976 (Cth)* was finished in December 2002 (the ACA Report). No exposure-draft legislation was circulated. Extensive consultations were undertaken prior to the development of the bill. Public hearings on the bill were undertaken by the Senate Legal and Constitutional Affairs Committee in October 2005. Two associated legislation promulgated in 2006 were:

- The *Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act 2006* (Cth), (allows two years for corporations to transfer from the ACA Act to the CATSI Act. The associated legislation also amends provisions in the Native Title Act dealing with prescribed bodies corporate (PBC) and registered native title bodies corporate (RNTBCs) to recognise their registration under the CATSI Act).
- The *Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Act 2006* (amends the *Corporations Act 2001* (Cth) (the Corporations Act) to remove contradictions and gaps between the CATSI Act and the Corporations Act).<sup>3</sup> (Note that the CATSI Act and the Corporations Act are different pieces of legislation.)





## Aims of the CATSI Act

The CATSI Act is aimed at promoting good governance and management of Indigenous corporations<sup>4</sup> while taking into account the special risks and requirements of the Indigenous corporate sector. It is intended to:

- create opportunities for innovation and best practice to flourish within Indigenous corporations;<sup>5</sup>
- modernise corporate governance practices and accountability standards, and improve security for funding bodies, creditors and other parties doing business with Indigenous corporations; and
- provide flexibility for Indigenous groups and communities in designing the corporation's constitution.

## Interaction of the CATSI Act and Native Title Act

A key aim of the CATSI Act is to ensure that it interacts appropriately with the Native Title Act.

The Explanatory Memorandum of the CATSI Act states:

The Act [CATSI Act] minimises the incompatibility between the Native Title Act and the CATSI Act through tailored provisions for RNTBCs or in relation to an application made for the purposes of becoming a RNTBC where necessary.<sup>6</sup>

## Administration of the CATSI Act

The CATSI Act is administered by the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC).

## Background to the CATSI Act

The CATSI Act came out of the review of the ACA Act and the ACA Act Report that was released in December 2002.

The ACA Act governed the operation of Indigenous corporations since 1976. Its intent was to provide Indigenous groups with a mechanism for flexible, appropriate, incorporation. About 2500 Indigenous corporations were registered under the ACA Act.

The ACA Act was different from mainstream corporations law in that it made provision for Indigenous representative membership, traditional laws and customs and decision-making processes. It also allowed for accountability to members by its governing committee, and a system of local and regional governance for Indigenous communities in the provision of services.



## The ACA Act Report

The 2002 review of the ACA Act made two significant recommendations in its report. These were that:

- a thorough reform of the ACA Act be conducted (which resulted in the CATSI Act); and
- the need to retain a special incorporation statute to meet the needs of Indigenous people.<sup>7</sup>

Both of these recommendations are implemented through the CATSI Act.

The review found that:

- the ACA Act was failing to prevent corruption. Consequently it provided inadequate protection for members of corporations;
- the rigidity of corporate governance was too prescriptive<sup>8</sup>; and
- there was insufficient protection for other parties, including funding agencies.

The review argued that the ACA Act:

- was so significantly out of alignment with mainstream corporations law that it disadvantaged many Indigenous communities; and
- may have been discriminatory because it was failing to protect Indigenous corporations in the same way as non-Indigenous corporations were protected under the law.<sup>9</sup>

Accordingly, amendments to the ACA Act were required to:

- bring the law governing Indigenous corporations in line with the Corporation Act and the Native Title Act; and better reflect modern corporate governance requirements; and
- better provide for the specific requirements of Indigenous corporations and their varying responsibilities.

The CATSI Act was developed after independent review and consultation over two years. Further research was conducted by the Office of the Registrar of Aboriginal Corporations (now ORATSIC), but concerns were still raised about the timing of the consultation process, given the complexity of the legislation.<sup>10</sup> As indicated, an extensive education program is being undertaken by the ORATSIC aimed at raising awareness and addressing problems arising from concerns over the consultation process.



## Indigenous corporations

Some large Indigenous corporations could be considered quasi-local governments, particularly those located in remote and regional areas. Depending on the size of the corporation, they might deliver:

- essential services that would usually be provided by mainstream local government, including access to basic human rights such as health, housing and medical services;
- a range of services that are different to those of mainstream corporations;
- functions associated with native title;
- an interface to 'mainstream' society;
- infrastructure (such as power stations) to remote Indigenous communities; and
- hold land for Indigenous groups or manage the group's native title rights and interests.

These organisations include land-holding bodies such as state and territory land rights corporations and registered native title bodies corporate (RNTBCs) of which there are currently more than 216.<sup>11</sup>

## Incorporation options

Most Indigenous corporations are not required to incorporate under the CATSI Act<sup>12</sup> unless it is a condition of their funding or they are legislatively directed to do so. Depending on their structure and purpose, a corporation may choose to incorporate under the CATSI Act or under the Corporations Act. If they incorporate under the Corporations Act the Australian Securities and Investments Commission (ASIC) regulates their activities.

Indigenous corporations that were registered under the ACA Act will automatically be registered under the CATSI Act. This is facilitated through the Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Act.

Corporations have two years from 1 July 2007 to make the changes required to comply with the CATSI Act. The major effect on a corporation is the need to change their constitution.

Indigenous bodies may also have the option to incorporate under state and territory incorporation laws<sup>13</sup> shown in the following table.



<b>Options for incorporation under state and territory incorporation laws</b>		
<b>Jurisdiction</b>	<b>Legislation</b>	<b>Regulatory body</b>
Northern Territory	<i>Associations Incorporation Act 2003</i> (NT)	Northern Territory Department of Justice – Consumer & Business Affairs Northern Territory Business Channel
Western Australia	<i>Associations Incorporation Act 1987</i> (WA)	Western Australian Department of Consumer and Employment Protection – Associations
South Australia	<i>Associations Incorporation Act 1985</i> (SA) [current on 1 January 2004]	South Australian Office of Consumer & Business Affairs – Associations
Australian Capital Territory	<i>Associations Incorporation Act 1991</i> (ACT)	Australian Capital Territory Registrar of Business Names and Associations Australian Capital Territory Indigenous Business Chamber
Tasmania	<i>Associations Incorporation Act 1964</i> (TAS)	Tasmanian Department of Consumer Affairs and Fair Trading – Associations
Queensland	<i>Associations Incorporation Act 1981</i> (Qld)	Queensland Office of Fair Trading – Associations
Victoria	<i>Associations Incorporation Act 1981</i> (VIC)	Consumer Affairs Victoria – Associations
New South Wales	<i>Associations Incorporation Act 1984</i> (NSW)	New South Wales Office of Fair Trading – Associations

## **Indigenous corporations holding land interests**

Various types of corporate bodies may hold the land interests of Indigenous people, including:

- a prescribed bodies corporate (PBC);
- a registered native title body corporate (RNTBC); and
- land trusts, and state and territory land rights corporations.

Some of these corporations may comprise of traditional owner groups, whilst other corporations may hold the title on behalf of an Indigenous group or community. There is information on RNTBCs and PBCs later in this chapter.



RNTBCs and PBCs are Indigenous corporations set up specifically to manage native title rights and interests on behalf of the common law holders (the traditional owners).

The establishment of the Indigenous Land Corporation, through the Native Title Act, has led to the transfer of various land interests to Indigenous groups. Under ILC policies, these interests must be held in trust by ACA Act corporations (now CATSI Act corporations).<sup>14</sup>

See an appendix at the end of the report for types of corporations that hold land interests.

### **Prescribed bodies corporate (PBCs)**

As provided for in the Native Title (Prescribed Bodies Corporate) Regulation 1999, a PBC is:

- an Indigenous corporation prescribed under Section 59 of the Native Title Act;
- registered with the Registrar of Aboriginal Corporations in accordance with Regulation 3(1) and 4(1) of the Native Title (Prescribed Bodies Corporate) Regulations; and
- in the process of becoming a registered native title body corporate to manage the native title rights and interests on behalf of the common law holders.

In determining if a corporation is a PBC, the court will consider the objects of the corporation which must include the purpose of holding and managing native title rights and interests, and whether the corporation is in the process of becoming a registered native title body corporate.

Section 59 of the Native Title Act details the kinds of prescribed bodies corporate that may be determined under Sections 56, 57 or 60 of the Native Title Act.

The court will determine whether the most appropriate structure for the PBC is as a trust or agency under Sections 56 and 57 of the Native Title Act.

Indigenous corporations that hold and manage land interests are known as PBCs prior to their determination and inclusion on the National Native Title Register. When the court determines native title it will decide which PBC is to hold the native title. The name of that PBC is added to the Native Title Register as a RNTBC.

### **Registered native title bodies corporate (RNTBCs)**

A registered native title body corporate in accordance with the Native Title Act:

- is the legal body which conducts business on behalf of the native title holders related to native title rights and interests as recognised by the court in a determination of native title;
- is determined by the court and entered on the National Native Title Register; and
- is registered with the Registrar of Aboriginal Corporations in accordance with the CATSI Act.



The CATSI Act requires that RNTBC have the words 'registered native title body corporate' or the abbreviation RNTBC as part of its name. A RNTBC is known as a PBC prior to the determination. Thus, if the Indigenous corporation was previously a prescribed body corporate, it is required to change its name to reflect the new status of RNTBC.

At the time the Federal Court makes a determination of native title, it must make a determination whether the native title is to be held in trust, and if so by whom. The court may determine that it is to be held in trust by a PBC (a trust PBC). If the court determines it is not to be held in trust, the court must take certain steps to determine which PBC is, after becoming a registered native title body corporate, to perform functions given to it as a registered native title body corporate under the Act or under regulations. Regulations provide for a registered native body corporate to do the functions set out in Section 58 of the Act. These include to act as agent or representative of the common law holders in respect of matters relating to native title.

### **RNTBCs and native title**

The exercise and enjoyment of Indigenous peoples' native title rights and interests is a fundamental concept in native title. RNTBCs are intended to be key elements in native title. This is because their effective operation maximises the ability of native title holders to exercise their native title rights and interests to gain cultural, social and economic benefits.

Crucially, a RNTBCs is required by law to maintain the relationship between the native title holders and their native title rights and interests. Further, they are the contact point for other parties, including industry and government, to access native title lands.

Up to 60% of all Indigenous corporations are remotely located,<sup>15</sup> and they have widely different access to resources. Thus, how functional and effective RNTBCs are, can vary extensively from one corporation to the next.

### **Complex regulation**

The CATSI Act links to the Native Title Act by defining a 'native title legislation obligation' as those obligations imposed by the native title legislation on a registered native title body corporate. The obligations include to:

- consult with the common law holders of native title;
- act in accordance with the directions of the common law holders of native title;
- act only with the consent of the common law holders of native title; and
- take any other action in relation to the common law holders of native title.<sup>16</sup>



However, PBCs and RNTBCs are governed by a complex legislative framework that sets out functions and responsibilities for RNTBCs through the Native Title Act and the Native Title (Prescribed Bodies Corporate) Regulations. While the CATSI Act aims to remove conflicts and uncertainty about how the two Acts operate together, the corporation may also have added responsibilities. The responsibilities may be under other Commonwealth, state or territory legislation. They are often expected to address broader community social and cultural issues that exceed legislative requirements and responsibilities.

A prescribed body corporate must be registered under the CATSI Act.<sup>17</sup> Additionally, they are regulated by a number of other complex and sometimes conflicting sources of law, including:

- the law of trusts and agency;
- the Federal Court's determination of native title; and
- aspects of traditional law and custom recognised by the Federal Court.<sup>18</sup>

This legislative framework is also supported by an array of administrative arrangements that involve:

- the Department of Families, Housing, Community Services and Indigenous Affairs;<sup>19</sup>
- the Office of the Registrar of Aboriginal and Torres Strait Islander Corporations;
- Native title representative bodies;
- state and local governments where Indigenous land use agreements and other native title agreements have been negotiated; and
- the private sector supporting the operations of registered native title bodies corporate.

### ***Effects of the complexity***

The complexity of statutory obligation demands a high-level of governance and management by a RNTBC. To achieve this there must be:

- good funding at an appropriate time;
- funding that is free from buck-passing between Commonwealth and states or territories;
- access to high quality advice (legal, accounting, management);
- good education for officers; and
- efficient office facilities.



## RNTBC's responsibilities in native title

RNTBCs provide a mechanism that can facilitate the exercise and enjoyment of Indigenous peoples native title rights and interests. For example, their functions as detailed in Regulation 6 and 7 of the Native Title (Prescribed Bodies Corporate) Regulations 2007 include:

- to manage the native title rights and interests of the common law holders;
- to hold money (including payments received as compensation or otherwise related to the native title rights and interests) in trust;
- to invest or otherwise apply money held in trust as directed by the common law holders;
- to consult with the common law holders in accordance with Regulation 8;
- to perform any other function relating to native title rights and interests as directed by the common law holders;
- to consult with other persons or bodies;
- to enter into agreements;
- to exercise procedural rights; and
- to accept notices required by any law of the Commonwealth, a state or a territory to be given to the common law holders.<sup>20</sup>

The Australian Government has recognised that these corporations are also central to discharging the native title holder's obligations to manage their lands.<sup>21</sup>

Administrative capacity in Indigenous corporations is usually limited, and every effort is needed to minimise 'red tape'. Evidence suggests that, of the RNTBCs established to date, most are struggling to meet the legislation requirements under which they are governed<sup>22</sup>.

## Number of RNTBCs

On 30 May 2007: of the 69 claimant determinations recognising native title, there were 49 RNTBCs determined, and 11 RNTBCs still waiting to be determined.<sup>23</sup> (The anomaly occurs because some RNTBCs hold more than one determination.)

FaCSIA<sup>24</sup> Land Branch has estimated that within the next 10-15 years there will be 100-150 RNTBCs.<sup>25</sup> These figures are likely to be underestimated according to RNTBCs, native title representative bodies, and native title service providers (NTSPs).





<b>Number of RNTBCs advised, and waiting to be advised, on 30 May 2007.<sup>26</sup></b> <b>Types of RNTBC (trustee or agent) are shown.</b>					
<b>State/Territory</b>	No. of claimant determinations recognising native title	No. of determined RNTBCs	No. of Trustee RNTBCs	No. of Agent RNTBCs	No. of RNTBCs waiting to be determined
New South Wales	1	1	1	0	0
Northern Territory	8	3	0	3	5
Queensland (mainland) <sup>27</sup>	16	8	1	8	1
Queensland (Torres Strait)	22	20	19	2	0
South Australia	2	0	n/a	n/a	2
Victoria	2	2	2	0	0
Western Australia	18	15	14	1	3
Total	69	49	37	14	11

### **Interplay with other land corporation interests**

As identified in the Explanatory Memorandum to the Native Title Amendment Bill 2006,<sup>28</sup> RNTBCs have important functions under the Native Title Act and the PBC Regulations, that PBCs do not have (for example, being a party to agreements and receiving future act notices).

The First National Meeting of Prescribed Bodies Corporate took place in April 2007. Out of that meeting the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) report pointed out that the reforms aimed for in the CATSI Act:

...do not account for the needs of those corporations that have been established by native title groups prior to a determination, or to manage native title outside determination processes, or those which sit alongside the RNTBC or manage other funds or economic development opportunities. Many of these corporations may be carrying out the functions of PBCs such as management of future acts, negotiating a range of native title related agreement, and/or managing related benefits.<sup>29</sup>



The meeting noted that ‘there is a need to develop better understandings of the growing corporatisation of native title groups and their relationships with other Indigenous community organisations.’<sup>30</sup>

RNTBCs are unique Indigenous corporations in that they have special land interests and responsibilities under the Native Title Act. The CATSI Act provides special protections for officers of RNTBCs.<sup>31</sup>

## **Corporations holding land and the CATSI Act**

Arising from the *ACA Act Report* a number of key elements of the CATSI Act have relevance to Indigenous corporations holding land interests, particularly native title corporations. Eight of these elements are discussed here.

### **Indigenous and non-Indigenous membership**

The *ACA Act Report*<sup>32</sup> recommended that Aboriginal corporations and their governing boards continue limitation of membership to ‘Indigenous natural persons’ and their spouses.

Contrary to that recommendation, the CATSI Act requires at least 51% of members and directors of Indigenous corporations be Indigenous people. Thus, 49% of members can be non-Indigenous people, including corporate partners who would hold full member rights.

This provision was made because the ORATSIC argued that non-Indigenous and corporate members could assist communities improve governance, provide access to expertise and assist with economic development in communities. However, in remote communities and townships, where essential services come only from Indigenous councils or corporations, non-Indigenous membership could ensure that non-Indigenous members are not disadvantaged.

While Indigenous people have views supporting non-Indigenous members (particularly in the service sector), some Indigenous stakeholders retain concerns (especially in native title). Undermining community control and Indigenous self-governance remain particular concerns.

The Central Land Council argued that non-Indigenous memberships ‘will not serve the ‘special needs’ of the Aboriginal people of Central Australia’. It asserts that while the CATSI Act allows ‘for a minority membership of non-Indigenous people, this will not be sufficient to ensure Aboriginal control’.<sup>33</sup>

There is the potential for governments and corporations to take advantage of the changes that allow for non-Indigenous and corporate membership to increase their control over Indigenous community affairs, services and assets.<sup>34</sup>

### **Protections**

RNTBCs have the protection of the Native Title (Prescribed Bodies Corporate) Amendment Regulations. The regulations provide that only native title holders of a RNTBC can be a member or a director. Provisions in the CATSI Act to allow non-Indigenous and corporate membership do not apply to RNTBCs. Thus, RNTBCs are less at risk to the erosion of community control under the CATSI Act than are other



Indigenous corporations including land trusts and state and territory land rights corporations.

For other corporations, non-Indigenous membership is only allowed where the rules of the corporation allow it. Therefore members must approve non-Indigenous membership, and there must be a majority of Indigenous members and Indigenous directors.

Further, members and directors have responsibilities under the CATSI Act and are subject to penalties for misconduct. A potential conflict of interest (where a government or industry partner was to apply for membership or directorship) must be considered and, practically, that would most likely exclude them from directorships. The interest of the corporation must be the priority of both members and directors rather than any personal agendas.

### **Constitutional amendments**

Because the CATSI Act must interact appropriately with the Native Title Act, RNTBCs must have constitutions and internal governance rules that are consistent with the Native Title Act.

The Explanatory Memorandum to the CATSI Act requires corporations to provide for the success and sustainability of Indigenous corporations by encouraging responsible incorporation practices and internal governance that compel the corporation to focus on important matters that would otherwise be difficult to resolve without clear rules and guidelines.<sup>35</sup>

For example, the CATSI Act requires Indigenous corporations to include dispute resolution processes in their rules. However, corporations may require additional funding for advice on developing dispute resolution mechanisms and to ensure that appropriate consultation and the free, prior and informed consent of its members is obtained to change the constitution.

RNTBCs are concerned that:

- requirements to amend their constitutions and governance rules will be an added administrative and logistical burden on RNTBCs; and
- they already have little or no resources to hold meetings necessary to make the changes. This is particularly relevant to those RNTBCs in remote areas where members are widely dispersed, and for those who live in the Torres Strait or the Tiwi Islands. All may have to travel long distances or between islands to attend meetings.

North Queensland Land Council<sup>36</sup> has highlighted the increased expense:

The process of changing rules can be quite expensive involving the calling of a SGM (Special General Meeting). It is noted that in most cases the proposed changes to rules must be advertised in a notice calling the SGM and in many cases, corporations may well need legal advice to prepare the appropriate notices and detailed suggested changes.



There has been no indication of increased funding to meet these expenses. Accordingly, the Senate Standing Committee on Legal and Constitutional Affairs recommended:

that the government monitor funding to assist corporations with the transition to the new regime and make provision in the 2007-2008 budget to increase funding if necessary.<sup>37</sup>

The CATSI Act has offered some solutions including a two-year transition period—rules could be considered at an appropriate meeting during that time. And the registrar has the power to extend the time and to allow corporations bi-annual general meetings.

### **Statutory reporting obligations**

Statutory reporting has been, and still is likely to remain, a burden on Indigenous corporations. Smaller bodies are especially affected. The *ACA Act Report* gives a good example:

A small, passive land-holding body may receive little or no income, and undertake few if any activities. As such, the reporting requirements would have to be met by the board of directors, who are drawn from the local community, and may have little formal education or appropriate training. The requirement to hold AGMs and provide detailed audited reports would clearly be onerous for such corporations. There is also little public interest in a high level of reporting and disclosure, as the corporation is not engaged in any significant activities.<sup>38</sup>

In the past the ACA Act required all bodies to report in the same way, irrespective of size and financial capacity. Even now, many corporations (particularly RNTBCs, land trusts, and state and territory land rights corporations) have small memberships that serve a large constituency spread over large geographic areas. Management is often voluntarily, and there is usually no income or start-up funds available.

### ***Issues of size and land***

Under the CATSI Act, Indigenous corporations will be classed as small, medium, or large. The reporting requirements will be determined according to their income, assets and number of employees rather than the size of their membership.<sup>39</sup>

While the asset base for some corporations could be in the millions of dollars (depending on the land value and other assets value) many face the same lack of resources and capacity as those that might be classified as 'small' with minimal reporting requirements.

The lands they hold in trust have not been gained through the native title process and are physical assets rather than native title rights and interests. Such grants of land may suggest these corporations should be in the 'medium' or 'large' category, and thus they might have to meet the more stringent reporting requirements. However, under the CATSI Act, native title rights and interests held by a RNTBC will not be included in determining the value of the assets for reporting purposes. Thus, many RNTBCs will fall into the category of 'small' and will have fewer reporting requirements.<sup>40</sup>



RNTBCs may now only need to provide a 'general report', and may only have to provide this every second year if approved by the registrar. While some will no longer be required to provide audited financial statements, RNTBCs will have to give some basic membership and contact data. It is not clear whether exemptions from providing audited financial statements will also be applicable to those corporations who may hold highly valuable land assets in trust.

### ***Land trusts and land rights corporations***

Some land trusts and state and territory land rights corporations may be better off under the Corporations Act. Take, for example, a corporation with Indigenous Land Council land valued at \$3 million and three employees. It may incorporate:

- under the Corporations Act where they would report as a small company; or
- under the CATSI Act where they would report as either a medium or large corporation and be required to meet more onerous reporting requirements.

While incorporating under the Corporations Act could reduce the administrative burden, it would also limit the information provided to the members about the status of the corporation and its assets. This is a particular problem where land assets are held on behalf of traditional owner groups, and there is a potential to lose their asset and risk de-registration due to non-compliance.

The need to build capacity and support mechanisms in Indigenous corporations is very pressing.

An appendix at the end of this report gives a brief summary of how corporations may be classified and what reporting requirements may be applicable.<sup>41</sup> They are contrasted with requirements under the Corporations Act.<sup>42</sup>

### ***'Involuntary' incorporation?***

A critical feature of many Indigenous corporations is that they are formed pursuant to a legislative requirement or as a result of government policy. Arguably they are not truly 'voluntary' corporations of individuals. For example:

- in certain circumstances, Indigenous groups are required by the Native Title Act to establish an Indigenous corporation (PBC) and incorporate under the CATSI Act;
- in certain circumstances, Indigenous groups are required by the *Aboriginal Land Rights (Northern Territory) Act 1976* and/or other State and Territory land rights regimes, to establish an Indigenous corporation and incorporate under the CATSI Act; and
- Commonwealth and state governments have adopted policies of 'self management', which give the responsibility for the delivery of a wide range of essential services (such as housing, health, employment/CDEP) to Indigenous communities themselves. Government funding bodies often require the communities to form corporations before they are eligible to receive the funding to perform these services.



As identified in the *ACA Act Report*.<sup>43</sup>

an increasing emphasis on economic development, and its policy linkage to self-determination at the community or group level, has led to the establishment of many corporations for commercial purposes. There are also increasing numbers of Indigenous associations being formed to represent the interests and reflect the identities of Indigenous groups and communities.

The report<sup>44</sup> went on to identify a number of consequences to involuntary incorporation for Indigenous corporations including:

- people who would not otherwise have formed a corporation, and who may not understand the consequences or technical requirements of incorporation, are required to do so;
- the requirement for incorporation can force together Indigenous groups which would not otherwise have joined together, and which might not share the same views or goals, making the corporation vulnerable to destabilising competition between groups; and
- the requirement for the establishment of community corporations to perform community services can result in confusion between the membership of the community and the membership of the corporation itself.

Once incorporated, the onus is on Indigenous corporations to perform functions and meet statutory obligations imposed upon them.

### **Membership numbers in Indigenous corporations**

The CATSI Act requires a corporation registered under it to have at least five members. Corporations can be granted an exemption from this number if it is appropriate and reasonable to do so.

RNTBCs are required by the Native Title (Prescribed Bodies Corporate) Regulations to consult and obtain consent from common law native title holders when making native title decisions. Evidence can be a document certifying that the common law holders have been consulted and given consent to the decision. Such documents must be signed by at least five common law holders who are members of the RNTBC. The Registrar of Aboriginal and Torres Strait Islander Corporations has the power to grant exemptions from this requirement. At the same time, the registrar is aware that groups registering under the CATSI Act as a RNTBC (or anticipated RNTBC) are also required to comply with the Native Title Act and will take that into account when receiving applications for such an exemption.

Prescribed bodies corporate that want to register under the CATSI Act are required to advise the registrar of their intention for the purpose of operating as a RNTBC.<sup>45</sup> The registrar is obliged to be mindful of compliance with the Native Title Act.<sup>46</sup>

Under the CATSI Act corporations have the ability to impose restrictions on their membership (for example being part of a particular Indigenous group) as was also the case under the ACA Act.<sup>47</sup> This is particularly relevant to the requirements for RNTBCs which are bound by regulation to ensure that all of their members are persons who have native title rights and interests in relation to the land or waters to which the native title determination relates.<sup>48</sup>



## Members' benefits in Indigenous corporations

The *ACA Act Report* was critical of the ACA Act for not significantly discouraging corruption and nepotism within Indigenous corporations. There were concerns about the need to protect the rights of members of Indigenous corporations against oppression and abuse by officers of the corporation and external stakeholders,<sup>49</sup> (particularly for those without the capacity to act themselves).

Following the review, the CATSI Act aligns the remedies for members with corporations law. The registrar has a new power to seek solutions to issues on behalf of members in circumstances where a corporation may not be acting fairly towards its members.<sup>50</sup>

Those provisions aim to increase the capacity for members to participate in managing the corporation by ensuring transparency and accountability. For example members now have the right to:

- apply to a court to inspect a corporation's books, or to stop a corporation from acting in a way that is unfair to its members;<sup>51</sup>
- ask for information about directors' payments; and
- members may be required to approve transactions that involve the business or personal interest of a director or even a relative of a director (these provisions are included to limit nepotism).<sup>52</sup>

While the intention of these provisions is good, in practice members' access to courts is often limited. To bridge the gap between Indigenous members of corporations and the courts, the CATSI Act provides the registrar with the power to seek remedies on behalf of the members.

For native title and registered native title bodies corporate, the CATSI Act provides an assurance that:

- the CATSI Act cannot be used to frustrate decisions of an RNTBC made in accordance with obligations under the Native Title Act; and
- a duty conferred upon a corporation or individual by the Native Title Act does not put the corporation or individual at risk of breaching provisions in the CATSI Act.

## Directors and their functions

A board of directors governs Indigenous corporations. The board is made up of members of the corporation. (In many Aboriginal corporations the board of directors is known as the governing committee.)

- Under the ACA Act, governing committees were elected by the membership.
- Under the CATSI Act, directors can now be *appointed* by the corporation rather than being selected only through election.



## ***Duties***

The directors hold authority over the corporation and are ultimately accountable for it. It is important to remember that each director may be personally liable at law for decisions. Directors have the duties of:

- loyalty to the corporation as a whole (which includes all its members and creditors);
- care and diligence;
- good faith;
- disclosure of conflicts of interest;
- not to improperly use positions or information; and
- not to trade while insolvent.

The duties of the directors also apply to officers of the corporation such as senior staff (like the chief executive officer, general or executive director), and the public officer under the CATSI Act.<sup>53</sup>

Generally speaking, the functions of the board can include appointing staff; setting goals, strategy, and policy; properly handling finances.

The chief executive officer, general manager, or executive director usually manages the day-to-day operations of a corporation rather than the board of directors or governing committee. However, the CATSI Act allows the directors to exercise all the powers of the corporation (except any powers that the CATSI Act, or the corporation's constitution requires a general meeting of members to exercise). This benefits corporations with limited budgets.

Where directors have little training in business management or corporate governance, the registrar must assist Indigenous corporations to fulfil their duties.

## ***Number of directors***

The CATSI Act sets the maximum number of directors for Indigenous corporations at twelve. This avoids large boards that can be difficult to manage. However, this restriction has caused some concern for native title representative bodies. Submissions to the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005 argued that this number may be too low to ensure representation across what are often broad geographic areas. The CATSI Act does provide some flexibility for corporations to apply for a variation in the number of directors.

## ***Director's term of office***

The CATSI Act limits all directors to two years maximum term of office. Some think this is too short for stable corporate governance. Arguments include:

- shorter terms may encourage more participation by members, yet often lose valuable management skills; whilst
- longer terms allow for stability and the transfer of acquired management skills.





For a two-year term, the Explanatory Memorandum to the CATSI Act argues that a critical feature of membership rights is participation in corporate affairs (including directorships).<sup>54</sup> Also, ORATSIC argues that a two-year term reduces the opportunity for corporations to be ‘captured’ by non-member interests.<sup>55</sup>

In favour of a longer term the North Queensland Land Council argues for a three-year term consistent with other elected terms, like those of governments.<sup>56</sup> Importantly, specialised corporate training is essential at the start of each term, to avoid directors and members being vulnerable to breaking laws they do not understand. A longer term requires less frequent training, and thus less money to pay for the training.

No matter what term of office, significant resources are needed to change management both now and in the future.

In an endeavour to accommodate longer terms of office for directors the CATSI Act allows corporations to change their constitutions to provide for the reappointment of directors.<sup>57</sup> However, changes to a corporations constitution requires the approval of the registrar.

### ***Directors of RNTBCs and the Native Title Act***

The CATSI Act ensures that the provisions for directors and their duties are consistent with those required by the Native Title Act, and that directors, officers, and employees of RNTBCs will not be placed in a conflicting position under the Native Title Act: ‘... regulations provide for the modification of the CATSI Act provisions to ensure sufficient flexibility should the circumstances of RNTBCs change over time.’<sup>58</sup>

RNTBCs are also offered extra protection under the CATSI Act. It provides that a court cannot grant orders on the grounds that the corporation is acting in a way that is oppressive to the members as a whole or oppressive to, or discriminatory against, a member or members if the action is done in good faith with the belief that it is necessary to ensure that the corporation complies with obligations under the Native Title Act.

### **Strict liability offences**

‘Strict liability offences’ involve serious personal obligations that could leave directors personally liable in certain circumstances. The CATSI Act includes a number of strict liability offences developed specifically for it, whilst others are equivalent to offences in the Corporations Act. Strict liability offences include not keeping the membership register up to date, not making the register available as required by the rules, and improper cancellation of membership.

### **Registrar’s powers**

Under the CATSI Act, the Registrar of Aboriginal and Torres Strait Islander Corporations has increased powers. They aim to give maximum flexibility to protect corporations, their members and their communities, and to improve the corporate governance of Indigenous corporations.



The Registrar of Aboriginal and Torres Strait Islander Corporations draws powers from the CATSI Act (based on similar functions in the *Australian Securities and Investments Commission Act 2001* (Cth)) to incorporate, monitor and regulate Indigenous corporations.

Good management skills are crucial to the success of Indigenous corporations. The registrar can help with advice, assistance, education, the ability to conduct research, develop policy, and provide public information.

The importance of this role is highlighted in the Explanatory Memorandum to the CATSI Act:

Conducting research and public education campaigns about good corporate governance for Aboriginal and Torres Strait Islander corporations is an important tool to support the development of improved corporate governance standards in corporations.<sup>59</sup>

### ***Increased powers***

The powers of the registrar have been significantly increased under the CATSI Act. In particular the registrar has discretion to:

- exempt corporations from reporting requirements;
- reject applications for incorporation;
- make changes to a corporations constitution;
- the power to seek assistance of certain people in prosecutions;
- disqualify directors;
- deregister corporations who are non-compliant; and
- appoint external administrators to minimise risk factors.

These powers confirm the registrar's obligation to administer the CATSI Act to contribute to the effectiveness and efficiency of Indigenous corporations, through both monitoring and regulation that promote good governance.

### ***Power to deregister***

The registrar has the power to deregister corporations where a corporation is being (or has been) wound up, and where a corporation has amalgamated, particularly those administratively amalgamated. These provisions are similar to those in the Corporations Act.<sup>60</sup>

Where a native title body has been replaced (or a default PBC has been determined and is therefore no longer a registered native title body corporate under the Native Title Act) the registrar is able to deregister the corporation. However, the CATSI Act prevents the registrar from deregistering a RNTBC because, under the Native Title Act, RNTBCs must be registered under the CATSI Act as Aboriginal and Torres Strait Islander corporations.

The CATSI Act also provides that regulations will deal with the deregistration of Indigenous corporations that hold land or have interests in land—other than RNTBCs.<sup>61</sup> This is particularly significant because many such corporations have land assets that are held in trust on behalf of its Indigenous members. The most important issue to be considered is the capacity for Indigenous people to retain their lands. The CATSI Act and the registrar must guarantee that land-holding corporations are not wound up due to non-compliance.



## Power to protect from abuse

The CATSI Act provides for the registrar to make application to the court to have 'rogue' directors and officers disqualified. The CATSI Act has aligned these provisions with those of the Corporations Act (which, as a general rule, prohibits disqualified people from managing corporations). Disqualification under the Corporations Act means automatic disqualification under the CATSI Act.<sup>62</sup>

## Power with discretion

The registrar has the discretion to consider factors that impact on the governance of Indigenous corporations, including the fact that many of them are located in very remote regions and the availability of directors may be limited.

### Recommendations

- 6.1** That ORATSIC report on the effects of the CATSI Act on under-resourced corporations, such as:
  - land trusts, state and territory land rights corporations; and
  - other corporations that hold title to Indigenous lands as a result of an Indigenous Land Corporation (ILC) divestment, or land purchase, or transfer of lands under land rights regimes.
- 6.2** That ORATSIC report on the financial burdens resulting from corporations redrafting their constitutions so that, if necessary, future Commonwealth budgets can increase funding for this work.
- 6.3** That the CATSI Act be amended so that:
  - decisions of the registrar be open to review in the Administrative Appeals Tribunal;
  - a requirement for appointment of a registrar must be that the applicant has a good understanding and experience of Indigenous peoples and communities; and
  - the Minister for Families, Housing, Community Services and Indigenous Affairs does not have complete discretion in the appointment of a registrar.
- 6.4** That ORATSIC report on non-Indigenous and corporate membership of PBCs. The report should consider whether non-Indigenous, corporate members and directors exercise their powers detrimentally to their Indigenous corporations and the communities that the corporations serve.



- 1 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p21, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007. Also see Division 1-25 of the CATSI Act.
- 2 See the ORATSIC website at [http://www.orac.gov.au/about\\_orac/legislation/reform\\_act.aspx#2](http://www.orac.gov.au/about_orac/legislation/reform_act.aspx#2) for information about the communication strategy. It will include plain English guides, fact sheets, and a video animation explaining the changes. The strategy has been designed specifically for remote community access and communities where English is the second or third language spoken. This will be particularly important for communities with little understanding of the legal system and in particular, in assisting them to ascertain the potential risks and benefits associated with the reforms.
- 3 Office of the Registrar of Aboriginal Corporations, *Get in on the Act: A guide to the start of the Corporations (Aboriginal and Torres Strait Islander) Act 2006*, November 2006, available online at: [www.orac.gov.au](http://www.orac.gov.au), accessed 10 July 2007.
- 4 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p1, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 5 The terms 'Indigenous corporations' and 'Aboriginal and Torres Strait Islander corporations' are used interchangeably throughout this chapter/part to refer to Indigenous corporations registered under the CATSI Act.
- 6 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p10, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 7 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, pii, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 8 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976*(Cth), December 2002, p157. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 9 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976*(Cth), December 2002, p24. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 10 Northern Land Council, *Submission to the Senate Legal and Constitutional Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, 4 October 2005, p1; and Dr Lisa Strelein as cited in Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976*(Cth), December 2002. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 11 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976*(Cth), December 2002, p72. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 12 Prescribed Bodies Corporate are Aboriginal and Torres Strait Islander Corporations that are required to incorporate under the CATSI Act. The objects of the CATSI Act provide for the incorporation, operation and regulation of bodies that are incorporated for the purpose of becoming a registered native title body corporate. See CATSI Act, Part 1, Division 1-25.
- 13 For more information about different options for incorporation, see the Office of the Registrar of Aboriginal Corporations, *Options for Incorporation*, available online at: <http://www.orac.gov.au/publications/legislation/ComparativeTableOfIncorporationStatutes.doc>, accessed 6 November 2007.
- 14 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976*(Cth), December 2002, p16. Report commissioned by the Office of the Registrar of Aboriginal Corporations. Available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.



- 15 In accordance with ABS classifications as cited in: The Parliament of the Commonwealth of Australia, Senate, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p7, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 16 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p12, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt). See s700-1 of the CATSI Act.
- 17 *Native Title (Prescribed Bodies Corporate) Regulations 2007*. Regulation 3(1) which provided a definition for Aboriginal association has been repealed and applies a new definition of Aboriginal and Torres Strait Islander corporation, as defined in the CATSI Act that is a corporation registered under the CATSI Act. See sections 700-1 and 16-5 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2007*.
- 18 Goldfields Land and Sea Council, *Submission to the Inquiry into the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, p9.
- 19 Now the Department of Families, Housing, Community Services, and Indigenous Affairs.
- 20 *Native Title (Prescribed Bodies Corporate) Regulations 2007*. Regulation 6 and 7.
- 21 Brough, M. (Minister for Families, Housing, Community Services and Indigenous Affairs), Ruddock, P. (Attorney-General), *Reforms to Improve Management of Native Title Rights*, Media Release, 27 October 2006, available online at: <http://www.atsia.gov.au/media/media06/7206.aspx>, accessed 6 July 2007.
- 22 Australian Government Attorney-General's Department, the Office of Indigenous Policy Coordination and the Office of the Registrar of Aboriginal Corporations, *Structures and Processes of Prescribed Bodies Corporate*, p6, available online at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/\\$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf), accessed 9 August 2007.
- 23 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Registered Native Title Bodies Corporate National Overview*, June 2007, p15, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/nationaloverview\(may\).pdf](http://ntru.aiatsis.gov.au/major_projects/nationaloverview(may).pdf), accessed 12 October 2007.
- 24 Department of Families, Housing, Community Services and Indigenous Affairs
- 25 Bauman, T. and Tran T., 2007, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Native Title Research Report No.3/2007, p21, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. Available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 11 July 2007.
- 26 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Registered Native Title Bodies Corporate National Overview*, June 2007, p19, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/nationaloverview\(may\).pdf](http://ntru.aiatsis.gov.au/major_projects/nationaloverview(may).pdf), accessed 12 October 2007.
- 27 Queensland (mainland) includes the Wellesley Island Sea Claim *Lardil Peoples V Qld (2004)*.
- 28 Native Title Amendment Bill 2006, *Explanatory Memorandum*, 2006, p75.
- 29 Bauman, T. and Tran T., 2007, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Native Title Research Report No.3/2007, p18, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. Available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 11 July 2007.
- 30 Strelein L. and Tran T., 2007, *Native Title Representative Bodies and Prescribed Bodies Corporate: native title in a post determination environment*, Native Title Research Report No. 2/2007, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. As cited in Bauman, T. and Tran T., 2007, *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Native Title Research Report No.3/2007, p19, Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra. Available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 11 July 2007.
- 31 For example, see Section 487-5 of the CATSI Act.
- 32 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act. Final Report of the Review of the Aboriginal Councils and Associations Act 1976(Cth)*, December 2002. Report commissioned by the Office of the Registrar of Aboriginal Corporations. Available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 33 Central Land Council, *Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, Attachment B, p1. Available online at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/corporations/submissions/sub09.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/corporations/submissions/sub09.pdf), accessed 3 July 2007.



- 34 To illustrate by example: the Government and a community enter into SRA negotiations. The government agrees to provide \$100 000 for community infrastructure to be delivered by a community corporation. The community people making the SRA are also the members of the corporation. One SRA obligation is that the community/members agree to change the corporation's constitution to allow for government officials to serve as directors or members.
- 35 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander Bill 2005*, p22, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007. Also see Division 1-25 of the CATSI Act.
- 36 North Queensland Land Council, *Submissions on Corporations (Aboriginal and Torres Strait Islander) Bill, 2005*, p1.
- 37 The Senate, Standing Committee on Legal and Constitutional Affairs, *CATSI Bill 2005 [Provisions], and Corporations Amendment (Aboriginal and Torres Strait Islander Corporations) Bill 2006 [Provisions], Corporations (Aboriginal and Torres Strait Islander) Consequential, Transitional and Other Measures Bill 2006 [Provisions]*, October 2006, p37.
- 38 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976(Cth)*, December 2002, pp263-264. Report commissioned by the Office of the Registrar of Aboriginal Corporations. Available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 39 See s37-10 of the CATSI Act, and Division 333 of the *CATSI Regulations, 2007*.
- 40 Registrar of Aboriginal Corporations, *Native Title*, Fact Sheet, published July 2007. Available online at [http://www.orac.gov.au/publications/CATSI\\_Act/Factsheet\\_Native-title\\_Jul2007-A4col.pdf](http://www.orac.gov.au/publications/CATSI_Act/Factsheet_Native-title_Jul2007-A4col.pdf), accessed 11 July 2007.
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- 42 ORATSIC are preparing a guide to reporting under the CATSI legislation that will be available on the ORATSIC website.
- 43 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976(Cth)*, December 2002, p67. Report commissioned by the Office of the Registrar of Aboriginal Corporations. Available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 44 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976(Cth)*, December 2002, p6. Report commissioned by the Office of the Registrar of Aboriginal Corporations. Available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 45 See s21-1(2)(b) of the CATSI Act.
- 46 See s66-1(5)(d) of the CATSI Act.
- 47 Office of the Registrar of Aboriginal Corporations, the CATSI Act and the Corporations Act – *some differences*, Fact Sheet, available online at [http://www.orac.gov.au/z\\_delete%2030%20June%202007/review\\_of\\_the\\_act/Factsheet\\_Corporations-Act\\_Feb2007--col.pdf](http://www.orac.gov.au/z_delete%2030%20June%202007/review_of_the_act/Factsheet_Corporations-Act_Feb2007--col.pdf), accessed 11 July 2007.
- 48 *Native Title (Prescribed Bodies Corporate) Amendment Regulations 2007* (No.1), 28 June 2007, p3.
- 49 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976(Cth)*, December 2002, p78. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 50 Corrs Chambers Westgarth, Anthropos Consulting, Mick Dodson, Christos Mantziaris, Senatore Brennan Rashid, *A Modern Statute for Indigenous Corporations: Reforming the Aboriginal and Councils Associations Act*. Final Report of the Review of the *Aboriginal Councils and Associations Act 1976(Cth)*, December 2002, pp155, 208. Report commissioned by the Office of the Registrar of Aboriginal Corporations, available online at [www.orac.gov.au/publications/legislation/final\\_report.pdf](http://www.orac.gov.au/publications/legislation/final_report.pdf), accessed 11 July 2007.
- 51 Registrar of Aboriginal Corporations, *Native Title*, Fact Sheet, published July 2007. Available online at [http://www.orac.gov.au/publications/CATSI\\_Act/Factsheet\\_Native-title\\_Jul2007-A4col.pdf](http://www.orac.gov.au/publications/CATSI_Act/Factsheet_Native-title_Jul2007-A4col.pdf), accessed 11 July 2007.





- 52 Registrar of Aboriginal Corporations, *Duties of directors and other officers*, Fact Sheet, published December 2006, available online at [http://www.orac.gov.au/publications/CATSI\\_Act/Factsheet\\_Directors-duties\\_Dec2006--col.pdf](http://www.orac.gov.au/publications/CATSI_Act/Factsheet_Directors-duties_Dec2006--col.pdf), accessed 11 July 2007.
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- 54 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander) Bill 2005*, p23, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 55 Office of the Registrar of Aboriginal Corporations, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, Attachment F: Response to Submissions, p8. Available online at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/corporations/submissions/sub05a.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/corporations/submissions/sub05a.pdf), accessed 3 July 2007.
- 56 North Queensland Land Council, *Submissions on Corporations (Aboriginal and Torres Strait Islander) Bill, 2005*, p1, available online at: [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/corporations/submissions/sub04.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/corporations/submissions/sub04.pdf), accessed 3 July 2007.
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- 58 Office of the Registrar of Aboriginal Corporations, *Corporations (Aboriginal and Torres Strait Islander) Bill 2005, Submission to the Senate Legal and Constitutional Affairs Committee Inquiry into the provisions of the Corporations (Aboriginal and Torres Strait Islander) Bill 2005*, September 2005, Attachment F: Response to Submissions, p13. Available online at [http://www.aph.gov.au/Senate/committee/legcon\\_ctte/corporations/submissions/sub05a.pdf](http://www.aph.gov.au/Senate/committee/legcon_ctte/corporations/submissions/sub05a.pdf), accessed 3 July 2007.
- 59 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander) Bill 2005*, p33, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 60 See s546-5 to s546-20, and s526-35 of the CATSI Act, and s601AB of the *Corporations Act*.
- 61 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander) Bill 2005*, p110, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007.
- 62 Corporations (Aboriginal and Torres Strait Islander) Bill 2005, *Revised Explanatory Memorandum, Corporations Aboriginal and Torres Strait Islander) Bill 2005*, p74, available online at: [http://www.austlii.org/au/legis/cth/bill\\_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill\\_em/catsib2006520.txt](http://www.austlii.org/au/legis/cth/bill_em/catsib2006520.txt/cgi-bin/download.cgi/download/au/legis/cth/bill_em/catsib2006520.txt), accessed 7 November 2007. See also s279 of the CATSI Act and s206 of the *Corporations Act*.







# Chapter 7

## Selected native title cases: 2006-2007

The Yankunytjatjara and Pitjantjatjara and other Indigenous people of the town of Yulara, in the shadows of Uluru, had their claim for compensation for extinguishment of native title rejected by Justice Sackville in the Federal Court (the *Jango* case)<sup>1</sup> in 2006. The Noongar people (the *Noongar* case)<sup>2</sup> had their claim for native title over the metropolitan area of Perth upheld. Further north, around Darwin, the Larrakia people (the *Larrakia* case)<sup>3</sup> learned that the common law would not recognise their native title when Justice Mansfield handed down his decision.

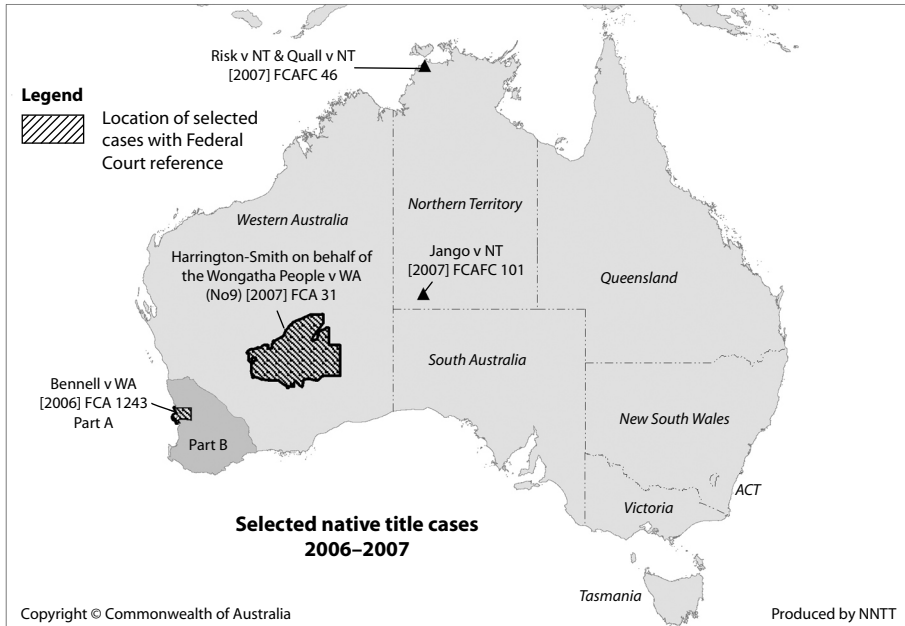
Out in the desert and mineral rich areas of the nation, in the Goldfields of central Australia, the Wongatha people, in arguably one of the most complex native title cases yet heard by the Federal Court (the *Wongatha* case),<sup>4</sup> heard that their claim was not properly authorised. After 100 hearing days and 17,000 pages of transcript, 12 years after they filed their first claim, they would have to start afresh.

These four cases<sup>5</sup> exemplify just how far removed the reality of the operation of today's native title system is from the intention of the Australian Parliament when it first passed the legislation. Each case highlights the hurdles faced by Indigenous peoples trying to use the native title system, established by the *Native Title Act 1993* (Cth) (the Native Title Act), to gain recognition of their rights and interests in country. Rights and interests that are held in accordance with their traditional laws and customs. Issues they highlight are:

- difficulties of obtaining compensation for extinguishment of native title;
- constraints imposed by the treatment of evidence and the rules of evidence;
- problems arising from the common law's interpretation of the definition of native title in Section 223 of the Native Title Act, especially the requirement for a 'society' and substantial continuity of traditional laws and customs;
- hurdles that remain before practical access may be gained to native title, even after a determination recognising native title; and
- authorisation of a native title claim and the system's capacity to identify issues early in the claim process.



These are only some of the issues arising from the interpretation of the Native Title Act by the common law. There is clearly a need to reassess the common law and, where appropriate, make legislative changes. The interpretation of the Native Title Act is placing almost insurmountable barriers in front of Indigenous people in their endeavours to gain recognition and protection of their native title.



### Other Federal Court decisions

As well as the four decisions considered in this chapter, the Federal Court made 16 determinations of native title between July 2006 and June 2007.<sup>6</sup> There were still 533 native title claimant applications in the system, at some stage between lodgement and resolution as at 30 June 2007.<sup>7</sup>

This chapter looks at the four cases mentioned above. The following chapter considers some common areas of concern that arise from these cases and makes some recommendations.

### Jango v Northern Territory

The *Jango* case was the first trial for compensation under the Native Title Act.

Justice Sackville found that the claim for compensation for extinguishment of native title was unsuccessful on 31 March 2006.<sup>8</sup> The claimants appealed to the Full Court of the Federal Court (three judges).<sup>9</sup> The court dismissed the appeal on 6 July 2007 and upheld Justice Sackville's decision.<sup>10</sup>



Two issues are important:

- **compensation for extinguishment of native title:** the case shows how difficult it is to obtain compensation under the Native Title Act. It identifies factors that are likely to be required for success in a litigated case; and
- **evidence:** native title proceedings exposed the difficulties imposed by Section 82 of the Native Title Act (the requirement that the rules of evidence apply) and by how the court treats expert evidence.<sup>11</sup>

Both of these are dealt with in a broader context in the next chapter.

### The case

The applicants were six people who applied to the Federal Court for a determination entitling them to compensation for the extinguishment of native title. They applied on behalf of a group made up predominantly of Yankunytjatjara and Pitjantjatjara people (the compensation claim group). The primary respondents to the application were the Northern Territory and Australian governments.<sup>12</sup>

The applicants were seeking a determination they were entitled to compensation under the Native Title Act for the past extinguishment of their native title<sup>13</sup> as a result of the construction of public works and the grant of freehold and leasehold interests over the town of Yulara (near Uluru in the Northern Territory). (I refer to the area over which compensation was claimed as the ‘compensation claim area.’)

The court held that to establish their right to compensation the applicants had to show they had native title rights and interests in the land just prior to the ‘compensation acts’ they claim extinguished their native title. Justice Sackville held that the claimants had failed to establish that, at the time the acts giving rise to compensation occurred (which he held to be in 1979), they were the native title holders for the land.<sup>14</sup> He held they had not established the existence of native title rights prior to the acts extinguishing native title giving rise to compensation. The applicant’s claim for compensation, therefore, had to fail:<sup>15</sup>

Because no native title rights existed...the compensation acts had no effect on any rights, and no compensation became payable.

The applicant’s argued they were the native title holders. They argued they were members of a wider society identified by anthropologists as the Western Desert Cultural Bloc<sup>16</sup> and that they held native title over the area through their acknowledgement and observation of Western Desert traditional laws and customs.<sup>17</sup> The judge accepted the society of the applicants was the Western Desert Cultural Bloc. This was a society whose members observe a body of laws and customs, despite population shifts that may have taken place over time. However, the judge saw deficiencies in the presentation of the case.

The evidence supported the possibility that a smaller group of people could have rights over country on the basis of patrilineal descent. However, the broader claimant group before the court had not made out their case.



The broader claim group seeking compensation could not demonstrate observance of the laws about land that were contained in the pleadings for the case.<sup>18</sup> Indeed, Justice Sackville said he had difficulty identifying a particular body of laws and customs that was consistently observed in recent times.<sup>19</sup> The witnesses, in his opinion, 'expressed very different views as to the content of the laws and customs that they recognised'.

The judge concluded that the traditional laws and customs of the Western Desert Cultural Bloc provided for small estate groups principally recruited on a patrilineal basis. The case put by the applicants did not emphasise patrilineal descent. The evidence before the judge showed differing views amongst Aboriginal people on the correct principles of recruitment. For these reasons the case fell short of showing that the contemporary laws and customs observed by people were traditional in the required sense.<sup>20</sup>

The judge considered that legally it was not open to him to find in favour of a smaller sub-group of claimants who could claim connection by patrilineal descent.

The *Jango* case prompted analysis of the relevant date at which extinguishment occurred, and therefore at which date the right to compensation accrued. Justice Sackville found that validation by the Native Title Act of prior extinguishing acts had the effect that extinguishment was taken to have occurred when the grant of the interest in land that extinguished native title was made (or the public work constructed). This was rather than when the legislation validating the prior extinguishing acts took effect (in the Northern Territory the validating legislation took effect in March 1994).

### ***Is a determination of native title required?***

Justice Sackville also considered the impact of Section 13(2) of the Native Title Act. Under that section if the court is making a determination of compensation and an approved determination of native title has not been made the court:<sup>21</sup>

... must also make a current determination of native title in relation to the whole or the part of the area, that is to say, a determination of native title as at the time at which the determination of compensation is being made.

Justice Sackville found a determination of whether native title existed was not required in the circumstances of a mere dismissal of the compensation claim. He therefore didn't make one.

### ***Claiming again?***

The court made reference to the possibility that, while the compensation claim has been dismissed, had the case been pleaded differently, a different finding in relation to the existence of native title may have been made. As a result, the applicants had the option of re-shaping their case and attempting once more to have their rights recognised at common law.<sup>22</sup>

### ***Appeal to the Full Federal Court***

The case was appealed by the claimants to the Full Federal Court.<sup>23</sup> The Full Federal Court dismissed the appeal, holding that Justice Sackville had not misunderstood the case, and that:<sup>24</sup>



The Court cannot, in hearing a native title determination application or a compensation application, conduct a roving inquiry into whether anybody, and if so who, held any and if so what native title rights and interests in the land and waters under consideration.

## Compensation for extinguishment

Justice Sackville found that no native title rights and interests were held by the claim group before the court. Therefore, he did not need to consider whether compensation was payable. Nevertheless, he went on to consider compensation under the Native Title Act. This was because the *Jango* case was the first litigated compensation case. This was not part of the reasons for his decision and is not binding (it is 'obiter'). The judge's comments do provide some insight into the significant procedural hurdles claimants are likely to have to overcome to obtain compensation under the Native Title Act.<sup>25</sup>

In order to receive compensation under the Native Title Act, the claimants must establish that:<sup>26</sup>

- they held native title rights and interests just prior to the 'compensation acts' they claim extinguished their native title. They must prove their rights in the same way as when applying for a determination that native title exists. This was the biggest issue for the claimants in *Jango*. Their evidence of native title wasn't accepted by the court as being sufficient to prove native title;
- those native title rights and interests had not been extinguished by acts that do not attract compensation prior to the acts that do attract compensation occurring;
- the compensation acts extinguished, or otherwise diminished, the native title rights; and
- the amount of compensation that should be awarded as a result of compensation acts.

A failure to establish any of these things will defeat a compensation claim. The issue of compensation I consider in a broader context in the next chapter.

## Evidence

In the *Jango* case evidence was a major issue. In a native title case the onus is on the applicants to provide sufficient evidence to prove their case on the balance of probabilities. This evidentiary burden is particularly heavy in native title cases where meeting the requirements under the Native Title Act to establish native title requires evidence going back to sovereignty.

Recognising the serious hurdles of proving native title, Justice Sackville stated:<sup>27</sup>

Claimants in native title litigation suffer from a disadvantage that, in the absence of a written tradition, there are no indigenous documentary records that enable the Court to ascertain the laws and customs followed by Aboriginal people at sovereignty. While Aboriginal witnesses may be able to recount the content of laws and customs acknowledged and observed in the past, the collective memory of living people will not extend back for 170 or 180 years.



Compensation cases may entail particular evidentiary hurdles:<sup>28</sup>

What is clear from *Jango* is that the persons who are entitled to compensation are those that held native title at the date the compensation act was undertaken. In future proceedings, the former holders of native title will have to provide evidence about their connection to land at that date. This evidentiary onus may become a burden for claimants when compensation acts occurred many years before and potential Aboriginal witnesses may not still be alive to give evidence needed.

### **Section 82**

As well as the heavy evidentiary burden on the applicants, how the court treats and admits evidence is an issue in nearly all native title proceedings. The admissibility of evidence in native title proceedings is governed by Section 82 of the Native Title Act. The Federal Court under that section is bound by the rules of evidence 'except to the extent that the Court otherwise orders'. Under Section 82(1) of the Native Title Act the court has the power to dispense with the rules of evidence. It did not do so in the *Jango* case.

### **Expert evidence**

In *Jango* the expert evidence submitted by the compensation claim group became an issue early in the case. Justice Sackville rejected expert evidence presented to him by the claimant group.

He ruled on more than 1,100 objections by the Commonwealth and Northern Territory Governments to the admission into evidence of substantial portions of the two anthropological reports presented by the group claiming compensation.<sup>29</sup> The objections related to the adequacy of the reports as expert evidence under the *Evidence Act 1995* (Cth) (the Evidence Act).

The majority of the objections concerned the:

- lack of distinction between fact and expert opinion;
- failure to identify the source of factual information relied upon;<sup>30</sup> and
- failure to demonstrate that opinion was based on specialised knowledge.

Justice Sackville concluded that the two reports had been prepared with 'scant regard' to the requirements of the Evidence Act.<sup>31</sup> He endorsed the following statement of Justice Lindgren in the *Wongatha* case:<sup>32</sup>

Lawyers should be involved in the writing of reports by experts: not, of course, in relation to the substance of the reports (in particular, in arriving at the opinions to be expressed); but in relation to their form, in order to ensure that the legal tests of admissibility are addressed. In the same vein, it is not the law that admissibility is attracted by nothing more than the writing of a report in accordance with the conventions of an expert's particular field of scholarship. So long as the Court, in hearing and determining applications such as the present one, is bound by the rules of evidence, as the Parliament has stipulated in s82(1) of the [*Native Title Act 1993* (Cth)], the requirements of s79<sup>33</sup> (and s56<sup>34</sup> as to relevance) of the [*Evidence Act 1995* (Cth)] are determinative in relation to the admissibility of expert opinion evidence.<sup>35</sup>



[The report] does not clearly expose the reasoning leading to the opinions arrived at by the authors. Nor does it distinguish between the facts upon which opinions are presumably based and the opinions themselves. Indeed, it is often difficult to discern whether the authors are advancing factual propositions, assuming the existence of particular facts, or expressing their own opinions. Certainly the basis on which the authors have reached particular conclusions is often either unstated or unclear.

### **A strong case fails?**

Uluru—most Australians would see this as the heart of Indigenous Australia. A sacred place, clearly part of the 'Aboriginal domain', Yulara sits in its shadows. Aboriginal people are the joint managers of Uluru-Kata Tjuta National Park. The area is surrounded by land held by Aboriginal Land Trusts. Yet the Yankunytjatjara and Pitjantjatjara and other Indigenous people of Yulara failed to have their rights recognised. The Native Title Act and the way the common law has interpreted it failed to provide them with compensation for extinguishment of their native title.

It must be asked, as it often is by traditional owners around the country, how this can happen? As one witness in the *Wongatha* case summed it up when he said words to the effect, 'if I cannot claim native title in this area, where can I claim it?'.<sup>36</sup> As the judge in that case pointed out:<sup>37</sup>

the implication [of the question] is that a Judge will surely have no difficulty in seeing that the witness must have native title somewhere. The fact is, however, that since the establishment of British sovereignty...there has been a new sovereign legal system, the laws of which are determinative of legal questions.

The concern I have is that the law, both the Native Title Act and the interpretation given it by the common law, are not allowing for compensation for extinguishment or for the full recognition and protection of native title. The preamble states that 'Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms and with a special right to negotiate its form, must be provided to the holders of the native title.' This is not occurring.

The *Jango* case is an example of a case considered strong by many. The judge recognised the strength of the claim. Yet it failed due to the particular difficulties of producing evidence to support a claim in native title proceedings, and because of difficulties in how it was pleaded. The difficulties in pleading the case are themselves an indication of the complexity of the law and the difficulty in pursuing native title determinations.

Section 82 of the Evidence Act provides the 'default' position on evidence in native title proceedings. The rules of evidence apply, including the rules on hearsay and opinion evidence. The special characteristics of Indigenous evidence in native proceedings makes such evidence particularly vulnerable to technical and collateral attacks on a claimants' case. This occurred in the *Jango* case. These can be extremely time consuming and diverting. The issue of evidence is considered in detail in the next chapter.



Technical attacks are part of the wider issue of native title proceedings taking place in an adversarial context. In such a context the respondent parties are entitled to take objection to every point of the claimant's case. Their job, in the adversarial setting, is to attack the claimant's case where ever possible.

## **Bennell v Western Australia**

The Federal Court determined on 19 September 2006 that native title exists over Perth. *Bennell v Western Australia* (the *Noongar case*)<sup>38</sup> was the first decision that native title existed over a capital city in Australia.<sup>39</sup> Justice Wilcox handed down the decision. The Australian and Western Australian governments appealed to the Full Federal Court. The appeal was heard in April 2007. At the time of writing this report the appeal decision had not yet been handed down.

The case highlights:<sup>40</sup>

- the difficulties the court faces in applying the definition of native title in Section 223 of the *Native Title Act 1993*; and
- the procedural complexities that can arise during lengthy and resource intensive native title cases.

While Justice Wilcox held that a limited number of the native title rights asserted by the applicants have survived, the final determination and the precise wording of that determination are to be decided between the parties.

### **The case**

Eighty applicants acting on behalf of the claimant group, the Noongar people, commenced action in the Federal Court in October 2005 to have their native title rights and interests determined. The land subject to the Single Noongar Claim was in the southwest corner of Western Australia and included Perth.<sup>41</sup> The primary respondent to the application was the Western Australian Government. The Commonwealth Government also became a party to the proceeding. Sixty-six other respondents were listed as parties.

The judge determined that native title rights and interests exist over the land; that the Noongar people are the traditional people for the southwest corner of Western Australia. He accepted that Perth, in the middle of this region, has always been part of Noongar country.

### **Satisfying the requirements of native title**

Section 223 of the Native Title Act defines native title. The three elements of that section must be established in any native title proceedings. The first of these is that the rights and interests claimed as native title must be possessed by the claimants under the traditional laws acknowledged, and the traditional customs observed, by Aboriginal peoples or Torres Strait Islanders. The laws and customs must be traditional.

Since the High Court's decision in the *Yorta Yorta* case, for the laws and customs to be traditional there must be a 'normative society' that has continued to exist from the date of sovereignty until today.<sup>42</sup> That society must have continued to observe





law and custom from that date. The claimants must establish that the content of that law and custom has continued to the present day.<sup>43</sup>

### **Society**

Justice Wilcox accepted the applicant's case that a single Noongar society existed in 1829 and that it continues to the present day as a body united by its observance of traditional laws and customs.

The judge concluded that as a matter of law *Yorta Yorta* requires only that the applicants show a 'common normative system' at sovereignty. It was not required to show a subjective sense of community, or some 'other factors which demonstrate unity and organisation' beyond common observance of traditional law and custom.<sup>44</sup>

In Justice Wilcox's words:<sup>45</sup>

The applicants' case was that the Noongar people continued to exist as a society, although in a changed form, and to apply, as between themselves, the traditional landholding rules.

The evidence led him to conclude:<sup>46</sup>

that, in 1829, there was a single society that occupied the whole of the claim area and whose laws and customs regulated land rights.

...

The basis of my conclusion was compelling evidence about five matters: the continuing use of the Noongar language by many people throughout the claim area; the adherence by all the witnesses to a complex of spiritual beliefs that accorded broadly with the beliefs noted by the early European writers and were widespread in the claim area; the maintenance of traditional hunting practices, even where this was not necessary for food-gathering purposes; the continuing coming-together of people for festivals, funerals etc; and, most importantly, the continued adherence, by many people, to the traditional rule about seeking permission to visit someone else's country.

Justice Wilcox found that in 1829 the claim area was occupied and used by 'Aboriginal people who spoke dialects of a common language and who acknowledged and observed a common body of laws and customs.'<sup>47</sup> He accepted that what united and distinguished them from neighbouring groups was a 'commonality of belief, language, custom and material culture.'<sup>48</sup> Though sub-groups or families exercised particular rights and responsibilities for particular areas to which they 'belonged', those rights and responsibilities arose from a wider normative system that operated within the broader Noongar society.<sup>49</sup> The rights of the sub-group were burdened by the entitlement of others to access land for various purposes.<sup>50</sup>

### **Substantial continuity of traditional laws and customs**

In *Yorta Yorta*<sup>51</sup> the High Court made it clear that two factors in particular can interfere with continuity of a society and continuity in the observance of traditional law and custom:<sup>52</sup>

- too much adaptation or change to the content of law and custom; or
- substantial interruption to the observance of law and custom.



These two factors have become key issues to Federal Court judges applying the law:

- what is a degree of tolerable adaptation and change to the content of law and custom; and
- what degree of interruption to the observance of law and custom and to societal continuity is acceptable.

In the *De Rose* case<sup>53</sup> the Full Federal Court said that continuity in the observance of law and custom is a question of fact and degree. It is likely the question in many cases will be whether the community or group as a whole has 'sufficiently' observed law and custom.

In the *Noongar* case, Justice Wilcox took himself back to the question:

whether the normative system revealed by the evidence is "the normative system of the society which came under a new sovereign order" in 1829, or "a normative system rooted in some other, different society"?

He found the current normative system of the Noongar people belongs to the Noongar society that existed at sovereignty and continues to be united by its observance of *some of its* traditional laws and customs. He conceded the enormous impact of European settlement and the cessation of observance for many traditional laws and customs. Nevertheless, conspicuously observing the verbal limitations set down by the High Court in *Yorta Yorta*,<sup>54</sup> he said that Noongar normative system was:<sup>55</sup>

much affected by European settlement; but it is not a normative system of a new, different society.

The modifications to traditional law observed by Justice Wilcox, were, in his view, within the parameters of acceptable change and adaptation; the story of the Noongar was held to be one of continuity and adaptation.<sup>56</sup>

In examining the issue of continuity, the judge looked at different aspects of the society. He found:<sup>57</sup>

- consistent evidence of spiritual beliefs, across age groups and across widely scattered parts of the claim area;
- reasonably strict and consistent marriage rules;
- less cogent evidence as to burial practices; and
- strong signs that 'lawful' conduct in relation to hunting, fishing and food-gathering remained important and was taught to younger family members.

With regard to descent and claims to land, he found that at the date of sovereignty there was a general rule of patrilineal descent (claiming through your father's side) with some exceptions. Today the exceptions have widened, so that claims based on matrilineal descent (claiming through your mother's side) are common. Now, there is a greater element of individual choice in deciding which of those two ways people go in claiming rights in land.



Justice Wilcox said that widening the exceptions to the general rule regarding descent was a realistic response to the widespread fathering of Aboriginal children by non-Aboriginal men. Changing descent rules was necessary to sustain the general operation of land rules across Noongar society. Likewise, other impacts, like dispossession and child removal, had made it 'obviously necessary' to allow a degree of choice of descent for country greater than 'what would have been necessary in more ordered, pre-settlement times'.<sup>58</sup>

Concerning the traditional rule of seeking permission to visit a sub-group's country, Justice Wilcox found:<sup>59</sup>

- striking similarities with the accounts of earlier writers, allowing for what he regarded as an acceptable level of adaptation to changed circumstances;
- the rule had adapted to modern circumstances – so that it would not apply 'if merely driving through another's country on the way to somewhere else' or 'visiting Perth on business or for medical treatment'; and
- 'the rule is regarded as extant and its breach strongly disapproved'.

### **The future of the *Noongar case***

At the time of writing the Full Federal Court had not handed down its decision on the appeal in the *Noongar* case. If the court upholds the decision there are still many hurdles to overcome before the Noongar people can practically access their native title rights and interests. Justice Wilcox has retired. A new judge will need to hear any outstanding issues. These include determining:

- the precise nature of the native title rights and interests. (Justice Wilcox heard and determined only some of the issues involved in the Part A matter (primarily whether traditional connection was established and maintained by the Noongar and what rights could be demonstrated to exist today).)
- the remaining Single Noongar Claim area (the area was split into Part A (Perth Metropolitan Area) and Part B (the remaining part of the claim area)). Part B remains to be determined.
- which native title rights and interests have been extinguished.
- whether the Noongar people are entitled to compensation under the Native Title Act.

A right to compensation may arise if there was an extinguishment of native title rights and interests between the *Racial Discrimination Act 1975* coming into force (on 30 October 1975, thereby making it discriminatory to extinguish the native title rights) and the commencement of the Native Title Act on 1 January 1994.<sup>60</sup>



Many of the acts which extinguished the Noongar people's rights will go uncompensated. However, almost half of Perth's current population has been accommodated since the Racial Discrimination Act came into effect.<sup>61</sup> This may mean a high proportion of extinguishing acts in the Perth metropolitan area are acts that must be compensated.

The broader issue of compensation for extinguishment of native title is considered in the next chapter.

## Risk v Northern Territory

*Risk v Northern Territory and Quall v Northern Territory* (the *Larrakia* case)<sup>62</sup> was a decision of the Federal Court given by Justice Mansfield on 29 August 2006. The court determined that native title rights and interests do not exist over an area that includes Darwin. The case was the second litigated native title determination over a capital city. Important aspects of the case are:

- issues of evidence; and
- the level of 'continuity' required by the definition of native title in Section 223 of the Native Title Act.<sup>63</sup>

An appeal to the Full Federal Court was dismissed.<sup>64</sup> The *Larrakia* were refused special leave to appeal to the High Court on 31 August 2007. There is no further avenue of appeal.

Overall, what the *Larrakia* case makes clear is how fragile the legal concept of native title is, when compared with notions of culture and identity. The break in continuity of traditional laws and customs that was sufficient for the court to find native title did not exist was a few decades (post World War II). The *Larrakia* revitalised their culture, laws and customs after this break. It was not enough.

I am deeply concerned that the passage of a few decades (even where unavoidable, significant impacts are experienced), is enough to see native title, as recognised by Australian law, gone forever. And this, where the culture under consideration has existed for over 40,000 years.

### The case

William Risk and others, representing the native title claim group of the *Larrakia* people,<sup>65</sup> applied to the Federal Court to have a native title determination made over an area covering parts of Darwin and its surrounds. The area comprised about 30 square kilometres of land and water most of which was Crown land or held by Darwin City Council and Palmerston City Council.<sup>66</sup> The area generally has not been used for commercial or residential development. The case considered Part A of consolidated proceedings. Part B has not yet been determined.<sup>67</sup>

The claim was contested by the Northern Territory Government, Darwin City Council and the Amateur Fisherman's Association of the Northern Territory. There were 15 other respondents to the claim.

Justice Mansfield determined that no native title rights and interests were held by the *Larrakia* people over the land. This was because the current laws and customs were not 'traditional' as required under Section 223(1)(a) of the Native Title Act.<sup>68</sup>



...the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not 'traditional' as required by s223(1) of the NT Act.

Just as Justice Wilcox in *Noongar*, Justice Mansfield noted that the requirement for continuity in *Yorta Yorta*<sup>69</sup> is not absolute but acknowledgement and observance of traditional laws and customs must have continued 'substantially uninterrupted' since sovereignty.

I have found that, at sovereignty, there was a society of indigenous persons who had rights and interests possessed under traditional laws and customs, and giving them a connection to the land and waters of the claim area. I have also found that that society continued to exist to European settlement from about 1869, and continued to exist into the 20th century, and that it continued to enjoy rights and interests under the same or substantially similar traditional laws and customs as those which existed at sovereignty. I have also found that the society was the Larrakia people, and not some different indigenous group. ...

The evidence shows that a combination of circumstances has, in various ways, interrupted or disturbed the presence of the Larrakia people in the Darwin area during several decades of the 20th century in a way that has affected their continued observance of, and enjoyment of, the **traditional** laws and customs of the Larrakia people that existed at sovereignty. The settlement of Darwin from 1869, the influx of other Aboriginal groups into the claim area, the attempted assimilation of Aboriginal people into the European community and the consequences of the implementation of those attempts and other government policies (however one might judge their correctness), led to the reduction of the Larrakia population, the dispersal of many Larrakia people from the claim area, and to a significant breakdown in Larrakia people's observance and acknowledgement of traditional laws and customs. ...

I have concluded that during much of the 20th century, the evidence does not show the passing on of knowledge of the traditional laws and customs from generation to generation in accordance with those laws and customs.<sup>70</sup>

Risk and others appealed to the Full Federal Court. The appeal was unsuccessful, and leave to appeal to the High Court was refused.

A native title determination has effect *in rem* – it is binding on the whole world.<sup>71</sup> Therefore, the court's finding is conclusive that native title does not exist in the area covered by the applications, whether by the Larrakia people or anyone else.

### **Satisfying the requirements of native title**

As in all native title proceedings, the Larrakia people, to gain recognition of their native title, needed to meet the definition of native title set out in Section 223 of the Native Title Act. A key aspect of this definition is the need to show substantial continuity of traditional laws and customs.

#### ***Substantial continuity of traditional laws and customs***

The Larrakia's case is the first conclusive application of *Yorta Yorta* principles applying 'interruption' of the continuity of observance of traditional laws and customs to the dismissal of a native title application.



The key issue for Justice Mansfield in evaluating the Larrakia application was whether the claimants could demonstrate that their contemporary laws and customs were 'traditional'. This is in the sense of:

- being handed down from the pre-sovereign society (that they had their 'origin in'); and
- a continued observance of traditional law and custom since sovereignty.

Justice Mansfield noted that some interruption in observance or change or adaptation of traditional law and custom 'will not necessarily be fatal to a native title claim'.<sup>72</sup> However observance must be substantially uninterrupted. Justice Mansfield concluded that, on the evidence, the Larrakia claim group had failed the 'substantially uninterrupted observance' test.

The time during and after World War II (WWII) was crucial to his conclusion. The judge considered there was only limited observance of the law and custom at the outset of WWII. This combined with further erosion of the practice of law and custom during and after WWII amounted to substantial interruption. The erosion was facilitated by removal of most Aboriginal people (and others) from Darwin during the war. It was exacerbated by policies of Aboriginal assimilation that the government applied after their return.

The evidence over this period did not, in Justice Mansfield's view, point to continued observance of most of the Larrakia traditional laws and customs.<sup>73</sup> Later evidence of cultural revitalisation was not sufficient to overcome the break in continuity of observance.<sup>74</sup>

Justice Mansfield made it clear that observance of law and custom will be measured holistically. In reaching his conclusion he examined many aspects of the society, including:

- cultural organisation and practices;<sup>75</sup>
- economy and resource use;<sup>76</sup>
- spirituality;<sup>77</sup>
- social structure;<sup>78</sup>
- language;<sup>79</sup> and
- country including, the extent of Larrakia country, feeling good about country, and looking after sites.<sup>80</sup>

The judgment demonstrates the breadth of inquiry that may be undertaken by the court in order to determine continual observance of traditional laws and customs.

Risk and others appealed to the Full Federal Court on three grounds.<sup>81</sup> One of the grounds they argued was that Justice Mansfield had incorrectly applied *Yorta Yorta*<sup>82</sup> in finding that the traditional laws and customs of the Larrakia people had been discontinued. The full court rejected this argument. It was satisfied Justice Mansfield had considered the evidence of law and custom between the time of sovereignty and the present.<sup>83</sup> The court was also satisfied that Justice Mansfield did not consider physical absence from places in the Larrakia claim as criteria for determining interruption.<sup>84</sup> The Full Federal Court observed:<sup>85</sup>



It is not that the dispossession and failure to exercise rights has, *ipso facto*, caused the appellants to have lost their traditional native title, but rather that these things have led to the interruption in their possession of traditional rights and observance of traditional customs.

In discussing the issue, the court noted that neither *Yorta Yorta*<sup>86</sup> nor *Western Australia v Ward*<sup>87</sup> suggest that *using* the land and waters or exercising rights over them are crucial to proving continuity.

In his judgment, Justice Mansfield referred to the transmission of knowledge of traditional law and custom by traditional means. The appellants considered that this imposed an additional requirement that knowledge be obtained in a certain way. The Full Federal Court disagreed:<sup>88</sup>

...No doubt the failure of a claimant group to continue to pass on knowledge of other customs and laws by word of mouth will not necessarily be fatal to their claim. But it may be evidence of an interruption in customs and laws generally. It is a factor that the trial judge rightly took into account in coming to his conclusion.

In summary, the Full Federal Court found that:

[Justice Mansfield's] findings that Larrakia did not maintain the acknowledgement of their traditional laws and observance of their traditional customs are based upon evidence, particularly from older members of the Larrakia group, that practices they had engaged in during the first half of the twentieth century did not last into the second half. The submission that his Honour inferred interruption from change is not supported by a close reading of his reasons. No inferences needed to be drawn, it was apparent to his Honour on the evidence that there had been a substantial interruption.<sup>89</sup>

### ***The Noongar case and the Larrakia case***

The requirement that there be a 'society' and that there be a continuity of that society is not written into the Native Title Act. It is a requirement arising from the common law (the High Court's decision in *Yorta Yorta*). Since that case there has been much concern amongst participants in the native title system about how this requirement would be interpreted and applied by courts in native title proceedings.

The *Noongar* case and the *Larrakia* case highlight divergent applications of the requirement. Both cases involved metropolitan areas. In the *Noongar* case the court found the requisite society and continuity of that society. In the *Larrakia* case, the court didn't. Each case is decided on its own particular facts. Nevertheless, I am concerned that the requirements of society and continuity are open to an interpretation that is unjustly harsh on Indigenous peoples and their ability to gain recognition of their native title. I am concerned that the requirements are out of step with the reality of contemporary ideas of how societies evolve. That it is too narrow and constraining. And, most particularly, that it fails to recognise that government policies like forced removal and assimilation contributed to a break in continuity. Nor does it give a place to the resurgence and revitalisation of culture and tradition. The latter is an important aspect to the human rights of Indigenous peoples.



I take these issues up in greater detail in the next chapter.

## **Evidence**

Evidence presented to the court posed a problem. Two out of the three grounds for appeal centred on issues of evidence. Justice Mansfield commented on some of the difficulties associated with evidence in native title proceedings, particularly expert anthropological evidence.

### ***Expert anthropological evidence***

Observations by Justice Mansfield about expert anthropological evidence have been succinctly summarised by the National Native Title Tribunal.<sup>90</sup> The judge noted:

- it is important that the intellectual processes of the expert can be readily exposed;
- that involves identifying, in a transparent way, what are the primary facts assumed or understood;
- it also involves making the process of reasoning transparent and, where there are premises upon which the reasoning depends, identifying them;
- the premises, whether based on primary facts or on other material, then need to be established;
- at least in the context of expert anthropological reports, the line between an opinion and the fact upon which that opinion is based is not always clear;
- while the clear separation of fact and premise from opinion is clearly desirable, it is necessary to accept that there is sometimes difficulty in discerning between the facts upon which an opinion is based and the opinion itself in an expert anthropology report; and
- such a difficulty should not be regarded as a fatal flaw that may render the report or the opinion inadmissible.

### ***Oral evidence***

The Larrakia people appealed on the ground that Justice Mansfield had failed to take into account critical evidence. It was contended that Justice Mansfield had failed to consider and evaluate a large body of oral evidence from Aboriginal witnesses. This evidence went to whether there was a substantial interruption in the observance of traditional laws and customs in the middle decades of the 20<sup>th</sup> Century. The appellants argued the judge had confined his consideration of oral Aboriginal evidence to the contemporary Larrakia society of the last decade.

The Full Federal Court dismissed this claim. It held that 'they were in no doubt that the trial judge was conversant with the evidence as a whole.'<sup>91</sup> It was noted:

the primary judge had before him a complex case. There were 47 Aboriginal witnesses, many expert witnesses, and a great deal of documentary material. The hearing lasted 68 days... considerable caution is appropriate before the Full Court infers that crucial evidence was not evaluated and necessary findings of fact were not made.<sup>92</sup>





### ***Failure to adopt the Kenbi Land Claim report***

A ground of appeal was that Justice Mansfield did not adopt the Aboriginal Land Commissioner Justice Grey's finding in the Kenbi Land Claim Report.<sup>93</sup> Justice Grey's finding was that under Aboriginal tradition, the Larrakia have attachments to and rights to forage over, occupy and use country associated with them.

Justice Mansfield stated:<sup>94</sup>

In the current proceedings, I am inclined not to adopt any of the findings of the Land Rights Commissioner in the Kenbi Report. The Kenbi Claim covered a claim area distinct from that involved in these proceedings. Not all of the witnesses who gave evidence before his Honour were called in these proceedings, for various reasons. The expert evidence was in part from different witnesses. The expert evidence too related to the different issues which arose under the [*Aboriginal Land Rights (Northern Territory) Act 1976* (Cth)], and was in respect of different land. The matters to which those findings relate have also been, to varying degrees, the subject of additional and in some instances different evidence in the current proceedings. Those considerations have led me to the view which I have expressed.

The Larrakia people appealed this ground on the basis that it was a miscarriage of the exercise of discretion conferred on the judge by Section 86 of the Native Title Act. That section allows the judge to adopt evidence or findings from other proceedings. The full court rejected this ground for appeal holding that Justice Mansfield's decision was appropriate and relevant.<sup>95</sup>

The judgment demonstrated the distinct nature of:

- native title proceedings; and
- inquiries undertaken by Aboriginal Land Commissioners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

Both entail an aspect of tradition. The Aboriginal Land Commissioner determines and reports on whether claimants making a 'traditional land claim', or any other Aboriginal persons, 'are the traditional Aboriginal owners of the land'.<sup>96</sup> The terms 'traditional Aboriginal owner' and 'traditional land claim' are defined as follows:<sup>97</sup>

*traditional Aboriginal owners*, in relation to land, means a local descent group of Aboriginals who: (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land.

*traditional land claim*, in relation to land, means a claim by or on behalf of the traditional Aboriginal owners of the land arising out of their traditional ownership.

Despite dealing with similar subject matter both proceedings are distinct. The *Larrakia* case highlights that the courts will not automatically accept the finding of an Aboriginal Land Commissioner in a native title proceeding. This is even where the Indigenous peoples making the different claims under the Aboriginal Land Rights (Northern Territory) Act and the Native Title Act are connected.



## Harrington-Smith on behalf of the Wongatha People v Western Australia

Approximately 160,000 square kilometres of the Goldfields area of Western Australia, near the town of Kalgoorlie, were subject to a native title claim by the Wongatha people in *Harrington-Smith on behalf of the Wongatha People v Western Australia* (the *Wongatha case*).<sup>98</sup> Justice Lindgren of the Federal Court dismissed the application on 5 February 2007 without making a determination whether native title rights and interests exist.

In response to the decision of the court dismissing the proceedings, the Commonwealth made a non-claimant application for native title to be determined over the area. This was discontinued.<sup>99</sup>

This discontinuation of the non-claimant application 'largely finalises the most expensive native title litigation to date – without an approved determination of native title.'<sup>100</sup>

### The case

The *Wongatha case* was '...arguably one of the most complex native title cases yet heard by the Federal Court.'<sup>101</sup> The primary reasons for the complexity included:

- the way the claim groups were constituted;
- the complexity of Western Desert society and its landholding arrangements; and
- the number of parties involved in the litigation.<sup>102</sup>

In August 1994 a native title claim was lodged with the National Native Title Tribunal (the tribunal) on behalf of the Wajlen people. On 18 December 1998, at a meeting of 'certain members of certain antecedent claim groups',<sup>103</sup> a resolution was made to add a number of further parties to the claim. In January 1999, an application was sought to amend the claim to reflect that resolution. Later that month, a Deputy District Registrar of the Federal Court ordered that the native title claim be combined with 19 other proceedings to form the Wongatha claim.<sup>104</sup> The result was that the Wongatha claim group comprised 820 individuals in 2002, and was a combination of 20 claims.<sup>105</sup>

When the claim came before the Federal Court for a determination, the court was not just determining the consolidated Wongatha claim. There were an additional seven overlapping claims to be considered. The court heard these claims to the extent that they overlapped with the Wongatha claim area.

This history helped produce a complex case that consumed considerable resources of people, time, money, emotion and energy:<sup>106</sup>

The judgment itself runs over 1,000 pages, not including annexures. The court sat for 100 hearing days in various locations...the transcript of which amounted to almost 17,000 pages. There were a total of 149 witnesses...volumes of expert reports (34) and volumes of submissions (97), not including extinguishment.

It was the first time a court had dealt with so many native title claims in the one proceeding.



## The finding

Justice Lindgren found that seven of the eight claims (including the Wongatha peoples' application) were not authorised as required by Sections 61(1) and 61(4) of the Native Title Act.<sup>107</sup> Therefore, he held that the court didn't have the jurisdiction to hear the applications and he dismissed the claims.<sup>108</sup> He made no determination on the existence or absence of native title.

The current requirements for authorisation were inserted in the Native Title Act by the 1998 amendments (which followed the *Wik* decision). In the *Wongatha* case the applications were made prior to the 1998 amendments. The applications were then amended after 1998. Justice Lindgren held that the amendments to the applications triggered the new, more stringent, post-1998 authorisation requirements. These had not been adhered to.<sup>109</sup>

Despite this finding, Justice Lindgren went on to consider the claims.<sup>110</sup> He found that there existed a Western Desert Cultural Bloc (WDCB) society at the time of sovereignty (in Western Australia this is taken to be 1829). This society continues to exist today.<sup>111</sup> However, he questioned whether the WDCB was a 'society' with laws and customs that would give rise to native title rights and interests in relation to land and waters.<sup>112</sup>

The notion of a single overarching society with regional societies within it seems useful. Accordingly, although with some doubt, I proceed on the basis that the WDCB is a 'society' in the sense described in *Yorta Yorta HCA* ...<sup>113</sup>

Accordingly, I find that there was in 1829 a WDCB society that had a body of laws and customs that provided for multiple pathways of connection, through which an individual might hold rights and interests, and that the Wongatha Claim area, but no further west than the Menzies-Lake Darlot line, was subject to that body of laws and customs. This says nothing, however, as to the subject matter of the rights and interests, that is, the identification of the land the subject of them...<sup>114</sup>

The claim failed because:<sup>115</sup>

1. The Wongatha applicants were not authorised to make the Wongatha application as required by s 61(1) of the NTA [Native Title Act].
2. The evidence does not establish that the Wongatha Claim group is a group recognised by WDCB traditional laws and customs as a group capable of possessing group rights and interests in land or waters.
3. The evidence does not establish that group rights and interests exist in the Wongatha Claim area under WDCB traditional laws and customs.
4. The evidence does not establish that at sovereignty, WDCB laws and customs provided for an ancestral group of the Wongatha Claim group to possess group rights and interests in the Wongatha Claim area, or for individuals to be able to form themselves into a group possessing such rights and interests.
5. The Wongatha Claim is an aggregation of claims of individual rights and interests, and the Wongatha Claim area is based on an aggregation of individual 'my country' areas, the subject of those claimed individual rights and interests, and the NTA does not provide for the making of a determination of native title consisting of group rights and interests in these circumstances.
6. The Wongatha Claim area is not an area that is ultimately, whether directly or indirectly, defined by reference to *Tjukurr* (Dreaming) sites or tracks.



7. Approximately the western one sixth of the Wongatha Claim area lies outside the area of the WDCB 'society' on which the Wongatha Claim is based.

8. Many, if not most or all, of the Wongatha claimants are the descendants of people who migrated into the Wongatha Claim area from desert areas outside that area, in particular, to the east of it, since, and under the influence of, European settlement, and it is not established that their ancestors had any connection with the Wongatha Claim area at sovereignty, or that they or the Wongatha claimants descended from them, acquired rights and interests in the Wongatha Claim area in accordance with pre-sovereignty WDCB laws and customs.

9. The evidence does not establish that the claimants constituting the Wongatha Claim group have a connection with the Wongatha Claim area by Western Desert traditional laws and customs as required by s 223(1)(b) of the NTA.

Ultimately Justice Lindgren declined to make a finding that there was no native title as he considered that the claim group did not have the required authority to apply for a determination.<sup>116</sup>

There is some acknowledgement and observance of some traditional laws and customs by some Wongatha claimants. Does the evidence lead to the conclusion that there is acknowledgement and observance by the Wongatha Claim group of the pre-sovereignty Western Desert laws and customs? As I indicated...I am refraining from answering this question.

However he did consider that he had set out the primary facts in sufficient detail for the Full Federal Court on the appeal to make a finding on continuity of observance and make a determination if they so decided.<sup>117</sup>

### **The Wongatha case – a system failure?**

The *Wongatha* case was dismissed because Justice Lindgren found that the applicants did not have the authority required under Section 61 of the Native Title Act.

I am concerned at what appears to have been a major failure of the native title system in the *Wongatha* case. The case ultimately failed because the applicants were not authorised to make the application as required by the Native Title Act. It is unclear why the failure to overcome the technical requirement of authorisation was not identified early in the history of the claim. Over the 12 years of complex litigation no party involved in the running of the proceeding appears to have identified this problem. The system appears to have failed to identify it until into the hearing, and this has failed the Aboriginal claimants.

At the time the case was heard, the Native Title Act was unclear about whether the court had the power to continue to hear and determine native title when the application was not properly authorised.<sup>118</sup> Yet, as was evidenced in *Wongatha*, '[q]uestions about the validity of the applicant's authorisation can arise at any stage during proceedings'.<sup>119</sup>

To deal with this problem, the Native Title Act was amended a few months after the *Wongatha* decision, to include Section 84D.<sup>120</sup> This section provides:

- applicants may be required to provide greater evidence that they have been authorised to make a claim on behalf of the claim group; and



- where an applicant has not satisfied the Section 61 authorisation requirements, the court may still determine native title (or make any other order it considers appropriate) if it decides it is appropriate 'after balancing the need for due prosecution of the application and the interests of justice'.<sup>121</sup>

I am concerned that in making these amendments the government has not given full consideration to the objectives of the Native Title Act and to ensuring that all Indigenous people have access to their native title rights and interests. I recognise the difficulty of the authorisation procedures set out in the legislation and the devastating impact's failure to authorise can have on a case such as *Wongatha*. However, authorisation is essential to the native title system. It is unclear why the reference point for the court's decision to disregard the authorisation requirements (as allowed by the new section 84D) is 'the need for due prosecution of the application and the interests of justice'.

The authorisation provisions in the Native Title Act are a safeguard to ensure that consultation occurs. They are there to ensure that the free, prior and informed consent of the Indigenous people whose rights and interests are being affected is obtained. It is essential that the right people are the applicants on any native title claim. This is an ongoing consideration throughout the whole process of claiming native title. While recognising that the authorisation provisions are causing many difficulties, this primary objective should be the key consideration of the court when deciding whether they should continue to hear the claim in the absence of satisfying Section 61.

The outcome of the case raises concerns about the resources exhausted by the case and the practical implications to the *Wongatha* people of their case being dismissed. The case is the most expensive native title litigation of native title to date.

One would have hoped that after such a lengthy and expensive hearing there would have been some certainty for the parties. Instead, this judgment adds yet another layer of uncertainty to native title case law...the main lesson that can be drawn from the *Wongatha* case is that the use of the court to adjudicate relationships between indigenous and non-indigenous Australia is a recipe for disaster.<sup>122</sup>

The *Wongatha* case was contested rigorously in the court system. It has been suggested one reason for this was because the *Wongatha*'s claim was over a resource rich part of the State and land which is 'economically extremely valuable to the WA State government'.<sup>123</sup>

Justice Lindgren referred to the seemingly unfair contest of some claims over others. Justice Lindgren recognised this in his summary accompanying his judgment:

some native title cases are strongly contested, while others are not. In pre-contact times, the indigenous people in two areas would have used the surface for camping, hunting, foraging and so on. Yet, in one case there is a consent determination and in the other there is a contest to the bitter end. Why? The reason relates to the value placed on the land by others. This is readily understandable, but has nothing to do with the respective merits of the two cases.<sup>124</sup>



## The future of the Wongatha claim

Justice Lindgren specifically stated in his judgment that he wasn't intending to preclude or encourage the groups to apply for a determination in the future.<sup>125</sup> The result of the dismissal of the case means that differently constituted claim groups can make new claims over the claim area. The native title representative body for the claimants says that the group plans on pursuing new claims that are well considered and which have the maximum opportunity to achieve consent determinations. The State of Western Australia has agreed to consider new claims pursuant to its connection guidelines. It has indicated its preference to avoid further litigation.<sup>126</sup> Mediation between the parties previously failed in this case.<sup>127</sup>



- 1 *Jango v Northern Territory* (2006) 152 FCR 150 and *Jango v Northern Territory* (2007) 159 FCR 531.
- 2 *Bennell v Western Australia* (2006) 230 ALR 603.
- 3 *Risk v Northern Territory* and *Quall v Northern Territory* [2006] FCA 404 and *Risk v Northern Territory* and *Quall v Northern Territory* (2007) 240 ALR 75.
- 4 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1.
- 5 It should be noted that not all of these four cases have exhausted the judicial process. The status of each case is given throughout this chapter.
- 6 However, this number does not include other Federal Court cases on native title that were heard throughout the year which did not result in a native title determination. The National Native Title Tribunal Annual Report sets out these determinations and other Federal Court cases on native title that were heard throughout the year. See the *National Native Title Tribunal, Annual Report 2006-07*, Commonwealth of Australia, 2007, available online at [http://www.nntt.gov.au/publications/annual\\_report\\_06-07.html](http://www.nntt.gov.au/publications/annual_report_06-07.html).
- 7 *National Native Title Tribunal, Annual Report 2006-07*, Commonwealth of Australia, 2007, available online at [http://www.nntt.gov.au/publications/annual\\_report\\_06-07.html](http://www.nntt.gov.au/publications/annual_report_06-07.html), p18.
- 8 *Jango v Northern Territory* (2006) 152 FCR 150.
- 9 *Jango v Northern Territory* (2007) 159 FCR 531.
- 10 At the writing of this report, the Full Federal Court had reserved its decision on who would pay the costs of the litigation. Once costs are determined, the parties may choose to seek leave to appeal to the High Court.
- 11 If you would like more detail on the case itself and a legal analysis of the decisions of the court, see Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, and National Native Title Tribunal, 'Compensation application over Yulara – Jango case', *Issue 19, Native Title Hot Spots*, available online at [www.nntt.gov.au/newletter/hotspots/](http://www.nntt.gov.au/newletter/hotspots/). See also Webb, R. and Kennedy G., 'Case note: the application of Yorta Yorta to native title claims in the Northern Territory – the city and the outback', (2006), 25 *Australian Resources and Energy Law Journal*, p201.
- 12 The claim was for compensation from the Northern Territory because the *Native Title Act 1993* (Cth) deems the State or Territory responsible for extinguishment by 'past acts': s 20(3). The Commonwealth's strong interest in the case presumably stems from the understanding that it would meet 75% of the compensation liability shouldered by States and Territories. See *Jango v Northern Territory* [2006] FCA 318, per Sackville J, para [12]. There was a third respondent – GPT Management Ltd, the holder of leasehold and freehold interests in the area covered by the compensation application, However GPT Management Ltd did not take an active part in the trial and did not enter an appearance for the appeal. See *Jango v Northern Territory* [2006] FCA 318, per Sackville J, para [13].
- 13 No native title determination had been made in relation to any part of the relevant area and there was no dispute that all native title rights and interests that otherwise might have existed had been extinguished. See *Jango v Northern Territory* [2006] FCA 318, per Sackville J, para [6].
- 14 *Jango v Northern Territory* [2006] FCA 318, per Sackville J, para [440]-[451].
- 15 Minter Ellison, *Native Title Act Unclear on Approach to Compensation*, April 2006, available online at [www.hg.org](http://www.hg.org), accessed August 2007.
- 16 This same grouping was relied on for the Wongatha claim (see below) and other significant native title cases such as *De Rose v South Australia* No 2 (2005) 145 FCR 290.
- 17 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [8].
- 18 Brennan, S., *Recent Developments in Native Title Case Law*, Presentation at the Human Rights Law Bulletin Seminar: Human Rights and Equal Opportunity Commission, Sydney, 4 June 2007.
- 19 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [446] – [448], [452].
- 20 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [497] – [507].
- 21 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [40].
- 22 *Jango v Northern Territory* (No 6) [2006] FCA 465 (3 May 2006).
- 23 Although the applicants' notice of appeal contained 12 grounds of appeal, set out at *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [62], these were dealt with as the two grounds described: see *Jango v Northern Territory* (2007) 159 FCR 531, para [65].
- 24 *Jango v Northern Territory* (2007) 159 FCR 531, para [84].
- 25 Minter Ellison, *Native Title Act Unclear on Approach to Compensation*, April 2006, available online at [www.hg.org](http://www.hg.org), accessed August 2007.
- 26 Minter Ellison, *Native Title Act Unclear on Approach to Compensation*, April 2006, available online at [www.hg.org](http://www.hg.org), accessed August 2007.
- 27 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [462].
- 28 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p11.
- 29 *Jango v Northern Territory* (2006) 152 FCR 150, per Sackville J, para [313].





- 30 Justice Sackville noted, at *Jango v Northern Territory (No 2)* [2004] FCA 1004, para [33], that Federal Court authority supports the view that Section 79 of the *Evidence Act 1995* (Cth) does not impose the 'basis rule' that exists at common law – the 'requirement that for an expert's opinion to be admissible, it must be based on facts stated by the expert and either proved by the expert or assumed by him or her and proved [from another source]'. However, Justice Sackville then proceeds to effectively impose the rule in his summary of the treatment of Commonwealth and Territory objections. He does so under the guise of the Section 79 *Evidence Act 1995* (Cth) requirement for an expert report to demonstrate how it is based on specialised knowledge.
- 31 *Jango v Northern Territory (No 2)* [2004] FCA 1004, per Sackville J, para [8].
- 32 *Jango v Northern Territory (No 2)* [2004] FCA 1004, per Sackville J, para [11].
- 33 Section 79 of the *Evidence Act 1995* (Cth) states 'Exception: opinions based on specialised knowledge - If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge'.
- 34 Section 56 of the *Evidence Act 1995* (Cth) states: 'Relevant evidence to be admissible - (1) Except as otherwise provided by this Act, evidence that is relevant in a proceeding is admissible in the proceeding. (2) Evidence that is not relevant in the proceeding is not admissible'.
- 35 *Harrington-Smith v Western Australia (No 7)* [2003] FCA 893 per Lindgren J, para [19].
- 36 *Jango v Northern Territory (No 2)* [2004] FCA 1004, per Sackville J, para [11].
- 37 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, summary, p2.
- 38 *Harrington-Smith on behalf of the Wongatha People v State of Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, summary, p2.
- 39 *Bennell v Western Australia* (2006) 230 ALR 603.
- 40 Native title had at this point been recognised in urbanised areas such as Broome (see *Rubibi Community v Western Australia* (2001) 112 FCR 409) and Alice Springs (see *Hayes v Northern Territory* (1999) 97 FCR 32).
- 41 If you would like more detail on the case itself and a legal analysis of the decisions of the court, see National Native Title Tribunal, 'Proposed Determination of Native Title – Single Noongar application', Issue 21, *Native Title Hot Spots*, available online at [http://www.nntt.gov.au/newsletter/hotspots/1160012986\\_1792.html](http://www.nntt.gov.au/newsletter/hotspots/1160012986_1792.html), Jowett, K., 'Native Title over Perth', (December 2006), Vol 7, Issue 11, *Native Title News*, p196.
- 42 The claim area included the whole of Perth and centres of Bunbury, Busselton, Margaret River, Albany, York, Toodyay, Katanning, Merredin and other towns. The Federal Court only considered native title rights within the Perth Metropolitan Area (PMA), a sub-region that was split off by Justice Wilcox from the original single Noongar claim as 'Part A'. The remainder of the claim area ('Part B') will be considered in a separate proceeding.
- 43 Although the *Native Title Act 1993* (Cth) does not refer to the word 'society', the High Court held in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 that in order to satisfy the s.223 references to traditional laws and customs, claimants must be members of a society which is united in and by its acknowledgement of those laws and customs. Therefore claimants must show that they are members of a society that existed at sovereignty and continues to exist until today in order to satisfy s223 of the *Native Title Act 1993* (Cth). If that society has ceased to exist or ceased at some point, then the laws and customs of a group will not be considered traditional. See *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 44 The date of 'sovereignty' varies across Australia. In Western Australia and the Northern Territory this date is taken to be 1829, for the Eastern Australian states, it is taken to be 1788 and for the Torres Strait it is taken to be 1879.
- 45 'In *Yorta Yorta*, Gleeson CJ, Gummow and Hayne JJ seem to have regarded common acknowledgement and observance of a body of laws and customs as a sufficient unifying factor. Certainly, as is graphically illustrated by *De Rose*, it is not necessary that the 'society' constitute a community, in the sense of all its members knowing each other and living together. If that element was required, it would constitute an additional hurdle, for native title applicants, which would be almost impossible for most of them to surmount. The task of showing the existence of a common normative system some 200 years ago is difficult enough; it would be even harder to show the extent of the mutual knowledge and acknowledgment of those who then lived under that normative system, bearing in mind the non-existence of Aboriginal writings at that time': *Bennell v Western Australia* [2006] FCA 1243, per Wilcox J, para [437].
- 46 Wilcox, M., 'The Noongar Native Title Claim', in Human Rights and Equal Opportunity Commission, *Us Taken-Away Kids*, Human Rights and Equal Opportunity Commission, Sydney, 2007, p23.
- 47 Wilcox, M., 'The Noongar Native Title Claim', in Human Rights and Equal Opportunity Commission, *Us Taken-Away Kids*, Human Rights and Equal Opportunity Commission, Sydney, 2007, p24.
- 48 Justice Wilcox quoted these words from the applicants' final written submissions. *Bennell v Western Australia* (2006) 230 ALR 603 per Wilcox J, para [84].
- 49 *Bennell v Western Australia* [2006] FCA 1243, per Wilcox J, para [84].





- 50 Although sub-groups enjoyed strong rights in relation to particular country, the picture was complicated by protocols for accessing neighbouring sub-group land and the different ways in which rights might be acquired. As the anthropologist called by the applicants Dr Palmer put it, 'rights in land were not hermetically or exclusively bounded and more than one country group had rights to use country beyond their own. The exercise of such joint or shared rights was tempered by a requirement to follow protocols requiring the seeking of permission, for some activities, although this was not an invariable rule': *Bennell v Western Australia* (2006) 230 ALR 603, per Wilcox J, para [188]. See also para [297].
- 51 *Bennell v Western Australia* (2006) 230 ALR 603, per Wilcox J, para [283], [297], [325].
- 52 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 53 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 54 *De Rose v South Australia No 2* (2005) 145 FCR 290, 305.
- 55 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 56 *Bennell v Western Australia* (2006) 230 ALR 603, per Wilcox J, para [791] quoting the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 57 Brennan, S., *Recent Developments in Native Title Case Law*, Presentation at the Human Rights Law Bulletin Seminar: Human Rights and Equal Opportunity Commission, Sydney, 4 June 2007.
- 58 *Bennell v Western Australia* (2006) 230 ALR 603, per Wilcox J, para [602]-[684].
- 59 The Full Federal Court has already accepted a finding in the Western Desert case in South Australia (*De Rose v South Australia No 2* (2005) 145 FCR 290) that a strict patrilineal system had given way to a more flexible one and that was consistent with the law set down by the High Court in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 60 *Bennell v Western Australia* (2006) 230 ALR 603, per Wilcox J, para [700].
- 61 Or occurring between 1 January 1994 and 23 December 1996, if the act meets the definition of 'intermediate acts'.
- 62 Australian Bureau of Statistics, *Australian Historical Population Statistics 2006*, Table 18, available online at: [www.ausstats.abs.gov.au/ausstats/abs@archive.nsf/0/23F533BC3E26D892CA2571760022856F/\\$File/3105065001\\_table18.xls](http://www.ausstats.abs.gov.au/ausstats/abs@archive.nsf/0/23F533BC3E26D892CA2571760022856F/$File/3105065001_table18.xls), accessed December 2006.
- 63 *Risk v Northern Territory* [2006] FCA 404 (trial judgment).
- 64 If you would like more detail on the case itself and a legal analysis of the decisions of the court, see National Native Title Tribunal, 'Determination of native title – Larrakia', Issue 19, *Native Title Hot Spots*, available online at [www.nntt.gov.au/newletter/hotspots/](http://www.nntt.gov.au/newletter/hotspots/), National Native Title Tribunal, 'Appeal in Larrakia (Risk) – Full Court', Issue 24, *Native Title Hot Spots*, available online at [www.nntt.gov.au/newletter/hotspots/](http://www.nntt.gov.au/newletter/hotspots/).
- 65 *Risk v Northern Territory* and *Quall v Northern Territory* (2007) 240 ALR 75 (appeal judgment).
- 66 The Larrakia asserted that their claim group encompassed two other claim groups' applications – the Quall applicants and the Roman applicants. Quall and others were also a party to the case, representing the Danggalaba/Kulumbiringin clan. The Quall applicants also appealed to the Full Federal Court and their appeal was dismissed, however Quall has applied for special leave to appeal to the High Court and that application is still outstanding. The Roman applicants discontinued their claim. This case note will look at the case of the Larrakia people, as presented by Risk.
- 67 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [17].
- 68 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [3].
- 69 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [839].
- 70 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 71 Mansfield J, Summary of *Risk v Northern Territory* [2006] FCA 404, para [9] –[13].
- 72 See for example, *Jango v Northern Territory* (2007) 159 FCR 531 per French, Finn and Mansfield JJ, para [85], where it was said: 'It is true, as the appellants point out, that a native title determination is a judgment in rem which binds the whole world so that the issues at stake are not confined to the private interests of litigants.'
- 73 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [811] echoing the words of Gleeson CJ and Gummow and Hayne JJ in *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at para [83].
- 74 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [816].
- 75 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [820]-[822], [812], [835].
- 76 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [533]-[542], [543]-[554], [555], [556]-[559] and [560]-[570].
- 77 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [571]-[577], [578]-[581], [582]-[585], [586]-[593], [594]-[598].
- 78 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [599]-[624], [625]-[628], [629]-[631], [632]-[645], [646]-[647], [648]-[666], [667]-[673], [674]-[677], [678].
- 79 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [680]-[699], [700]-[728].
- 80 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [729]-[731].
- 81 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [732]-[735], [736]-[737], [738]-[793].



- 82 It should be noted that Quall also appealed the decision, but on different grounds. He claimed that Mansfield J failed to consider the substance of the case advanced by the Danggalaba/Kulumbiringin clan, that he failed to identify the relevant society that was the source of the traditional laws and customs, and that he failed to provide proper reasons for his decision. The Full Federal Court dismissed the appeal concluding that the case 'was in substance disposed of on the basis of insufficiency of evidence. [Justice Mansfield's] reasons make quite plain where that insufficiency lay'. See *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, per French, Finn and Sundberg JJ, para [178]. See also National Native Title Tribunal, 'Appeal in Larrakia (Risk) – Full Court', Issue 24, *Native Title Hot Spots*, available online at [www.nntt.gov.au/newletter/hotspots/](http://www.nntt.gov.au/newletter/hotspots/).
- 83 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 84 *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, para [83].
- 85 *Risk v Northern Territory and Quall v Northern Territory* [2007] 240 ALR 75 [103 - 104].
- 86 *Risk v Northern Territory and Quall v Northern Territory* [2007] 240 ALR 75, para [104].
- 87 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 88 *Western Australia v Ward* (2002) 76 ALJR 1098.
- 89 *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, para [107].
- 90 *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, para [103].
- 91 National Native Title Tribunal, 'Determination of native title – Larrakia', Issue 19, *Native Title Hot Spots*, available online at [www.nntt.gov.au/newletter/hotspots/](http://www.nntt.gov.au/newletter/hotspots/), taking from the judgment at [469], [470], [472] and [473].
- 92 Brownhill, S., 'Larrakia claims over Darwin: Decision of the Full Federal Court in *Risk v Northern Territory and Quall v Northern Territory* [2007] FCAFC 46; BC200702332' (July 2007), 8(3), *Native Title News*, p44.
- 93 *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, paras [70] and [71].
- 94 This was a claim made under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) including the report of the relevant Aboriginal Land Commissioner, Justice Gray. In addition sections of the transcript of hearing before Justice Gray and the 1979 Kenbi Land Claim Book were submitted as evidence.
- 95 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [442].
- 96 *Risk v Northern Territory and Quall v Northern Territory* (2007) 240 ALR 75, para [114].
- 97 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s.50(1)(a).
- 98 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) s.3(1), definition of 'traditional Aboriginal owner' and 'traditional land claim'.
- 99 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR.
- 100 The Commonwealth announced that it would discontinue its 'non-claimant' application in October 2007.
- 101 *Native Title News*, Vol 8 (issue 5) October 2007, p87.
- 102 O'Bryan, K., 'Certainty and the court: the perils of litigated outcomes: *Harrington-Smith on behalf of the Wongatha People v Western Australia*', (July 2007), 8(3), *Native Title News*, p46.
- 103 On the applicant side, there were seven claims that overlapped in part or in full with the Wongatha application. On the respondent side there were originally 574 respondents, a list that was reduced to 116 by February 2002. See *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1, per Lindgren J, paras [62-63].
- 104 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1, per Lindgren J, para [19].
- 105 Indigenous Law Centre, 'Harrington-Smith on behalf of the Wongatha people v state of Western Australia [No 9]' (2007), 11(1), *Australian Indigenous Law Review*, p104.
- 106 *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) (2007) 238 ALR 1, per Lindgren J, para [1166].
- 107 O'Bryan, K., 'Certainty and the court: the perils of litigated outcomes' (July 2007), 8(3), *Native Title News*, p46.
- 108 That is, that the person who makes the application has been authorised appropriately to make that claim on behalf of the claim group, this procedure is dealt with further in Section 251B of the Native Title Act which requires traditional laws and customs (where they exist regarding similar matters) to be the source of the decision making process for the authorisation. Where there are no applicable traditional forms of decision-making, then a decision-making process must be agreed and adopted by the group.
- 109 The application of the Mantjintjarra Ngalia was made before the 1998 amendments which introduced the Section 61 Native Title Act requirements regarding authorisation, and has not been amended since, and therefore Lindgren J held that there was no issue regarding authorisation of the applicants to make the application. (The remaining claim of the Mantjintjarra Ngalia application was dismissed on other grounds.)
- 110 De Soyza, A, 'Settling Claims in Midas' Land: The Goldfields after *Harrington-Smith v Western Australia* (No 9)' (May 2007) 8(2), *Native Title News*, p22.



- 111 He did this in order to 'guard against the possibility that his decision on authorisation might be overturned on appeal'. O'Bryan, K., 'Certainty and the court: the perils of litigated outcomes' (July 2007), 8(3), *Native Title News*, p47. See for example *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1270].
- 112 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, p6. See *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1003].
- 113 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1276].
- 114 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1288].
- 115 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1292].
- 116 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1167].
- 117 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [1874] - [1875].
- 118 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* (2007) 238 ALR 1, per Lindgren J, para [978].
- 119 *Native Title Amendment (Technical Amendments) Bill 2007*, Explanatory Memorandum, para 1.282.
- 120 *Native Title Amendment (Technical Amendments) Bill 2007*, Explanatory Memorandum, para 1.282.
- 121 On 20 July 2007, the Native Title Amendment (Technical Amendments) Bill 2007 was passed by Parliament. Item 88 of the Bill introduces the new s84D of the *Native Title Act 1993* (Cth). The section commenced 1 September 2007.
- 122 In considering the need for justice, the court may consider a range of factors, including 'the nature of the defect in authorisation, whether the applicant is now authorised to deal with matters arising in relation to the application and whether the application has progressed to trial or mediation, or is still at the preliminary stages'. See Native Title Amendment (Technical Amendments) Bill 2007, *Explanatory Memorandum*, para 1.286.
- 123 O'Bryan, K., 'Certainty and the court: the perils of litigated outcomes' (July 2007), 8(3), *Native Title News*, p47.
- 124 O'Bryan, K., 'Certainty and the court: the perils of litigated outcomes' (July 2007), 8(3), *Native Title News*, p47.
- 125 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* 238 ALR 1, p4.
- 126 *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] 238 ALR 1, per Lindgren J, para [4008].
- 127 see the Goldfields Land and Sea Council website, available online at: [www.glc.com.au](http://www.glc.com.au). See Goldfields Land and Sea Council, *Wongatha News*, May 2007, available online at: [http://www.glc.com.au/pu\\_xx/NL%20Wongatha%20May07.pdf](http://www.glc.com.au/pu_xx/NL%20Wongatha%20May07.pdf).
- 128 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, p4.





# Chapter 8

## Whereto native title

There are three issues I would like to pursue that arise from the previous chapter that reviewed selected cases from 2006-2007:

- compensation for extinguishment of native title;
- evidence; and
- resurgence of culture and human rights.

These issues highlight some concerns I have with the operation of the *Native Title Act 1993* (Cth) (Native Title Act), how it is interpreted by the common law and how the native title system is operating. They seriously impact on the exercise and enjoyment of human rights of Indigenous peoples.

### Compensation for extinguishment of native title

The *Jango* case was the first compensation case litigated to judgment. It was unsuccessful, failing on threshold issues. From the comments of the judge in the case it appears it will be very difficult to be successful in any claim for compensation under the scheme established by the Native Title Act. A broad look at the legal basis for compensation provides a context in which I suggest the compensation scheme under the Native Title Act needs to be reviewed. The scheme doesn't appear to be working to provide compensation for extinguishment of native title to which Indigenous people are justly entitled and as intended by the Act.

### Has any compensation been paid?

Up until 30 June 2007 the Federal Court has awarded no compensation. There have been 33 applications for compensation made under Section 61 of the Native Title Act. Most have been discontinued. A number are still 'active' but none are currently being actively pursued.

There has been money given to claimants through agreements made under the Native Title Act, but no determinations of compensation have been made by the Federal Court. It is not possible to determine what compensation, if anything, may have been paid for extinguishment under these agreements because they are confidential. It is also not known what, if anything, may have been defined as compensation.



## A legal right to compensation?

The legal right of native title holders to recover compensation for the extinguishment or impairment of native title is highly restricted.

At common law, there is no general right to recover compensation for extinguishment by inconsistent Crown grant, unless a statute says otherwise in a clear and unambiguous fashion.<sup>1</sup> Compensation is not available prior to 31 October 1975 (the Territories are a possible exception).

Compensation for extinguishment of native title by acts of government occurring after 30 October 1975 (the date the *Racial Discrimination Act 1975* (Cth) (RDA) came into effect) may be available either as a result of:

- the compensation scheme in the Native Title Act; or
- the RDA in combination with the Native Title Act.

The vast majority of acts extinguishing native title are likely to have been committed prior to this date.

Whether compensation is payable, though, is a question specific to each particular situation.

### Compensation under the Native Title Act

Under the Native Title Act compensation is payable for extinguishment of native title in very limited circumstances. Division 5 of Part 2 of the Native Title Act governs the payment of compensation under the Act.

A registered native title body corporate or a compensation claim group may apply to the Federal Court for a determination of compensation under Sections 50(2) and 61 of Division 5 of Part 2.

The criteria for determining compensation are set out in Section 51 of Division 5. These include:

- compensation must be made on just terms (Section 51(1));<sup>2</sup> and
- compensation must consist of the payment of money (Section 51(5)).<sup>3</sup>

The amount of compensation mustn't exceed the amount which would have been payable if the act that extinguished native title had been the compulsory acquisition of a freehold estate (the so-called 'freehold cap')(Section 51A). This is subject to the requirement that the compensation be on 'just terms' if it would amount to an 'acquisition of property' for the purposes of Section 51(xxxi) of the Australian Constitution.

Compensation is payable under Divisions 2, 2A, 2B, 3, or 4 of Part 2 of the Native Title Act.

Division 2 validates certain acts that occurred before 1 January 1994 (the date the Native Title Act came into effect). These acts would have otherwise been invalid because of native title. This is known as the 'past acts' regime. Part of this regime provides that when certain past acts have taken place that extinguish native title, and which the Native Title Act has made valid, the native title holders are entitled to compensation.<sup>4</sup>



Division 2A extended this period of retrospective validation to cover certain acts that occurred between 1 January 1994 and 23 December 1996. The date of 23 December 1996 is when the High Court decision in the *Wik* case confirmed the potential for native title to co-exist on Crown tenures such as pastoral leases.

Division 2B came into effect on 30 September 1998. This Division 'confirms' that native title was extinguished (either fully or in part) by certain acts that were done by the government. These acts are:

- *previous exclusive possession acts* (PEPAs) such as granting a freehold estate; or
- *previous non-exclusive possession acts* (PNEPAs) such as granting a non-exclusive pastoral lease.

This regime provides that native title holders are entitled to compensation when their rights and interests have been extinguished under this Division. However, the entitlement to compensation under this Division only arises where the statutory extinguishment exceeds the extinguishment that would have occurred at common law.<sup>5</sup>

Division 3 provides for compensation for extinguishing acts done after the Native Title Act came into operation in 1994 ('future acts').

Division 4 provides that if compensation is payable to native title holders by virtue of the Racial Discrimination Act, then it must be determined in accordance with the Native Title Act.<sup>6</sup> Some native title holders may have the loss of their rights and interests compensated for under Section 10 of the Racial Discrimination Act.<sup>7</sup>

### **The Australian Constitution and compensation**

Behind these statutory provisions lies the unresolved operation of the 'just terms' guarantee in the Australian Constitution (Section 51(xxxi)). A Commonwealth law 'with respect to' an 'acquisition of property' must provide 'just terms'. But the same guarantee does not apply to the States. States enacted the lion's share of legislation resulting in extinguishment of native title by inconsistent grant. Nevertheless, the just terms guarantee in the Constitution remains potentially relevant to the extinguishment of native title in the territories.

The principle of compensating people when their proprietary interest in land has been lost is one of the few rights recognised in the Australian Constitution. Section 51(xxxi) of the Constitution provides:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

(xxxi) The acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws ; ...

How this Constitutional protection applies to native title rights and interests is still uncertain.<sup>8</sup>



Although it is still unclear whether Section 51(xxxi) would apply to native title, there are strong arguments for why it should. After all native title:

... enjoys many of the characteristics associated with notions of property ... There seem to be no persuasive grounds for excluding traditional rights in relation to land or waters of indigenous people from the constitutional category of 'property' and indeed a number of High Court judges have already indicated that they regard native title as property in the constitutional sense.<sup>9</sup>

The right to compensation under the Native Title Act should be equally accessible and comprehensive for Indigenous peoples' native title rights and interests as it is for any other Australian's right to compensation under the Constitution.

### **Compensation under International human rights law**

The right to compensation for the deprivation of native title has a basis in international human rights law.

As pointed out in previous native title reports, the arbitrary deprivation of a property right belonging to a particular race or ethnic group is a breach of Article 5(d) of the International Covenant on the Elimination of All Forms of Racial Discrimination (the ICERD). Australia has ratified this convention and committed to making it part of domestic law. The United Nations Committee on the Elimination of Racial Discrimination makes it clear in General Recommendation 23 on Indigenous Peoples<sup>10</sup> that:

... where [Indigenous Peoples] have been deprived of their lands and territories traditionally used or otherwise inhabited or used without their free and informed consent, [States are] to take steps to return these land and territories. Only where this is for factual reasons not possible, the right to restitution should be substituted by the right to *just, fair and prompt* compensation. Such compensation should as far as possible take the form of lands and territories. [Italics added.]<sup>11</sup>

This principle was further cemented in 2007 with the adoption by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples (the DRIP). The DRIP specifically mentions the right of Indigenous peoples to compensation. Article 28 states:

(1) Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.

(2) Unless otherwise freely agreed upon by the parties concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

### **The amount of compensation**

The amount of any compensation that may be payable under the Native Title Act for extinguishment of compensation is an issue. Justice Sackville commented on this in the *Jango* case.<sup>12</sup> He observed that prolonged recognition of a place as a site of spiritual significance would be relevant to the amount of compensation payable under the Native Title Act.





There are two principles involved:

- *the value of the land as freehold estate*: Section 51A of the Native Title Act refers to the amount of compensation being capped at an amount quantified under land valuation principles for a freehold estate (that is, the value of the land as a freehold estate).
- *compensation on just terms*: Section 51(1) of the Native Title Act states that an entitlement to compensation is an entitlement to compensation on just terms.

These two principles have the potential for quite divergent interpretation. The comments of Justice Sackville in the *Jango* case appear to clarify that compensation for native title rights and interests may exceed the freehold value of land. Compensation may take into consideration particular connection with country that Indigenous peoples may have when evaluating 'just terms'.

Commenting on this aspect of the *Jango* decision, the Native Title Research Unit considers that:<sup>13</sup>

Sackville J's comments in *Jango* may indicate that where native title has been extinguished over land containing a significant site or sites, a greater amount of compensation may be payable than under land valuation principles for a freehold estate as capped in s. 51A of the NTA.

This interpretation recognises what previous High Court and Federal Court decisions have also recognised – that the connection that Indigenous people have with country is essentially a spiritual one.<sup>14</sup> For instance, in *Milirrpum v Nabalco* Justice Blackburn referred to the fact that:<sup>15</sup>

the fundamental truth about the aboriginals' relationship to the land is that whatever else it is, it is a religious relationship. ... There is an unquestioned scheme of things in which the spirit ancestors, the people of the clan, particular land and everything that exists on and in it, are organic parts of one indissoluble whole.

In recognising the potential imbalance between market value compensation and the actual intrinsic value of the land to Indigenous people, the National Native Title Tribunal has also recognised that market value for compensation of native title may be of limited use:<sup>16</sup>

... market value is an 'uncertain guide to the true value of a loss of native title rights and interests in the land ... [a]t best, the land value is a starting point, for want of a better yardstick' In *Western Australia v Thomas* the NNTT considered the application of the 'similar compensable interest test' in s. 240, under the old NTA and stated that it may lead to inequality as:

... the rights and interests of native title holders are artificially converted to freehold rights and that the peculiar features of native title are to be ignored. To do so may impose a regime of formal legal equality which gives rise to actual inequality.

Justice Sackville's comments in *Jango* on compensation were not part of the reasons for his decision (they were 'obiter'). Whether they are taken up by higher courts (the Full Federal Court or the High Court) and become binding is yet to be seen. They are a welcome and positive interpretation that is consistent with Australia's international human rights commitments under the International Covenant on the Elimination of All Forms of Racial Discrimination (which provides a right to just, fair



and prompt compensation). It is also consistent with the purpose of the Native Title Act itself:<sup>17</sup>

When considering the value of land in the context of Aboriginal ownership, the purpose of the NTA must also be considered. In *Commonwealth v Yarmirr* McHugh J stated:

The [NTA] should therefore be read as having a legislative purpose of wiping away or at all events ameliorating the 'national legacy of unutterable shame' that in the eyes of many has haunted the nation for decades. Where the Act is capable of construction that would ameliorate any of those injustices or redeem that legacy, it should be given that construction.

### **An inquiry into compensation?**

Section 137 of the Native Title Act provides that the minister may ask the National Native Title Tribunal to hold an inquiry into an issue relating to native title. A specific example in Section 137(2) of the type of inquiry that may be held is to examine alternative forms of compensation that could be provided in relation to acts covered by the Native Title Act.

As far as I am aware the power of the minister in Section 137 has never been invoked. Further, no government has ever initiated any review of the compensation mechanisms provided for in the Native Title Act to ascertain whether they are working to ensure Indigenous peoples' right to compensation is being realised. I have made a recommendation at the end of this chapter.

### **Evidence**

The production of evidence before the court is a major concern of all parties to any native title proceeding. It is the second main area I would like to highlight from the review of the cases in the previous chapter.

#### **Section 82 of the Native Title Act**

Section 82 of the Native Title Act deals with how the court can receive evidence during a native title proceeding.

When the Act was introduced in 1993, Section 82 provided:

82(1) The Federal Court must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt.

(2) The Court, in conducting proceedings, must take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders.

(3) The Court, in conducting proceedings, is not bound by technicalities, legal forms or rules of evidence.

In applying this provision, Justice Olney in the Federal Court decision of *Yorta Yorta*<sup>18</sup> said:

One of the mechanisms which the Court has adopted, consistent with its obligation under s.82(1), is to permit the parties to tender the evidence-in-chief of their witnesses in the form of a written statement which may either be verified by the witness in Court, or by consent of the other parties, and tendered without formal proof.



It should perhaps be observed at this point that since this matter was first raised in Court I have had the opportunity to read an article ... in which the author observes in relation to s.82(3) ...:

It is not to be expected that the Court will lapse into whimsical regulation of the evidence it admits. Requirements of procedural fairness and the requirement of s82(1) of the Native Title Act that the Court must pursue the objective of providing a mechanism that is fair, just, economical, informal and prompt should ensure this.

The point is well made but in addition ... there is the more fundamental requirement that in arriving at its findings of fact the Court may have regard only to evidence which is relevant, probative and cogent...

Between the judgment at first instance and the final appeal to the High Court in *Yorta Yorta*, Section 82 of the Native Title Act was amended as part of the substantial amendments to the Act made in 1998. Section 82 now reads [text in *italics* are the amendments]:

82(1) *The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.*

(2) *In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.*

(3) *The Court or a Judge must exercise the discretion under section 47B of the Federal Court of Australia Act 1976 to allow a person to appear before the Court or Judge, or make a submission to the Court or Judge, by way of video link, audio link or other appropriate means if the Court or the Judge is satisfied that:*

*(a) the conditions set out in section 47C in relation to the video link, audio link or other appropriate means are met; and*

*(b) it is not contrary to the interests of justice to do so.*

The law itself and the accompanying Explanatory Memorandum to the Bill provide no guidance on what factors may justify an order setting aside the rules of evidence.

The High Court in *Yorta Yorta* noted the changes to Section 82 and the difficulties of evidence that may now arise in native title claims:<sup>19</sup>

It may be accepted that demonstrating the content of that traditional law and custom may very well present difficult problems of proof. But the difficulty of the forensic task which may confront claimants does not alter the requirements of the statutory provision. In many cases, perhaps most, claimants will invite the Court to infer, from evidence led at trial, the content of traditional law and custom at times earlier than those described in the evidence. ...

When the primary judge was hearing evidence in this matter the *Native Title Act* provided that, in conducting proceedings under the Act, the Federal Court, first, was "not bound by technicalities, legal forms or rules of evidence" and, secondly, "must pursue the objective of providing a mechanism of determination that is fair, just, economical, informal and prompt". It may be that, under those provisions, a rather broader base could be built for drawing inferences about past practices than can be built since the 1998 Amendment Act came into operation. ...



### ***Presumption of rules of evidence***

The Native Title Act now starts from the premise that in native title proceedings, the rules of evidence will apply. In previous Native Title Reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner (the 2002<sup>20</sup> and 2005<sup>21</sup> reports) reference has been made to the significant evidentiary difficulties faced by Indigenous peoples seeking to establish the elements of the definition of native title in Section 223 of the Native Title Act. The standard and burden of proof required, and the operation of Section 82 place particular burdens on Indigenous people seeking to gain recognition and protection of their native title.

In 2005, the United Nations Committee on the Elimination of Racial Discrimination stated in its Concluding Observations on Australia's periodic reports on the Convention on the Elimination of All Forms of Racial Discrimination:<sup>22</sup>

The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands (art. 5). ...

[The Committee] recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.

The Australian Law Reform Commission addressed the issue of evidence in detail in its December 2005 report on the Uniform Evidence Law. In considering whether the uniform Evidence Acts<sup>23</sup> should be amended to include a provision dealing specifically with the admissibility of evidence of Indigenous traditional laws and customs they recommended:<sup>24</sup>

In recognition of the fact that the rules of evidence have not been sufficiently responsive to some of the inherent difficulties in proving in an Australian court ATSI [Aboriginal and Torres Strait Islander] traditional laws and customs, the Commissions recommend that the uniform Evidence Acts be amended to include a provision dealing specifically with the admissibility of such evidence. The adoption of a broad definition of 'traditional laws and customs', which includes the observances, practices, knowledge and beliefs of an ATSI group, will facilitate the receipt of more diverse evidence which can be used to prove the existence and content of particular traditional laws and customs of the group.

The ALRC observed that the central difficulty for proof of traditional laws and customs presented by the rules of evidence arises from the distinction between matters of fact and matters of opinion. As well as from the insistence on first-hand evidence based on personal knowledge of matters of fact. Both the opinion rule and the hearsay rule create problems for proving traditional laws and customs developed and maintained over time as part of an oral tradition.<sup>25</sup>

Federal Court judges involved in native title proceedings have also commented many times on the difficulties of evidence in native title proceedings. In *Ward v Western Australia*,<sup>26</sup> Justice Lee said:



Of particular importance in that regard is the disadvantage faced by Aboriginal people as participants in a trial system structured for, and by, a literate society when they have no written records and depend upon oral histories and accounts, often localised in nature. In such circumstances application of a rule of evidence to exclude such material unless it is evidence of general reputation may work substantial injustice ...

### **Section 82 rarely used**

The amended Section 82 gives the court the power to order that the parties are not bound by the rules of evidence. It has rarely been used by the courts. In *Daniel v Western Australia*, Justice Nicholson held that it 'requires some factor for the court to otherwise order'.<sup>27</sup> The ALRC states that the 'Native Title Act does not allow the court to dispense generally with the rules of evidence in native title proceedings'.<sup>28</sup> In the *Wongatha* case (considered in the previous chapter), Justice Lindgren noted that for Section 82 to be invoked it is:<sup>29</sup>

... not a sufficient reason that the rules of evidence render certain evidence inadmissible: the terms of section 82 reflect an acceptance by the Parliament that this will be so, and that the position, should not, as a matter of course, be relieved from.

Nonetheless, Section 82 has been used to allow evidence to be submitted that would otherwise be inadmissible. Justice O'Loughlin relied on it in *De Rose v South Australia* to allow hearsay evidence to be admitted.<sup>30</sup> The judge accepted hearsay evidence. He gave the reason that Aboriginal witnesses, with an oral history, were told about traditional laws and customs, particularly by older generations. The judge dealt at some length with the evidentiary problems that are seen as peculiar to native title claims, particularly in what is normally regarded as hearsay evidence.<sup>31</sup> He clearly stated that he would use the discretion in Section 82 to admit evidence to:<sup>32</sup>

... ensure that applicants are not required to meet an evidentiary burden that is, in the circumstances that are unique to every native title application, impossible to meet.

It is far from clear what is necessary for the court to use the Section 82 discretion. The Yamatji Marlpa Barna Baba Maaja Aboriginal Corporation stated in its submission to the ALRC that the factor required by Section 82 for the court to dispense of the evidence rules 'remains an enigma with no judicial determination of what this entails'.<sup>33</sup>

The ALRC had received submissions and reviewed cases that highlighted the inconsistent way the evidence rules were being applied for native title cases. How they were applied depended on counsel, judges and 'improvised solutions'.<sup>34</sup> The admissibility of evidence also depends on the respondent's objections and whether counsel for the respondent 'tires' of objecting.

These factors were evident in the cases considered in the previous chapter. In *Wongatha*, Justice Lindgren faced 30 expert reports, to which 1426 objections were lodged.<sup>35</sup> In *Jango* it was a similar story; certain expert anthropologists' reports were the subject of in excess of 1000 objections by the respondents.<sup>36</sup>



In the *Larrakia* case, Justice Mansfield dealt with evidence, specifically stating that under Section 82 of the Native Title Act he was bound by the rules of evidence.<sup>37</sup> Nonetheless, Justice Mansfield commented on many difficulties associated with evidence in native title proceedings including:<sup>38</sup>

[I]t must always be borne in mind that any historical record about Aboriginal people is incomplete. There are ‘silences’ in the historical record ... ‘[t]he nature of these ‘silences’ and the manner in which they should be addressed is the subject not merely of academic interest, but one that bears directly upon the approach the Court must take in order to interpret the expert and witness evidence, and to derive the inferences that of necessity must be made, in order to decide upon the issues in contention’.

As a consequence of these various approaches to evidence in native title proceedings, the ALRC considered:<sup>39</sup>

... that without statutory amendment, the laws of evidence will continue to present undesirable barriers to the admission and use of evidence of traditional laws and customs. Submissions and consultations indicate that the admission of such evidence is often contested, and divergent judicial approaches are developing to resolve these disputes.

### **The role of written European evidence in native title proceedings**

In three of the cases reviewed in the previous chapter the judges referred to the role that written European evidence played in proving aspects of the Indigenous culture at the time of sovereignty. This highlights the tension between the admissibility and weight given to oral evidence and that given to written evidence.

In the *Noongar* decision, Justice Wilcox referred to the written evidence left over from Europeans at settlement:<sup>40</sup>

An unusual feature of this case is the wealth of material left to us by Europeans who visited, or resided in, the claim area at, or shortly after, the date of settlement ... The cumulative effect of these writings is to provide an insight into Aboriginal life, including Aboriginal laws and customs, in and about the date of settlement, which is possibly not replicated elsewhere in Australia.

One of the expert witnesses in the case commented that:<sup>41</sup>

‘The observers provided more information than we have for many other comparable parts of Australia. Dr Brunton thought the information was sufficient to allow him to conclude ‘that in the South West of Western Australia at sovereignty there was a normative system under which rights to speak for country were held by estate groups, membership of which was reckoned by patrilineal descent.’

On the other hand, the counsel for the respondents warned the court not to put too much weight on the evidence of contemporary Aboriginal witnesses in identifying the society that existed in 1829. Counsel warned that the knowledge held by the current Aboriginal society may be as a result of a resurgence in interest in their traditions and culture – and not one that has continued since colonisation. Justice Wilcox essentially accepted the warning.<sup>42</sup> Nevertheless, ultimately, Justice Wilcox found that native title rights and interests do exist over the claim area.

In the *Larrakia* case, the expert witnesses and evidence presented to the court also recognised the importance of early written European documentation of



Indigenous people in the region. These written documents from the period of settlement impacted on the expert evidence that was presented to the court. One expert recognised that the lack of written historical records, partly because of destruction of those records, impacted on the conclusions they could make about the Larrakia people.<sup>43</sup> The court found that native title rights and interests did not exist over the claim area.

In the summary of the *Wongatha* case, Justice Lindgren observed the difficulties that arise where claimants must prove matters back to the date of sovereignty (1829 in Western Australia) that is earlier than first European settlement. Often, in the intervening period there will be no written records of Aboriginal laws and customs. The result is 'what may appear to be unequal treatment as between different groups of Aboriginal people':<sup>44</sup>

... in the present case, the claimants must prove what indigenous laws and customs were being acknowledged and observed in the Goldfields at the date of sovereignty – 1829. But the first explorer did not reach any part of the Wongatha claim area until 1869, and, in substance, European settlement did not occur there until the gold rush in the 1890s. In other words, the first substantial written records we have of Aboriginal people anywhere in the Wongatha Claim area relate to the last decade of the nineteenth century, yet the claimants bear the onus of proving what the position was there in 1829. By contrast, in a case relating to an area where settlement of a colony first occurred, there will be written records relating to Aboriginal laws and customs as they existed at sovereignty.

... any lack of proof or inference as to what the position was in the Goldfields in 1829 tells against the claimants, who bear the onus of proving all the elements of their claims.

Justice Lindgren dismissed the claim.

### **Reconciling the evidence rules and Indigenous culture**

I am concerned that the current evidence requirements for native title prescribed by Section 82 appear not to be working. As the law currently operates, Section 82 remains a significant barrier to Indigenous people trying to use the Native Title Act to access their native title rights and interests.

The ALRC's report on the rules of evidence (the report was not on the Native Title Act) recommended that the Evidence Acts be amended to provide exceptions to the hearsay and opinion evidence rules for evidence relevant to Aboriginal or Torres Strait Islander traditional laws and customs. These traditional laws and customs include a wide range of topics, including knowledge, beliefs, practices and observances.<sup>45</sup>

The report recommended that the hearsay rule be amended to allow an exception related to Aboriginal or Torres Strait Islander traditional laws and customs. In determining admissibility the ALRC considered the focus should shift from technical breaches of the law, to whether the particular evidence is reliable.<sup>46</sup>

The ALRC also recommended amending the opinion evidence rule to permit a member of an Indigenous group to give opinion evidence about the laws and customs of that group. This means the Indigenous member would not have to establish that he or she has 'specialised knowledge based on [his or her] training study or experience' as required under Section 79 of the Evidence Act.<sup>47</sup>





The recommendations of the ALRC are positive and the government should consider the report and make commitments on what action it will take on these recommendations.

The ALRC paper focused solely on the Evidence Acts. It did not recommend how Section 82 of the Native Title Act should be amended (if at all). The ALRC did, however, conclude that Section 82 did not appear to be operating effectively. It recommended that the section be reviewed as 'the provision does not provide sufficient guidance or certainty on the admissibility of evidence in native title proceedings.'<sup>48</sup> This observation is supported by the cases reviewed in the previous chapter.

### **Resurgence of culture – native title and human rights**

The resurgence of culture amongst Indigenous peoples is occurring in many parts of the country. It is raised in native title proceedings when the court considers the issues of continuity of society and continuity of observance of traditional laws and customs. Continuity of observance must continue 'substantially uninterrupted' from sovereignty to the present time for the laws and customs currently practiced to be considered traditional.

If the court determines there has been a substantial interruption then any later resurgence of culture and of the practice of laws and customs will not overcome it. They will not be considered 'traditional' to the extent required for recognition of native title.

In the *Noongar*, *Larrakia*, and *Wongatha* cases, the judges of the Federal Court recognised Indigenous peoples' attempts to reinvigorate their culture and traditions. The judges explicitly recognised the strength of these various Indigenous communities.

They also recognised that communities that have reinvigorated their culture and traditions will not be able to have these recognised as native title rights and interests by Australian law as it stands. That is unless the laws and customs they are revitalising have continued to be observed, substantially uninterrupted, since sovereignty.

This constraint is due, primarily, to the definition of native title in Section 223 and the High Court's interpretation of that section in the *Yorta Yorta* case.

Justice Wilcox was aware of this constraint and the need to be cautious where evidence was given of the resurgence of culture in native title proceedings. Counsel for the respondents in the *Noongar* case emphasised: 'in recent years there has been a resurgence of interest in Western Australian Aboriginal history and tradition, perhaps particularly amongst the Aborigines themselves'. Justice Wilcox accepted this was a reason the court should be cautious in relying on Aboriginal witnesses in identifying the society that existed since 1829. Despite this he went on to find that native title existed, stating in his judgment:

I did not gain an impression, in relation to any of the 30 Aboriginal witnesses, that his or her evidence was tailored to suit the claim or that the identification arose out of the recent resurgence of interest in the Aboriginal traditions of south west Western Australia.<sup>49</sup>





I am concerned about current common law and its interpretation of the Native Title Act. It appears to deny how societies and cultures evolve. It is a narrow, unnecessarily legalistic, interpretation of the requirement for recognition of native title. The effect is to restrict Indigenous peoples' exercise of their human rights. It is an impediment on the capacity of the Native Title Act to deliver in accordance with its preamble.

The resurgence of culture and tradition needs to be seen in the context of Indigenous peoples' human rights as understood in international law. Resurgence is very much in line with those human rights.

### **Indigenous peoples' human rights**

International human rights standards provide considerable direction on a State's obligations to protect the cultural, religious, property and governance rights of Indigenous people.

#### ***The rights to minority cultures***

The preservation and protection of Indigenous culture is addressed in the *International Covenant on Civil and Political Rights*<sup>50</sup> (ICCPR) and the *Convention on the Rights of the Child*.<sup>51</sup> Both agreements have similar wording, providing that people belonging to ethnic, religious or linguistic minorities have the right, in community with their group, to enjoy their own culture and to use their own language.<sup>52</sup> The Human Rights Committee, in explaining the importance of these rights, noted:

[ICCPR] article 27 [protecting minority culture] relates to rights whose protection imposes specific obligations on States Parties. The protection of these rights is directed towards ensuring the survival and continued development of the cultural, religious and social identity of the minorities concerned, thus enriching the fabric of society as a whole.<sup>53</sup>

The Human Rights Committee expressed concern about potential inconsistencies between the 1998 amendments to the Native Title Act and Australia's obligations under ICCPR Article 27.<sup>54</sup>

The Committee is concerned ... that the Native Title Amendments of 1998 in some respects limit the rights of indigenous persons and communities, in particular in the field of effective participation in all matters affecting land ownership and use, and affects their interests in native title lands, particularly pastoral lands. The Committee recommends that the State party take further steps in order to secure the rights of its indigenous population under article 27 of the Covenant. The high level of exclusion and poverty facing indigenous persons is indicative of the urgent nature of these concerns. In particular, the Committee recommends that the necessary steps be taken to restore and protect the titles and interests of indigenous persons in their native lands, including by considering amending anew the Native Title Act, taking into account these concerns.

The Committee expresses its concern that securing continuation and sustainability of traditional forms of economy of indigenous minorities (hunting, fishing and gathering), and protection of sites of religious or cultural significance for such minorities, which must be protected under article 27, are not always a major factor in determining land use.



### ***The right to equality before the law and to not be discriminated on the basis of race***

Guarantees of equality before the law and racial non-discrimination<sup>55</sup> are contained in Article 26 of the ICCPR and Articles 2 and 5 of the *International Convention on the Elimination of All Forms of Racial Discrimination*<sup>56</sup> (ICERD).

The recognition and protection of the distinct rights of Indigenous peoples is also implicit in the concept of equality. The Committee on the Elimination of Racial Discrimination has recognised, as aspects of the principle of equality, the obligations of States to protect Indigenous culture. The CERD Committee explained that States must ensure that Indigenous communities can exercise their rights to practise and revitalise their cultural traditions and customs and to preserve and to practise their languages.<sup>57</sup>

[T]he provisions of ... [ICERD] apply to indigenous peoples. The Committee is conscious of the fact that in many regions of the world indigenous peoples have been, and are still being, discriminated against and deprived of their human rights and fundamental freedoms and in particular that they have lost their land and resources to colonists, commercial companies and State enterprises. Consequently, the preservation of their culture and their historical identity has been and still is jeopardized. The Committee calls in particular upon States parties to ... ensure that indigenous communities can exercise their rights to practise and revitalize their cultural traditions and customs and to preserve and to practise their languages.<sup>58</sup>

### ***The right to freedom of religion and belief***

The right to freely practice one's religion and belief are protected at international law. Article 18 ICCPR states:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to ... manifest [t]his religion or belief in worship, observance, practice and teaching.<sup>59</sup>

There is commentary suggesting that the human right to freedom of religion and belief provides support for protection of sites that are sacred or significant to Indigenous people.<sup>60</sup>

The High Court, in the *Ward* decision, recognised the relationship between Indigenous people and their land as a spiritual one. Native title, as a recognition of Indigenous relationships to land encompasses this spiritual dimension. In the *Ward* decision, Justice Kirby, emphasised the lack of attention, in native title cases, that has thus far been given to the freedom of religion,<sup>61</sup> which is protected not only in international human rights standards, but under the Australian Constitution.<sup>62</sup>

Justice Kirby indicated that freedom of religion could provide greater protection of Indigenous interests than has, to date, been accorded:

There is one further possibility that I should mention. It concerns the possible availability of a constitutional argument for the protection of the right to cultural knowledge, so far as it is based upon the spirituality of Australia's indigenous people. That involves the application of s 116 of the Constitution, which provides a prohibition on laws affecting the free exercise of religion. The operation of that section has not been argued in these appeals. ... The full significance of s 116 of the Constitution regarding freedom of religion has not yet been explored in relation to Aboriginal spirituality and its significance for Aboriginal civil rights. ... One thing is



certain – the section speaks to all Australians and of all religions. It is not restricted to settlers, their descendants and successors, nor to the Christian or other organised institutional religions. It may be necessary in the future to consider s 116 of the Constitution in this context.<sup>63</sup>

### ***The right to self-determination***

The right to self-determination is enshrined in Article 1 of the ICCPR and the *International Covenant on Economic, Social and Cultural Rights*<sup>64</sup> (ICESCR). Australia is a party to both of these covenants and is bound to act in compliance with their terms. The common Article 1 reads:<sup>65</sup>

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

### ***The Declaration on the Rights of Indigenous People***

In September 2007 the United Nations General Assembly adopted the *Declaration on the Rights of Indigenous People* (the DRIP). The declaration specifically states in Article 11 that Indigenous peoples have the right to practice and revitalise their cultural traditions and customs. Australia is expected to adopt the declaration.

### **The Native Title Act as a mechanism to realise human rights?**

In Australia's current legal framework there are limited avenues for Indigenous people to hold the government to account for access to their human rights. The Native Title Act may be an avenue through which Indigenous people might be able to access their human rights when they are related to land and waters.

The Act has not always proved an effective way to access their human rights particularly so after the 1998 amendments to the Act. The Native Title Act, as currently interpreted and applied, can only be used by Indigenous people in very limited circumstances to access very limited and specific rights. This is despite its drafting as 'beneficial legislation'. This tension between the interpretation and application of the Act, and the original intent and purpose underpinning the legislation, is highlighted in the *Larrakia* case.

In *Larrakia*, Justice Mansfield recognised throughout his judgment the strength of the Indigenous society before him. After giving his conclusion that native title didn't exist, he stated:<sup>66</sup>

It is a conclusion which is not intended to, and should not, be seen as meaning that the Larrakia people do not presently exist as a society in the Darwin area with a structure of rules and practices directing their affairs. They clearly do.



Justice Mansfield specifically identified the limitations on the court taking into account re-establishment of traditional laws and customs when determining native title under the Native Title Act.<sup>67</sup>

In my judgment, the present laws and customs of the Larrakia people reflect a sincere and intense desire to re-establish those traditional laws and customs adapted to the modern context. These are the consequence of significant efforts on the part of many to achieve that result. It is an entirely proper objective. It is apparent that the process is enriching the lives of the Larrakia people, and of the Darwin community. That, however, is not a sufficient factual foundation for making a determination of native title rights and interests in this proceeding. ...

To summarise, in my judgment, the Larrakia people were a community of Aboriginal people living in the claim area at the time of sovereignty. The settlement of Darwin from 1869, the influx of other Aboriginal groups into the claim area, the attempted assimilation of Aboriginal people into the European community and the consequences of the implementation of those attempts and other government policies (however one might judge their correctness), led to the reduction of the Larrakia population, the dispersal of Larrakia people from the claim area, and to a breakdown in Larrakia people's observance and acknowledgement of traditional laws and customs. In the 1970s the land claims drew interest to the Larrakia culture and there has since been a revival of the Larrakia community and culture. A large number of people who now identify as Larrakia only became aware of their ancestry during these land claims, and acquired much 'knowledge' at this time. The Larrakia community of 2005 is a strong, vibrant and dynamic society. However, the evidence demonstrates an interruption to the Larrakia people's connection to their country and in their acknowledgement and observance of their traditional laws and customs so that the laws and customs they now respect and practice are not 'traditional' as required by s 223(1) of the NT Act.

The Larrakia people may be an Indigenous society presently existing in the Darwin area with a structure of rules and practices directing their affairs. Their structure of laws and customs may reflect a sincere and intense desire to re-establish traditional laws and customs, adapted to the modern context. Yet Australian law as it currently interprets and applies native title law will not recognise those rights and interests created by those laws and customs as native title. This failure limits the capacity of Australian law to promote the exercise and enjoyment of human rights of Indigenous people.

The definition in Section 223 of the Act, and the common law's interpretation, especially of 'traditional' by three judges of the High Court, has limited the scope of recognition of native title.

Australian law loses an opportunity, through the application of the Native Title Act, to foster a minority culture, to promote self-determination, equality before the law, and freedom of religion.



The Native Title Act and the system it establishes were initially perceived, and to many, still are perceived, as allowing Indigenous people access to human rights. In the *Wongatha* decision, Justice Lindgren considered this when he considered the 'unsatisfactory state of affairs in the native title area':<sup>68</sup>



One matter is that expectations are created. The indigenous people in this case are the descendents of those who lived in Australia for tens of thousands of years. One witness said words to the effect, 'if I cannot claim native title in this area, where can I claim it?'

In the *Noongar* case Justice Wilcox stated that 'Native Title is neither the pot of gold for the indigenous claimants nor the disaster for the remainder of the community that is sometimes painted'.<sup>69</sup>

The Native Title Act does not currently fulfil Australia's human rights obligations to its Indigenous population to the extent the preamble and objects suggest was the original intent of the Australian Parliament.

## Recommendations

**8.1** That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry:

- into how the compensation provisions of the Native Title Act are currently operating; and
- whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation.

In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments.

The tribunal present to Parliament specific options for reform:

- to ensure Indigenous people can effectively and practically access their human right to compensation; and
- to ensure the amount of compensation is just, fair and equitable.

**8.2** That the Native Title Act be amended to insert a definition of 'traditional' for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests.

**8.3** That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993.

**8.4** That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.



- 1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 15.
- 2 The requirement for 'just terms' does not apply to cases falling within section 51(3), that is, where the act is not a compulsory acquisition but is one to which the similar compensable interest test applies. This test is defined in section 240 of the *Native Title Act 1993 (Cth)* and is satisfied if the native title concerned related to an onshore place and compensation would be payable under any law for the act if the native title holders instead held ordinary title to the land. See Perry, M. and Lloyd, S., *Australian Native Title Law*, Lawbook Co., Sydney, 2003, p402 onwards.
- 3 Although requests can be made for non-monetary compensation: s51(6) of the *Native Title Act 1993 (Cth)*.
- 4 See sections 17 and 20 of the *Native Title Act 1993 (Cth)*.
- 5 See section 23J of the *Native Title Act 1993 (Cth)*.
- 6 Section 45 of the *Native Title Act 1993 (Cth)*.
- 7 Section 10(1) of the *Racial Discrimination Act 1975* provides that: '10(1) If by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.'
- 8 See Brennan S., 'Native title and the 'acquisition of property' under the Australian Constitution' (2004), Volume 28, *Melbourne University Law Review*, p28.
- 9 Brennan S., 'Native title and the 'acquisition of property' under the Australian Constitution' (2004), Volume 28, *Melbourne University Law Review*, p77.
- 10 United Nations Economic and Social Council, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, United Nations, Geneva, 2001, p192.
- 11 As referred to in the Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p69. See also United Nations Economic and Social Council, *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN doc HRI/GEN/1/Rev.5, United Nations, Geneva, 2001, p192.
- 12 Justice Sackville commented on a number of legal points regarding the compensation claim such as the date at which the entitlement to compensation would have arisen – that being the date the acts were done or the construction commenced and that the person or group entitled to compensation would be those who held native title rights and interests at the date the compensation act happened.
- 13 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9.
- 14 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9 quoting Justice Blackburn in *Milirrpum v Nabalco* (1971) 17 FLR 141.
- 15 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9 quoting Justice Blackburn in *Milirrpum v Nabalco* (1971) 17 FLR 141.
- 16 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p10.
- 17 Jowett, K. and Williams K., 'Jango: Payment of Compensation for the Extinguishment of Native Title', *Land, Rights, Laws: Issues of Native Title* (May 2007), Volume 3 (Paper No.8), Native Title Research Unit, Australian Institute of Aboriginal and Torres Strait Islander Studies, p9.
- 18 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
- 19 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, per Gleeson CJ, Gummow and Hayne JJ, at Paras [80] [81].
- 20 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p22.
- 21 See Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, p135-136, and Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*.
- 22 United Nations Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN doc CERD/C/AUS/CO/14, United Nations, Geneva, 2005.
- 23 The uniform Evidence Acts, for the purposes of the ALRC inquiry was a consideration of the *Evidence Act 1995 (Cth)*, the *Evidence Act 1995 (NSW)*, the *Evidence Act 2001 (Tas)* and the *Evidence Act 2004 (NT)*.



- 24 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, main recommendations.
- 25 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/> para 17. 6.
- 26 *Ward v Western Australia* (1998) 159 ALR 483
- 27 *Daniel v Western Australia* (2000) 178 ALR 542.
- 28 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.37.
- 29 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 17.28.
- 30 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.38 and 19.39, citing *De Rose v South Australia* [2002] FCA 1342.
- 31 *De Rose v South Australia No 2* (2005) 145 FCR 290, para [264]-[271].
- 32 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.38 and 19.39, citing *De Rose v South Australia* [2002] FCA 1342, at para [270].
- 33 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.40.
- 34 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.68.
- 35 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [456], referring to *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) 238 ALR 1.
- 36 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [458], referring to *Jango v Northern Territory* 15 FCR 150.
- 37 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [451].
- 38 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [135] referring to *Daniel v State of Western Australia* [2003] FCA 666, per Nicholson J, para [149].
- 39 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.67.
- 40 Wilcox J's statement attached to *Bennell v Western Australia* [2006] FCA 1243.
- 41 *Bennell v Western Australia* [2006] 230 ALR 603, per Wilcox J, para [112].
- 42 *Bennell v Western Australia* [2006] 230 ALR 603, per Wilcox J, para [449].
- 43 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [107] – [122].
- 44 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia* (No 9) [2007] FCA 31, p.3.
- 45 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, recommendations 19.1-19.3. For more detail on how these recommendations were arrived at, and for the recommendation on how 'traditional laws and customs' should be defined, see chapter 19 of the paper.
- 46 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.74.
- 47 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.77.
- 48 Australian Law Reform Commission, *Uniform Evidence Law*, ALRC Report 102, 2005, available online at: <http://www.austlii.edu.au/au/other/alrc/publications/reports/102/>, para 19.86.
- 49 *Bennell v Western Australia* [2006] FCA 1243, per Wilcox J, para [449] – [450].
- 50 United Nations General Assembly, *International Covenant on Civil and Political Rights*, United Nations Treaty Series ('UNTS') 171, UN Doc A/6316, United Nations, Geneva, 1966. Australia ratified the Convention in 1980.
- 51 United Nations General Assembly, *Convention on the Rights of the Child*, 1577 UNTS 3, 1989. Australia ratified the Convention in 1990.
- 52 United Nations General Assembly, *International Covenant on Civil and Political Rights*, United Nations Treaty Series ('UNTS') 171, UN Doc A/6316, United Nations, Geneva, 1966, Article 27. See also United Nations General Assembly, *Convention on the Rights of the Child*, 1577 UNTS 3, 1989, Article 30.
- 53 Human Rights Committee, *General Comment 23 – The rights of minorities*, (1994) para 9; in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, United Nations ('UN') doc HRI/GEN/1/Rev.5 (26 April 2001), p147.
- 54 Human Rights Committee, *Concluding observation of the Human Rights Committee: Australia*, (UN doc A/55/40 para's 498-528) 24 July 2000.





- 55 The international legal approach to equality is one of substantive rather than formal equality: G Triggs, 'Australia's Indigenous Peoples and International Law' (1999) 23 *Melbourne University Law Review* 372 at 379-381; also Australian Law Reform Commission, *Recognition of Aboriginal Customary Laws*, Report No 31(1986) paras 150, 158. The Committee on the Elimination of Racial Discrimination has recognised as aspects of the principle of equality the obligations of States parties to ICERD (inf.) to ensure that no decisions directly relating to the rights and interests of indigenous peoples are taken without their informed consent, as well as to recognise and protect the rights of indigenous peoples to own, develop, control and use their communal lands and territories and resources: General Recommendation XXIII – Indigenous Peoples, (1997) para's 4-5, in Human Rights Committee, *General Comment 23 – The rights of minorities*, (1994) para 9; in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, United Nations ('UN') doc HRI/GEN/1/Rev.5 (26 April 2001), p192.
- 56 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966. Australia ratified the Convention in 1975.
- 57 United Nations Human Rights Committee, *General Comment 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5, United Nations Office of the High Commissioner for Refugees, Geneva, 1994, para 4(e).
- 58 United Nations Human Rights Committee, *General Comment 23: The rights of minorities (Art. 27)*, UN Doc CCPR/C/21/Rev.1/Add.5, United Nations Office of the High Commissioner for Refugees, Geneva, 1994, para 2-4(e).
- 59 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966. Article 18.
- 60 'Article 18 [freedom of religion]...might well assist in securing access to and control of sacred sites, skeletal remains, burial artefacts and other items of religious or cultural significance to Indigenous Australians', S Pritchard (ed), *Indigenous Peoples, the United Nations and Human Rights*, The Federation Press, Sydney, 1998, p192. Another commentary indicates that proposing article 18 as supporting the right to exclude people from a place would be 'new ground' for this article: 'It is unfortunate that the HRC [Human Rights Committee] has issued so few consensus comments on the limits to the freedom to manifest religion or belief. It would be instructive, for example, for the HRC to issue opinions on the permissibility of restrictions of such religious activities as polygamy, animal sacrifice, or the exclusion of women from the church hierarchy': S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights*, Oxford University Press, Oxford, 2000, at [17.13]
- 61 *Western Australia v Ward (2002)* 213 CLR 1 at para [586].
- 62 Section 116, *Constitution of Australia*.
- 63 *Western Australia v Ward (2002)* 213 CLR 1, per Kirby J, at para [586].
- 64 United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 660 UNTS 195, UN Doc A/6316, United Nations, Geneva, 1966.
- 65 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 1999*, Human Rights and Equal Opportunity Commission, Sydney, 2000, pp89- 97.
- 66 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [938].
- 67 *Risk v Northern Territory* [2006] FCA 404, per Mansfield J, para [836] and [839].
- 68 Lindgren J's summary attached to *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31, p2.
- 69 Wilcox J's statement attached to *Bennell v Western Australia* [2006] FCA 1243.





# Chapter 9

## Northern Territory intervention and Indigenous land

The federal government on 21 June 2007 announced measures to tackle sexual abuse against Aboriginal children in the Northern Territory. The legislation it passed to implement the measures has significant implications for Aboriginal owned and controlled land.

This chapter sets out the main provisions in that legislation that affect land. Concerns are identified. A more comprehensive analysis of the intervention in the Northern Territory and human rights is set out in my *Social Justice Report 2007*. In that report I provide an overview of the main human rights standards and legal obligations relevant to the government's intervention. In this *Native Title Report 2007* I focus on native title and land issues.

The areas addressed are:

- compulsory five-year leases;
- town camps;
- effects of other laws; and
- rights in construction areas and infrastructure.

### Overview

Legislation giving effect to the Australian Government's intervention into Aboriginal communities in the Northern Territory received Royal Assent<sup>1</sup> on 17 August 2007.

The main provisions dealing with the federal government's acquisition of rights, titles and interests in land are contained in Part 4 of the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act).

There are also provisions dealing with infrastructure in Schedule 3 (Infrastructure) of the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth) (FCSIA(NTNER) Act). That Act amends the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) inserting Part IIB (Statutory rights over buildings or infrastructure).

Broadly, under the legislation the federal government acquires rights, titles and interests in the Northern Territory in Aboriginal land,<sup>2</sup> community living areas,<sup>3</sup> Canteen Creek, Nauiyu (Daly River), town camps, and construction areas<sup>4</sup> and infrastructure constructed on Aboriginal land.



### Concerns

I am concerned at the federal government's all encompassing acquisition of interests in land. The rights, titles and interests the federal government has acquired include:

- compulsory acquisition of five-year leases over certain lands;<sup>5</sup>
- control of leases for town camps in Darwin, Katherine, Tennant Creek and Alice Springs including the power to forfeit the lease and resume the land;
- power to acquire all rights, titles and interests in the land subject to a town camp lease; and
- rights in construction areas, and buildings and infrastructure constructed on Aboriginal land.

### Compulsory five-year leases

A central aspect of the previous federal government's legislative intervention in the Northern Territory is the compulsory acquisition by the government of five-year leases over Aboriginal owned land. This is affected by Division 1 of Part 4 of the NTNER Act.

On 18 August 2007,<sup>6</sup> the day after the NTNER Act received Royal Assent, the federal government compulsorily acquired five-year leases over:

- 47 specified areas of Aboriginal land;<sup>7</sup>
- 16 specified community living areas;<sup>8</sup>
- Canteen Creek;<sup>9</sup> and
- Nauiyu (Daly River).<sup>10</sup>

The federal government also compulsorily acquires five-year leases, once the land is prescribed by regulation, over:

- any other Aboriginal land in the Northern Territory;<sup>11</sup>
- any other community living areas in the Northern Territory;<sup>12</sup> and
- land in which, as at 18 August 2007, an estate in fee simple or a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association [sic], the Daguragu Community Government Council or the Pine Creek Aboriginal Advancement Association Inc.<sup>13</sup>



### Concern: ministerial powers

Wide-ranging powers have been delegated to the federal minister to deal with Indigenous land. In many instances the mechanism by which the federal minister exercises powers (for example by giving notice in writing to a relevant party) is deemed not to be a legislative instrument. This precludes scrutiny by the Parliament of the instrument giving effect to the minister's decision. It also precludes Parliament's disallowance of the instrument.

### Relevant owner

The legislation uses the term 'relevant owner' to describe the owners of land who are affected by the legislation. The federal government has compulsorily acquired five-year leases from the following relevant owners.<sup>14</sup>

Lease over	Acquired from
Aboriginal land	the Aboriginal Land Trust that holds the <i>estate in fee simple</i> in the land
Community living areas	the person or body that holds the <i>estate in fee simple</i> in the land (this will usually be an association)
Canteen Creek	the Northern Territory
Naiyu (Daly River)	the Catholic Church of the Diocese of Darwin Property Trust
Land in which, as at 18 August 2007, a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association Incorporated [sic] or the Daguragu Community Government Council	the Northern Territory

### Lease period

The starting date of each lease is staggered and depends on the area.<sup>15</sup> All the leases end five years from 18 August 2007.<sup>16</sup>

There is no express provision in the legislation for the period of the five-year lease to be extended or renewed.

However, there is provision for the federal minister to make other terms and conditions of the five-year lease.<sup>17</sup> Potentially this allows the federal minister to make a term or condition extending the period of the lease or for renewal of the lease.



The federal government (acting as the lessee) can terminate the lease at any time. To do this, the federal minister would give notice in writing to the owner of the land.<sup>18</sup> The notice is deemed not to be a legislative instrument.<sup>19</sup>

The owners of the land (the lessor) cannot terminate the lease.

<b>Starting dates for five-year leases</b>		
<b>Starting date</b>		<b>Leases over</b>
18 August 2007	20 Aboriginal lands and 6 community living areas. <sup>20</sup>	<p><b>Aboriginal land</b> – Ali Curung, Amoonguna, Ampilatwatja, Areyonga, Daguragu, Gapuwiyak, Gunbalanya, Gunyangara, Hermannsburg, Kaltukatjara, Kintore, Ngukurr, Nyirripi, Papunya, Pmara Jutunta, Ramingining, Santa Teresa, Wallace Rockhole, Yirrkala, Yuendumu</p> <p><b>Community living areas</b> – Alpururulam, Atitjere, Minyerri, Titjikala, Wutunugurra, Yarralin.</p>
Date proclaimed by the Government (or if not proclaimed then at the end of 6 months from 18 August 2007)	27 Aboriginal lands, 10 community living areas, <sup>21</sup> and Canteen Creek	<p><b>Aboriginal land</b> – Acacia Larrakia, Amanbidji, Barunga, Belyuen, Beswick, Bulman, Galiwinku, Haasts Bluff, Lajamanu, Maningrida, Manyallaluk, Milikapiti, Milingimbi, Minjilang, Mt Liebig, Nturiya, Numbulwar, Palumpa, Peppimenarti, Pigeon Hole, Pirlangimpi, Robinson River, Wadeye, Warruwi, Weemol, Willowra, Yeulamu</p> <p><b>Community living areas</b> – Binjari, Bulla, Engawala, Imangara, Imanpa, Jilkminggan, Laramba, Rittarangu, Tara, Wilora</p> <p><b>Canteen Creek</b></p>
The first day after the end of the disallowance period for the regulations prescribing the land	Land prescribed by regulation	<p>Land that may be prescribed by regulation:</p> <p><b>Aboriginal land</b> – any Aboriginal land that is held by an Aboriginal Land Trust for an <i>estate in fee simple</i></p> <p><b>Community living areas</b> – any community living areas where an estate in fee simple has been granted to an association</p> <p>Land in which, as at 18 August 2007, an <i>estate in fee simple</i> or a lease was held by the/The Aputula Social Club Incorporated [sic], the/The Aputula Housing Association Incorporated [sic] (this includes lease of land at Finke), the Daguragu Community Government Council (this includes lease of land at Kalkarindji) or the Pine Creek Aboriginal Advancement Association Inc.</p>



The first day after the end of the disallowance period for the regulations prescribing the commencement of the lease		Naiiyu (Daly River) <sup>22</sup>
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### Area excluded from the lease

Land that is already covered by a lease at the time the compulsory five-year lease comes into effect, is excluded from the five-year lease.<sup>23</sup>

However, the federal government may terminate the earlier lease<sup>24</sup> and vary the compulsory five-year lease to include the area previously excluded.<sup>25</sup> This does not apply to leases of Naiiyu (Daly River), Finke or Kalkarindji which are dealt with separately in the legislation<sup>26</sup> (see later in this chapter under the heading 'special provisions').

The termination of the earlier lease takes place by the federal minister giving notice in writing to the person who holds the lease.<sup>27</sup> The variation of the compulsory five-year lease to include the area previously excluded takes place by the federal minister giving notice in writing to the relevant owner of the land.<sup>28</sup> Both notices are deemed not to be legislative instruments.<sup>29</sup>

The federal minister may, at any time, vary the five-year lease to exclude land from it.<sup>30</sup> This also is done by the federal minister giving notice in writing to the landowner.<sup>31</sup> The notice is deemed not to be a legislative instrument.<sup>32</sup>

### Pre-existing rights, titles or other interests

Generally, a right, title or interest that existed in relation to the area covered by the compulsory five-year lease immediately before the time the lease takes effect is preserved.<sup>33</sup> This includes any licences.<sup>34</sup>

However the federal minister may, at any time, terminate the right, title or interest by giving notice in writing to the person who holds it.<sup>35</sup> Compensation may be payable but is not guaranteed.<sup>36</sup> The notice is deemed not to be a legislative instrument.<sup>37</sup>

The preservation of pre-existing rights, titles or other interests does not apply to native title rights and interests. Any native title rights and interests, to the extent that they may occur over the area covered by the lease, are not expressly preserved by the legislation.

However, to the extent that the granting of a compulsory five-year lease is an act that may affect native title rights and interests that may exist in the leased area, the legislation states that the non-extinguishment principle applies within the meaning of the *Native Title Act 1993* (Cth) (Native Title Act).<sup>38</sup> The non-extinguishment principle also applies to other specified acts (along with the act of granting a five-year lease) (see later in this brief under the heading 'Effect of other laws-Native Title Act').<sup>39</sup>



## Terms and conditions of lease

Under the compulsory five-year lease the federal government gains 'exclusive possession and quiet enjoyment of the land' while the lease is in force.<sup>40</sup>

This is subject to:

- any pre-existing right, title or other interest that is preserved;<sup>41</sup>
- the granting of a lease of a township for 99 years by an Aboriginal Land Trust under Section 19A of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA);<sup>42</sup> and
- the granting of a lease under Section 19 of the ALRA.

The federal government's exclusive possession and quiet enjoyment will also be subject to Sections 70C to 70G of the ALRA<sup>43</sup> from a date to be proclaimed or if not proclaimed then on the first day at the end of six months from 17 August 2007.<sup>44</sup>

The federal minister may determine additional terms and conditions of the lease and may vary these.<sup>45</sup>

A determination of other terms and conditions, and a variation, are legislative instruments, however, the provisions in the *Legislative Instruments Act 2003* allowing Parliament to disallow the legislative instrument have been excluded.<sup>46</sup>

On 17 August 2007 the federal minister made a determination of additional terms and conditions for compulsory five-year leases granted under Section 31 of the NTNER Act. The determination came into effect on 18 August 2007. The additional terms and conditions are that the federal government:

- is entitled to use, and permit the use of, the land under lease for any use the federal government considers is consistent with the fulfilment of the object of the NTNER Act;<sup>47</sup>
- is entitled to enter and access, and permit entry to and access to:
  - all buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the land under lease; and
  - all utilities and services which are on or under the leased land, including sewerage, drainage, water, electricity, gas and telecommunications services.
- may carry out any activity on or in relation to the leased land consistent with fulfilment of the object of the NTNER Act.

The federal government may carry out on the land, activities that include:

- maintaining, repairing, upgrading, refurbishing, fitting out, landscaping, clearing, dismantling, demolishing, removing and replacing:
  - buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the land (other than erected or attached by or on behalf of the federal government after 21 June 2007); and



- utilities and services which are on or under the leased land including sewerage, drainage, water, electricity, gas and telecommunications services (other than those installed by or on behalf of the federal government after the commencement of the lease).
- constructing, erecting, installing, placing, altering, refurbishing, fitting out, landscaping, dismantling and clearing:
  - buildings, structures, fixtures, fittings, plant and equipment, signs and other items erected on, or attached to, or under the leased land by or on behalf of the federal government;
  - utilities and services installed on or under the leased land by or on behalf of the federal government including sewerage, drainage, water, electricity, gas and telecommunications services.

The federal government also has the power to, at any time prior to the end of the lease, remove or demolish certain improvements<sup>48</sup> it may have made to the land under lease and certain utilities and services it may have installed.

Ownership of improvements made by the federal government will, subject to certain conditions, at the end of the lease pass to the relevant owner of the land.

The federal government is liable to pay all rates and taxes payable in respect of the land the subject of the compulsory five-year lease.

### **Dealing with land under compulsory five-year leases**

The federal government may, at any time, sublease, license, part with possession of, or otherwise deal with its interest in the five-year lease. It cannot transfer the lease.<sup>49</sup>

The legislation does not authorise an Aboriginal Land Trust to deal with an estate or interest in land covered by a compulsory five-year lease other than by granting a lease under Sections 19 or 19A of the ALRA.<sup>50</sup>

An Aboriginal Land Trust may, despite the grant of a compulsory five-year lease, grant another lease in accordance with Section 19 of the ALRA that covers part of the land.<sup>51</sup> This requires the consent, in writing, of the federal minister.<sup>52</sup> If the Land Trust grants a lease under Section 19 the compulsory five-year lease is varied to exclude the area of the Section 19 lease.<sup>53</sup>

The Aboriginal Land Trust for the land over which a compulsory five-year lease has been granted may, in accordance with Section 19A of the ALRA, grant a lease of a township for 99 years.<sup>54</sup> If such a lease is granted then the compulsory five-year lease is terminated if it covers all of the same area. If the lease of the township only covers part of the area covered by the compulsory five-year lease then that area is excluded from the compulsory five-year lease.<sup>55</sup>



## Rent

Effectively it is up to the lessee, that is the federal government, whether it pays rent. The federal government is not liable to pay the owner of the land any rent in relation to the five-year lease the federal government has compulsorily acquired.<sup>56</sup>

The federal minister may, however, from time to time, request the Valuer-General to determine a reasonable amount of rent to be paid by the federal government to the relevant owner (not the Northern Territory) of the land covered by the five-year lease.<sup>57</sup> If such a request is made the Valuer-General must comply and the federal government must pay the amount determined.<sup>58</sup>

The Valuer-General must not take into account in determining a reasonable amount of rent the value of any improvements on the land.<sup>59</sup>

There is nothing to compel the federal minister to request a rental determination from the Valuer-General. Without a request no rent is payable by the federal minister to the land owner for the five-year lease.

## Variation of the lease

The federal government may vary the compulsory five-year lease by:

- excluding land from it; and
- including land excluded at the time the five-year lease takes effect (because it was covered all or in part by a pre-existing registered lease).<sup>60</sup>

Variation takes place by the federal minister giving notice, in writing, to the relevant owner of the land.<sup>61</sup> The notice is deemed not to be a legislative instrument.

There does not appear to be any other express provision in the NTNER Act allowing the federal minister to vary the terms and conditions set out in the Act. However if the federal minister exercises the power in Section 36 of the NTNER Act to make additional terms and conditions then he may vary these.<sup>62</sup>

The owner of the land covered by the lease may not vary the compulsory five-year lease.<sup>63</sup>

## Special provisions – Traditional land claim at Canteen Creek

The legislation provides for the continuation of the traditional land claim under the ALRA at Canteen Creek.<sup>64</sup> It does this by providing that the grant of a compulsory five-year lease of Canteen Creek has effect—despite the provisions in the ALRA<sup>65</sup> that estates or interests not be granted while land is subject to traditional land claims under that Act.<sup>66</sup>

The legislation also provides that the grant of a compulsory five-year lease does not affect any application to an Aboriginal Land Commissioner under the ALRA for a traditional land claim of Canteen Creek. However, if the claim is successful and the Governor-General executes a deed of grant in fee simple in the land at Canteen Creek, the deed is of no effect until the compulsory lease ends.<sup>67</sup>





### **Special provisions – Earlier lease at Nauiyu (Daly River)**

As at 18 August 2007, when a compulsory five-year lease was granted over Nauiyu (Daly River), any earlier lease covering that area in force immediately before the compulsory five-year lease was granted is varied to exclude land covered by the later lease.<sup>68</sup>

Once the compulsory five-year lease ends, if the earlier lease is still in force it is varied to include the land excluded when the five-year lease was granted.<sup>69</sup>

It would appear that the provisions enabling the federal minister to subsequently extend the boundaries of a compulsory five-year lease to include areas excluded at the time it was granted<sup>70</sup> do not apply to the Nauiyu (Daly River) five-year lease.<sup>71</sup>

### **Special provisions – Leases of Finke and Kalkarindji**

Special provisions apply in regard to the leases of Finke (known also as Aputula) and Kalkarindji (known also as Wave Hill) held at 18 August 2007 by The Aputula Social Club Incorporated, The Aputula Housing Association Incorporated, and Daguragu Community Government Council.<sup>72</sup> These leases are suspended while the compulsory five-year leases granted over the land are in force. This is provided that the compulsory five-year leases cover all of the land the subject of the earlier leases. Once the compulsory leases end, the suspension ceases.

The five year compulsory leases over land at Finke and Kalkarindji already leased by The Aputula Social Club Incorporated, The Aputula Housing Association Incorporated, and Daguragu Community Government Council commence on the first day after the end of the disallowance period for the regulations that prescribe the land.

### **Rights of way**

The federal minister and federal government employees and agents have the right to use the shortest practicable route between areas of land covered by compulsory five-year leases.<sup>73</sup>

They also have the right to use a road over land granted to an association for a community living area that is not covered by a compulsory five-year lease to gain access to that area of the land that is covered by such a lease.<sup>74</sup> A similar right exists over land owned by the Catholic Church of the Diocese of Darwin Property Trust.<sup>75</sup>



## Summary

### Implications for Aboriginal human rights resulting from compulsory five-year leases

The compulsory five-year leases have wide-ranging implications for Aboriginal human rights. Some of these are:

- Any existing Aboriginal land in the Northern Territory may be subject to a compulsory five-year lease without any consent needed by the owner of the land.
- There is no unconditional guarantee for compensation on just terms.
- Significant interruption to community living can be expected.
- The minister is able to make wide-ranging decisions that are not answerable to Parliament.
- Traditional rights of use and occupation (under Section 71 of the ALRA) in compulsorily leased Aboriginal lands will be displaced by the existence of the compulsory lease.
- The right for an Indigenous person to even reside on compulsorily leased Aboriginal lands will be capable of being cancelled by the federal government at any time.
- The federal government is not compelled to pay rent.

## Town camps

There are a number of areas in and around centres in the Northern Territory known as town camps. These town camps are established by leases granted under the *Special Purposes Leases Act 1953 (NT)* (SPLA) and the *Crown Lands Act 1992 (NT)* (CLA). They are granted by the Northern Territory Minister or the Administrator of the Northern Territory.

Division 2 of Part 4 of the NTNER Act deals with the acquisition by the federal government of rights, titles and interests relating to town camps. In essence, Division 2 provides for the federal minister to take over the leases from the Northern Territory and to do such things as terminate the leases and resume the land under lease.

Under the NTNER Act the federal minister is able to:

- forfeit the lease establishing the town camp, resume the land under lease, and reserve the resumed land for a wide range of purposes; and
- specify that all rights, titles and interests in the land subject to a lease under the SPLA or the CLA, including town camp leases, are vested in the federal government. This is regardless of whether the lease has first been forfeited or the land resumed.



## Lands affected

The lands affected by the NTNER Act are:

- 33 town camps under SPLA and CLA leases listed in Part 4 of Schedule 1 of the NTNER Act. These are:
 

Darwin	Bagot, Knuckey Lagoons, Kulaluk/Minmirama Park, Palmerston Town Camp, Railway
Katherine	Miali Brumby, Warlpiri Transient Camp
Tenant Creek	Kargaru, Marla Marla, Munji-Marla, Ngalpa Ngalpa, Sorry Camp, The Village, Tinkarli, Village Camp, Wuppa
Alice Springs	Akngwertnarre, Anthelk-Ewlpaye, Anthepe, Aper-Alwerrkngge, Basso's Farm, Ewyenper-Atwatye, Ilperle Tyathe, Ilpeye Ilpeye, Ilyiperenye, Inarlenge, Irklanacha Atwacha, Karnte, Mount Nancy, Mpwetyerre, New Ilparpa, Nyewente, Yarrenyty-Arltere
- any land in the Northern Territory that is the subject of a lease granted under the SPLA or the CLA, including a lease for a town camp, that is prescribed by the regulations.<sup>76</sup>

## Forfeiture of town camp leases and resumption of land

Under the NTNER Act the federal minister has the same powers as the Northern Territory Minister or the Administrator of the Northern Territory under the SPLA and the CLA to do certain things in relation to leases granted under those Acts over the affected lands.<sup>77</sup> These powers include:

- to forfeit the lease where there have been specified breaches or where the purpose for which the lease was granted has been fulfilled or is no longer capable of fulfilment;<sup>78</sup>
- to determine the amount of compensation to be paid by the federal government to the lessee for any buildings left on the land if the lease is forfeited;<sup>79</sup>
- to resume and reserve land comprising, or included in, the lease for:
  - any public purpose (in the case of land subject to a SPLA lease); and
  - any purpose (in the case of land subject to CLA lease), the federal minister thinks fit, including a number of specified purposes.<sup>80</sup>

The federal minister is required to give 60 days notice, in writing, when resuming land comprising or included in a town camp lease. This has been reduced from the previously required notice of 6 months.<sup>81</sup>

Where land the subject of a lease under the SPLA or the CLA has been resumed compensation is payable to the lessee for:

- improvements on the resumed land that are the property of the lessee;
- the loss of the lease; and
- depreciation in the value of the land comprised in the lease which is not resumed.<sup>82</sup>



## Vesting of rights, titles and interests in town camp land in the federal government

The federal minister may specify that all rights, titles and interests in land that is the subject of a lease under the SPLA or the CLA, including a lease for a town camp, are vested in the federal government. The rights, titles and interests are freed and discharged from all other rights, titles and interests and from all trusts, restrictions, dedications, reservations, obligations, mortgages, encumbrances, contracts, licences, charges and rates.<sup>83</sup>

This is done by the federal minister giving to the Northern Territory a notice specifying certain land. The land must be the subject of a lease under the SPLA or the CLA. The lands the federal minister may specify are:

- any of the 33 town camps listed in Part 4 of Schedule 1; and
- any land in the Northern Territory under a SPLA or CLA lease that is prescribed by the regulations.<sup>84</sup>

Once specified, all rights, titles and interests in the land are vested in the federal minister.

The federal minister may specify land whether or not the land has been resumed or forfeited under the SPLA or the CLA.

The act of specifying land is not one to which the future act regime in Division 3 of Part 2 of the Native Title Act applies.<sup>85</sup> To the extent that the act of specifying land, and the vesting of all rights, titles and interests in the federal government that flows from that, affects native title, the non-extinguishment principle applies (see later in the brief under the heading 'Effect of other laws – Native Title Act').<sup>86</sup>

Rights, titles or interests in the land, at the time the land is specified, may be preserved. This requires that the notice specifying the land specify that a right, title or interest in the land is preserved, in which case it does not vest in the federal government.

However, so long as the federal government's interest in the land exists, the federal government may terminate the preserved right, title or interest at any time by giving notice in writing to the persons who holds the right, title or interest. Such a notice terminating a preserved right, title or interest is deemed not to be a legislative instrument.<sup>87</sup> Compensation may be payable.<sup>88</sup>



### Concerns: town camps

The acquisition of rights, titles and interests in town camps has implications for Indigenous human rights:

- There may be little or no compensation.
- Allows the minister to make wide-ranging decisions that are not answerable to Parliament.
- The notice period for lease resumption is reduced from 6 months to 2 months demonstrating less favourable treatment of town camp special purpose leases.
- Lack of conventional safeguards for compulsory acquisition suggests less favourable treatment for the leases over town camp areas.

## Compensation

The NTNER Act does not provide an unconditional guarantee for compensation on just terms for acquisition of property by the federal government under the Act.

Under Section 60 of the NTNER Act the federal government is liable to pay 'a reasonable amount of compensation' in certain circumstances. If the federal government and the person to be compensated do not agree on the amount of compensation then the person may institute court proceedings to recover from the federal government a reasonable amount.

In determining what is a reasonable amount the court must take into account:

- any rent paid or payable in relation to the land;
- any amounts of compensation paid or payable by the federal government under the SPLA or CLA; and
- any improvements to the land funded by the federal government (whether before or after a lease is granted to, or all rights, titles or interests are vested in the federal government). This includes the construction of, and improvements to, any building or infrastructure on the land.

A number of points arise from compensation provisions in Section 60:

- the federal government's liability to pay 'a reasonable amount of compensation' is only where the acquisition of the property is an acquisition to which the just terms requirements in Section 51(xxxi) of the Constitution applies;
- the NTNER Act refers to 'a reasonable amount' rather than to compensation on just terms;
- the issue of whether Section 51(xxxi) of the Constitution applies to the exercise of power under Section 122 of the Constitution and the acquisition of property by the federal government in the Territory is the subject of conflicting case law;<sup>89</sup>



- the NTNER Act displaces the requirement in the *Northern Territory (Self-Government) Act 1978* (NT(SG)A) that the acquisition of certain property in the Territory must be on just terms;<sup>90</sup>
- with the displacement of the NT(SG)A requirement for just terms compensation it opens the way for the federal government to more easily challenge the application of the constitutional just terms protection in the Northern Territory in any court case seeking compensation.

### **Concern: compensation provisions**

The compensation provisions have serious implications for Indigenous human rights.

- ‘a reasonable amount’ of compensation rather than ‘just terms’ compensation is referred to in the legislation.
- Displacing the requirement under *Northern Territory (Self-Government) Act 1978* that acquisition of certain property in the Territory be on just terms.
- The requirement that the court is compelled to take into account improvements to the land funded by the federal government, rent paid or payable, and other amounts.

### **Effect of other laws**

The federal government’s acquisition of rights, titles and interests in land under Part 4 of the NTNER Act impacts upon, and is affected by, other federal and Northern Territory laws. Part 4, Division 3 of the NTNER Act deals with how these laws interact with the acquisition of rights, titles and interests in the land by the federal government.

### **Native Title Act**

Section 51(1) of the NTNER Act provides that Part 2, Division 3 of the Native Title Act, which deals with future acts, does not apply to:

- any act done by, under or in accordance with any provision in Part 4 of the NTNER Act<sup>91</sup> including:
  - the grant of a compulsory five-year lease; and
  - the vesting of rights, titles and interests in land subject to a lease under the SPLA or the CLA, including a lease for a town camp, in the federal government.<sup>92</sup>
- any act done by the federal government, the Northern Territory or an Authority, within five-years from 18 August 2007, on land that has been resumed, or on land in respect of which a lease has been forfeited, in accordance with Division 2 of Part 4 of the NTNER Act;<sup>93</sup>



- any act done by the federal government, the Northern Territory or an Authority on land in which a federal interest exists; and
- any act that is related to any of the above acts.

The non-extinguishment principle applies to these acts.<sup>94</sup>

In essence, the affect of this is that procedures set out in the future act regime in Part 2, Division 3 of the Native Title Act, that would have had to be followed if the acts were future acts, do not have to be followed.

However, as the non-extinguishment principle applies, to the extent that any of these acts affect any native title rights and interest that may exist in the land, those native title rights and interests are not extinguished.

If the future act regime had not been expressly excluded these acts may have been 'future acts' and hence subject to that regime.

A 'future act' is defined in Section 233 of the Native Title Act. Essentially, a 'future act' is an act ('act' is defined in Section 226 of the Native Title Act) which affects native title (or would affect native title if it were valid) and:

- consists of the making, amendment or repeal of legislation which takes place on or after 1 July 1993; or
- is any other act taking place on or after 1 January 1994.

The future act regime set out in Part 2, Division 3 of the Native Title Act provides for procedures to be followed to ensure that a future act is valid and prescribes the affect of future acts on any native title rights and interests. In some cases compliance with procedural requirements is a precondition for a future act to be valid. Notification to those who hold, or may hold, native title in the land in question may be required and the parties may be required to negotiate in good faith for the doing of the act. Where procedural requirements must be followed failure to do so will mean the future act is invalid.<sup>95</sup>

### **Aboriginal Land Rights (Northern Territory) Act**

Despite the grant of a compulsory five-year lease over Aboriginal land, an Aboriginal Land Trust may grant a lease in accordance with Sections 19 or 19A of the ALRA over the land. This is dealt with earlier in the chapter under the heading 'Dealing with land under compulsory five-year leases'.

### **Application of federal laws**

Under the NTNER Act the federal minister may, by legislative instrument, prevent any law or a provision of a law from applying in relation to the following land in the Northern Territory:<sup>96</sup>

- land covered by a compulsory five-year lease;
- land in which a federal interest exists; and
- land resumed or forfeited in accordance with Division 2 of Part 4<sup>97</sup> (other than land in which a federal interest exists).<sup>98</sup>



This is done by the federal minister specifying a law, or a provision of a law, of the Australian Parliament. The law or provision then has no effect to the extent that it would regulate, hinder or prevent the doing of an act in relation to the land.

### **Modification of certain NT laws for land covered by Part 4**

The regulations may make modifications of any law of the Northern Territory relating to:

- planning;
- infrastructure;
- the subdivision or transfer of land;
- local government; and
- other prescribed matters.

to the extent that the law applies to land:

- covered by a compulsory five-year lease;
- in which a federal government interest exists; and
- resumed or forfeited in accordance with Division 2 of Part 4 (other than land in which a federal interest exists).

#### **Concern: interaction with other laws**

I have concerns about the provisions dealing with the interaction with other laws:

- Removal of the future act regime and the loss of rights under that regime.
- The federal minister is able to prevent any law or a provision of a law from applying to certain lands thus bypassing Parliament (albeit that it is by way of legislative instrument).

### **Rights in construction areas and infrastructure**

The FCSIA(NTNER) Act amended the ALRA, inserting Part IIB (Statutory rights over buildings or infrastructure),<sup>99</sup> to provide for the acquisition (by the federal government, the Northern Territory, or one of their authorities) of extensive statutory rights in relation to areas of Aboriginal land designated as *construction areas*.

The relevant provisions of Part IIB of the ALRA are Division 1 (Preliminary), Division 2 (Federal rights) and Division 3 (Northern Territory rights).





## Area over which rights are acquired – the ‘construction area’

A *construction area* is an area of Aboriginal land held by an Aboriginal Land Trust for an *estate in fee simple* which:

- the federal minister has identified in a written determination (where the rights are acquired by the federal government or a federal authority); or
- the Chief Minister of the Northern Territory or a delegate of the Chief Minister has identified in a written determination (where the rights are acquired by the Northern Territory or a Northern Territory authority).

## Circumstances in which the rights are acquired

The rights are acquired where:

- works are proposed to be carried out on a *construction area*; and
- the Aboriginal Land Council for the area in which the land is situated consents in writing;<sup>100</sup>
- immediately before the Land Council consents the area is not covered by a lease under Sections 19 or 19A of the ALRA; and
- the federal government, the Northern Territory or one of their authorities wholly or partly<sup>101</sup> funds the works.

The works<sup>102</sup> must be:

- the construction of one or more buildings or infrastructure; or
- the major alteration, extension, restoration, refurbishment or fitting out of one or more buildings or infrastructure, the total estimated cost of which exceeds \$50,000.<sup>103</sup>

## Rights acquired

The statutory rights acquired in relation to the *construction area* are exclusive<sup>104</sup> to the body funding the works and are the right to:

- carry out works on the construction area;
- occupy, use, maintain, repair or replace the buildings or infrastructure covered by the works;
- occupy or use the construction area;
- construct, maintain, repair or replace minor improvements on the construction area; and
- provide services to the construction area.

During the period a person has the statutory rights the buildings or infrastructure is taken to be the property of the person.<sup>105</sup>



## Who acquires the rights

The rights are acquired by the body that funds the works.<sup>106</sup>

Funding body	Body acquiring the rights
The federal government (where fully funded by the federal government)	The federal government
A federal authority (where fully funded by a federal authority)	The federal authority
The Northern Territory (where fully funded by the Northern Territory)	The Northern Territory
A Northern Territory authority (where fully funded by a Northern Territory authority)	The Northern Territory authority
Partly funded by the federal government or a federal authority or both (whether or not there is to be funding from another source)	The federal minister determines in writing whether the funding body is the federal government or the authority
Partly funded by the Northern Territory or a Northern Territory authority or both (whether or not there is to be funding from another source)	The Chief Minister of the Northern Territory must determine, in writing, whether the funding body is the Northern Territory or the authority <sup>107</sup>

## Transfer of rights

The statutory rights may be transferred by the party who has acquired them to the federal government, a federal authority, the Northern Territory or a Northern Territory authority (depending on who has acquired them).<sup>108</sup>

## Exercise of rights by others

A person who has the statutory rights may permit, in writing, a person or persons to exercise some or all of the statutory rights in relation to the whole or a part of the *construction area*.<sup>109</sup> A person who is authorised to exercise the statutory rights does not acquire them.<sup>110</sup>

## Compulsory negotiations for lease under Section 19 of the ALRA

It would appear that the relevant Land Council must negotiate in good faith with:

- the person who has acquired the statutory rights for that person to be granted a lease of the construction area under Section 19 of the ALRA. This is unless a lease is granted under Section 19A of the ALRA.<sup>111</sup>



- a funding body that has not acquired the statutory rights because there is already a compulsory five-year lease at the time a *construction area* has been created.

So, once the Land Council has agreed in writing to the works taking place (and the other statutory requirements for the acquisition of statutory rights have occurred) it would appear the Land Council is compelled to enter into negotiations in good faith for a lease of the land under Section 19 of the ALRA.

If a lease is granted under Section 19 of the ALRA then the federal government, federal authority, Northern Territory or Northern Territory authority (as the case may be) is authorised to dispose of an interest in land covered by the lease granted under Section 19 of the ALRA in accordance with the terms and conditions of the lease.<sup>112</sup>

### Prohibition on leases under Section 19 of the ALRA

The Land Trust which holds the Aboriginal land for an *estate in fee simple* must not grant any other lease under Section 19 of the ALRA of the *construction area* other than to:

- the person who has the statutory rights;<sup>113</sup> and
- the funding body which has not acquired the statutory rights because there is already a compulsory five-year lease at the time a *construction area* has been created.

<b>Effect of leases on rights</b>		
<b>Type of lease</b>	<b>Relevant circumstances</b>	<b>Effect on statutory rights</b>
Compulsory five-year lease	<ul style="list-style-type: none"> <li>▪ A compulsory five-year lease is in force; and</li> <li>▪ works are proposed to be carried out on a <i>construction area</i>; and</li> <li>▪ the Land Council for the area consents, in writing, to the works; and</li> <li>▪ the works are to be wholly or partly funded by the federal government, a federal authority, the Northern Territory or a Northern Territory authority.</li> </ul>	The acquisition by the funding body of the statutory rights is suspended for the period the compulsory five-year lease is in force.



Section 19 ALRA leases	<p>Where a lease has been granted under Section 19 of the ALRA to:</p> <ul style="list-style-type: none"> <li>▪ a person who has acquired the statutory rights;</li> <li>▪ a funding body that has not acquired the statutory rights because there is already a compulsory five-year lease at the time a <i>construction area</i> has been created.</li> </ul>	<p>The acquisition by the funding body of the statutory rights is suspended while the lease is in force.</p>
Section 19A ALRA leases	<ul style="list-style-type: none"> <li>▪ A lease is in force under Section 19A of the ALRA covering the construction area; and</li> <li>▪ a person has acquired the statutory rights in relation to the construction area immediately before the lease took effect;</li> <li>▪ a sublease is granted to the person who has the statutory rights.</li> </ul>	<p>Immediately before the sublease is granted the Division 2 (federal rights) or Division 3 (Northern Territory rights), as appropriate, ceases to apply in relation to the <i>construction area</i>.</p>

### Displacement of traditional rights of use and occupation

The FCSIA(NTNER) Act amendments<sup>114</sup> to the ALRA displace the protection, given in Section 71 of the ALRA,<sup>115</sup> to the traditional rights of use and occupation of Aboriginal land.

#### Concern

I am very concerned about the displacement of the protection given in Section 71 of the ALRA, to the traditional rights of use and occupation of Aboriginal land.

An Aboriginal or a group of Aboriginals is no longer entitled to enter upon Aboriginal land and use or occupy that land in accordance with Section 71(1) of the ALRA if to do so would interfere with the use or enjoyment of the statutory rights of a government (or authority or a third party with a permit to exercise those rights) acquired under Part IIB of the ALRA.



## Conclusion

From a native title perspective, it is the removal of the future acts regime and the loss of rights under that regime that is particularly concerning. The preamble to the Native Title Act states:

In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate.

The provisions of the intervention legislation appear to pay no attention to the preamble. It is given no weight. This approach to native title treats native title as a hindrance rather than as a necessity. Something to be legislated away where it looks like it may block a desired course of action. This is of deep concern.



- 1 There are 5 pieces of legislation, 2 of which deal with appropriations: *Appropriation (Northern Territory National Emergency Response) Act (No. 1) 2007 – 2008 2007*; *Appropriation (Northern Territory National Emergency Response) Act (No. 2) 2007 – 2008 2007*; *Families, Communities Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) 2007*; *Northern Territory National Emergency Response Act 2007* (NTNER Act); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007*.
- 2 The term 'Aboriginal land' is used in the legislation to refer to:  
 a) land held by an Aboriginal Land Trust for an estate in fee simple; or  
 b) land the subject of a deed of grant held in escrow by an Aboriginal Land Council. This is the definition in s3(1) of the *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).
- 3 Broadly, community living areas (sometimes also referred to as Aboriginal community living areas) are areas of land taken out of pastoral leases for the benefit of Indigenous people. An estate in fee simple is granted to associations established or nominated to hold the title. They are created by the operation of the *Pastoral Land Act 1992* (NT) (PLA) (and prior to the operation of that Act, the *Crown Lands Act 1992* (NT)) (CLA), and the *Lands Acquisition Act 1978* (NT) (LAA). The owners of the land described as Aboriginal community living areas (in so far as they hold the estate in fee simple in the land) are associations formed or approved under Part 8 of the PLA (or Part IV of the CLA). The process for making an application to the Northern Territory Minister for the excise of land from a pastoral lease for a community living area is set out in Part 8 of the PLA (or Part IV of the CLA as in force before the commencement of the PLA). This works in conjunction with Part V of the LAA.
- 4 A 'construction area' is defined in s20T of the ALRA and is considered in this briefing paper under the heading 'rights in construction areas and infrastructure'.
- 5 The lands are set out in s31(1) of the NTNER Act.
- 6 One day after the legislation received the Royal Assent (s2(1) of the NTNER Act).
- 7 NTNER Act, s31(1)(a) and Schedule 1 Part 1.
- 8 NTNER Act, s31(1)(a) and Schedule 1 Part 2.
- 9 NTNER Act, s31(1)(a) and Schedule 1 Part 3.
- 10 NTNER Act, s31(1)(a) and Schedule 1 Part 3.
- 11 NTNER Act, s31(1)(b)(i).
- 12 NTNER Act, s31(1)(b)(ii).
- 13 NTNER Act, s31(1)(b)(iii).
- 14 *relevant owner* is defined in s3 of the NTNERA.
- 15 See the NTNER Act, s31(2) for the different commencement times for each lease.
- 16 NTNER Act, s31(2)(b).
- 17 NTNER Act, s36.
- 18 NTNER Act, s35(7).
- 19 NTNER Act, s35(11).
- 20 These are listed in the NTNER Act Schedule 1 Parts 1 and 2.
- 21 These are set out in the NTNER Act Schedule 1 Parts 1 and 2.
- 22 This is the effect of the NTNER Act s31(1)(a) and s31(1)(2)(a)(iv).
- 23 NTNER Act, s31(3).
- 24 NTNER Act, s37(1)(b).
- 25 NTNER Act, s35(6)(b).
- 26 They are dealt with in the NTNER Act, ss38, 39, 40.
- 27 NTNER Act, s37(3).
- 28 NTNER Act, s35(8).
- 29 NTNER Act, s37(5).
- 30 NTNER Act, s35(6).
- 31 NTNER Act, s35(8).
- 32 NTNER Act, s35(11).
- 33 NTNER Act, s34.
- 34 NTNER Act, s34(10).
- 35 NTNER Act, s37(1)(a).
- 36 See note to s37 and s60 of the NTNER Act.
- 37 NTNER Act, s37(5).
- 38 NTNER Act s51(2). The non-extinguishment principle is set out in s 238 *Native Title Act 1993* (Cth). In essence, where the non-extinguishment principle is said to apply then if the act affects any native title in relation to the land or waters concerned the native title is nevertheless not extinguished, either wholly or partly by the act.
- 39 The acts under the NTNER Act to which the non-extinguishment principle applies are set out in s 51(1) of the NTNER Act.
- 40 NTNER Act, s35(1).
- 41 That is, preserved under NTNER Act, s34.



- 42 Despite the compulsory five-year lease of Aboriginal land an Aboriginal Land Trust may grant a head lease of a township in accordance with s 19A of the ALRA (under s 37(6) of the NTNER Act). If this occurs the five-year lease is terminated or varied to the extent of area covered by the township lease. This takes place at the time the township lease takes effect.
- 43 These sections were inserted in the ALRA by the *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (FCSIA(NTNER) Act). They provide for changes to requirements for accessing Aboriginal land and the need for permits.
- 44 NTNER Act s35(1) as amended by Schedule 5, item 7 of the FCSIA(NTNER) Act.
- 45 NTNER Act, s36.
- 46 NTNER Act, s36(2) states that s 42(disallowance) of the Legislative Instruments Act 2003 does not apply.
- 47 NTNER Act, s5 states the object of the Act as 'to improve the well-being of certain communities in the Northern Territory'.
- 48 Improvements are defined as 'all buildings, structures, fixtures, fittings, plant and equipment, signs and other items which are on or under the leased land' in para 1.1.8 of the Additional Terms and Conditions for Leases Determination 2007 dated 17 August 2007 made pursuant to s36 of the NTNER Act.
- 49 NTNER Act, s35(5).
- 50 NTNER Act, ss52(1), (5), 37(6).
- 51 NTNER Act, ss52(1), (5). Section 19 of the ALRA makes provision for a Land Trust to grant an estate or interest in land vested in it to certain parties, including:
- an Aboriginal or an Aboriginal and Torres Strait Islander corporation:
    - (a) for use for residential purposes by the Aboriginal and his or her family; or an employee of the Aboriginal or the corporation, as the case may be;
    - (b) for use in the conduct of a business by the Aboriginal or the corporation, not being a business in which a person who is not an Aboriginal has an interest that entitles him or her to a share in, or to a payment that varies in accordance with, the profits of the business; or
    - (c) for any community purpose of the Aboriginal community or group for whose benefit the Land Trust holds the land.
  - the federal government, the Northern Territory or an Authority for any public purpose (s19(3) of the NTNER Act)
  - a mission for any mission purpose (s19(3) of the NTNER Act)
  - to any person for any purpose (s19(4A) of the NTNER Act).
- 52 NTNER Act, s52(2).
- 53 NTNER Act, s52(3).
- 54 NTNER Act, s37(6). Section 19A of the ALRA provides for a Land Trust to grant a headlease over a township to an approved entity if the Minister consents in writing to the grant of the lease and the Land Council for the area directs, in writing, the Land Trust to grant the lease. The Land Council must not give such a direction unless it is satisfied that:
- (a) the traditional Aboriginal owners of the land understand the nature and purpose of the proposed lease and, as a group, consent to it; and
  - (b) any Aboriginal community or group that may be affected by the proposed lease has been consulted and has had adequate opportunity to express its view to the Land Council; and
  - (c) the terms and conditions of the proposed lease (except those relating to matters covered by s19A) are reasonable (s19A(2) of the ALRA).
- 55 NTNER Act, s37(8).
- 56 NTNER Act, s35(2).
- 57 NTNER Act, s62(1).
- 58 NTNER Act, s62.
- 59 NTNER Act, s62(4).
- 60 NTNER Act, s35(6).
- 61 NTNER Act, s35(8).
- 62 NTNER Act, s36.
- 63 NTNER Act, s35(4).
- 64 NTNER Act, s38.
- 65 NTNER Act, s67A.
- 66 NTNER Act, s38(1).
- 67 NTNER Act, s38.
- 68 NTNER Act, s39.
- 69 NTNER Act, s39(4).
- 70 NTNER Act, s35(6)(b).
- 71 See note to s31(3), and ss35(6)(b), 39(3) of the NTNER Act.
- 72 NTNER Act, s40.
- 73 NTNER Act, s42(1).



- 74 NTNER Act, s42(2).  
 75 NTNER Act, s42(2).  
 76 NTNER Act, ss43, 45.  
 77 The affected lands are the land referred to in Part 4 of Schedule 1 to the NTNER Act (the 33 town camps), and any land in the Northern Territory the subject of a lease granted under the SPLA or the CLA prescribed by the regulations (ss43, 45 of the NTNER Act).  
 78 *Special Purposes Leases Act* (SPLA), ss23, 24 and *Crown Lands Act* (CLA), s38.  
 79 With regard to improvements on land subject to a lease under the SPLA that has been forfeited the federal government is only liable to pay as compensation the value, in the opinion of the federal minister, to the federal government of the buildings on the land (see s44(1) NTNER Act, s26 of the SPLA).  
 80 With regard to town camps under SPLA leases: s44(1)(iii) NTNER Act, and s28 SPLA. With regard to town camps under CLA leases: s46(1)(a)(ii) NTNER Act, and s76 CLA.  
 81 NTNER Act, ss44(1)(b), 46(1)(b), SPLA s29, CLA s80.  
 82 NTNER Act, ss44, 46, CLA s82, SPLA s32.  
 83 NTNER Act, s47.  
 84 NTNER Act, s47(1).  
 85 NTNER Act, ss47(3), 51(1).  
 86 NTNER Act, ss47(3), 51(2).  
 87 NTNER Act, ss48, 49.  
 88 Under the NTNER Act, s60.  
 89 The High Court, by a 4:3 majority, did however say in the *Kakadu Case (Newcrest Mining (WA) Ltd v Commonwealth (1997) 190 CLR 513* that constitutional just terms protection did apply in the Northern Territory.  
 90 The requirement under the s50(2) of the *Northern Territory (Self-Government) Act 1978* (NT(SG)A) that the acquisition of any property in the Territory must be on just terms has been removed with respect to:
  - the operation of Part 4 of the NTNER Act;
  - any act done in relation to:
    - land covered by a compulsory five-year lease;
    - land resumed, or in respect of which a lease has been forfeited, by the Commonwealth under the SPLA or the CLA; and
    - land in which a federal government interest exists
  - any act done by the federal minister under the SPLA or the CLA.
 The requirement under the NT(SG)A normally applies to the acquisition of property in the Northern Territory, which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution applied.  
 91 This includes:
  - the grant of a compulsory five-year lease; and
  - the vesting of rights, titles and interests in land subject to a lease under the SPLA or the CLA, including a lease for a town camp, in the federal government (done by specifying the land under s47 of the NTNER Act).
 92 This is done by specifying the land under s47 of the NTNER Act.  
 93 Other than land in which a Commonwealth interest exists (s51(1)(c) of the NTNER Act).  
 94 NTNER Act s51.  
 95 *Native Title Act 1993 (Cth)*, s28.  
 96 NTNER Act, s54.  
 97 Division 2 of Part 4 makes provision for the resumption by the Commonwealth Minister of land under SPLA or CLA leases (including 33 town camps listed on Schedule 1 of Part 4) and the forfeiture by the Commonwealth Minister of leases granted under the SPLA or the CLA.  
 98 NTNER Act, s54.  
 99 Schedule 3 (Infrastructure) of the FCSIA(NTNER) Act inserted Part IIB (Statutory rights over buildings or infrastructure) into the ALRA.  
 100 See ALRA, s23(3) (which deals with Land Council consultation with traditional Aboriginal owners and Aboriginal communities or groups).  
 101 Where the works are partly funded by the Commonwealth or the Northern Territory or one of their authorities (whether or not there is to be funding from other sources) the Commonwealth Minister must determine, in writing, whether the *funding body* is to be considered to be the Commonwealth, the Northern Territory or one of their authorities (ss20V(3), 20ZG(3) of the NTNER Act).  
 102 ALRA, s20T.  
 103 Or a higher amount if specified in the regulations (ALRA 20T-definition of *works*).  
 104 NTNER Act, s20W(3).  
 105 ALRA ss20Z, 20ZK.  
 106 ALRA ss20V, 20W, 20ZG, 20ZH.





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- 107 ALRA ss20ZG, 20ZW.  
108 ALRA ss20X, 20ZI.  
109 ALRA ss20Y, 20ZJ.  
110 ALRA ss20Y(2), 20ZJ(2).  
111 ALRA ss20ZC, 20ZN.  
112 ALRA ss20ZC(4), 20ZN(4).  
113 ALRA ss20ZC, 20ZN.  
114 FCSIA(NTNER) Act schedule 3 item 3 which amends s71 of the ALRA by adding at the end of s71:  
(3) A reference in this section to an estate or interest in Aboriginal land includes a reference to the statutory rights a person has under section 20W, 20X, 20ZH or 20ZI or a person may exercise under section 20Y or 20ZJ.  
(4) Subsection (3) does not limit section 66.  
115 ALRA s71 provides:  
(1) Subject to this section, an Aboriginal or a group of Aboriginals is entitled to enter upon Aboriginal land and use or occupy that land to the extent that that entry, occupation or use is in accordance with Aboriginal tradition governing the rights of that Aboriginal or group of Aboriginals with respect to that land, whether or not those rights are qualified as to place, time, circumstances, purpose, permission or any other factor.  
(2) Subsection (1) does not authorise an entry, use or occupation that would interfere with the use or enjoyment of an estate or interest in the land held by a person not being a Land Trust or an incorporated association of Aboriginals.





# Chapter 10

## Commercial fishing: A native title right?

The *Native Title Act 1993* (Cth) (the Native Title Act) does not preclude the possibility that native title rights and interests recognised may be *commercial* rights and interests.

Yet throughout the legal and academic commentary on fishing rights available under native title, there have been two growing distinctions:

- That commercial rights and interests are not traditional rights and interests as required by the definition of native title in Section 223.
- That granting native title rights of a commercial nature would require the rights to be exclusive, and over sea country, exclusive native title rights have been held not to exist (High Court decision in Croker Island!).

There does not appear to be any convincing reason why these two distinctions are used to deny native title rights to fish commercially.

The current government's pre-election policy supports an interpretation of Section 223 of the Native Title Act allowing a recognition of traditional native title rights and interests to fish commercially.



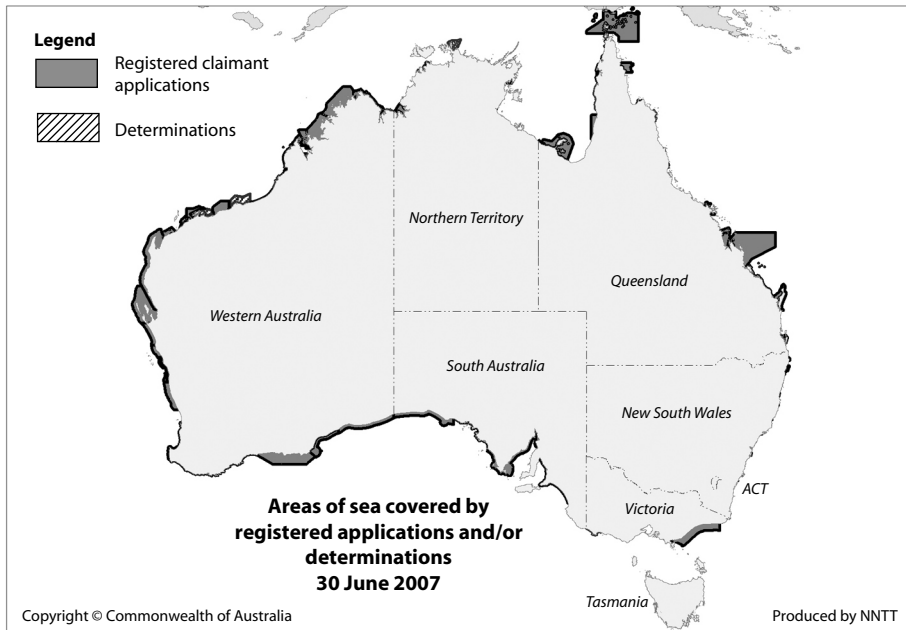
On 11 October 2001, the High Court determined that the Yarmirr people of Croker Island have a native title right to fish in their sea country.<sup>2</sup> It was the first Australian decision to recognise Indigenous peoples' right to native title over the sea. And it is now established law that native title rights and interests can include the right to fish or gather marine resources of the sea, rivers, lakes and inter-tidal zones.

In the Croker Island decision, the High Court held that native title rights and interests over marine waters relating to fishing and general access to the area are *not exclusive*. Being not exclusive means that the right of others who use and access the waters are unchanged (for example, the right of passage of vessels or the rights of commercial and public fishermen remain intact).<sup>3</sup>

While the Croker Island decision supports the existence of non-exclusive native title rights over sea country, the result did not necessarily exclude future native title applicants from establishing native title rights to fish *commercially* – two distinct concepts. To date however, the common law recognition of native title rights to sea country has predominantly concentrated on native title rights to fish and use marine resources for *non-commercial* purposes only.



But could the Native Title Act recognise a commercial right to fish as part of the interpretation of traditional rights and interests?



Current registered native title applications and determinations over sea country.

## Defining native title

The preamble to the Native Title Act says that, where appropriate, governments have a responsibility to facilitate negotiation on proposals for the use of land (and waters) for economic purposes. Both the federal government and the opposition have promoted economic development as the foundation necessary to improve the lives of Indigenous Australians. In its 2007 Platform and Constitution, the Labor Government specifically acknowledged that native title is a valuable economic resource and that land and water provide the basis for Indigenous spirituality, law, culture, economy and wellbeing.<sup>4</sup>

### Section 223 Native Title Act

In order for Indigenous people to have their native title rights and interests recognised, the key provision they must satisfy is the definition of 'native title' in Section 223 of the Native Title Act.



### **i** Section 223 Native Title Act

(1) The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognised by the common law of Australia.

*Hunting, gathering and fishing covered*

(2) Without limiting subsection (1), *rights and interests* in that subsection includes hunting, gathering, or fishing, rights and interests.

Section 223(2) of the Native Title Act expressly includes fishing rights as one of the rights and interests that may be protected by the recognition of native title. However, the section does not define the exact nature of such fishing rights except to the extent that they must have formed part of the traditional laws and customs. In the High Court's decision in *Yorta Yorta*<sup>5</sup>, the court expanded on the requirements of Section 223. The judgment set out three elements that constitute 'traditional' for the purposes of Section 223(1)(a). The laws and customs:

- must have been passed down from generation to generation;
- must have existed before the assertion of sovereignty. That is, the person must establish that the laws and customs considered are the normative rules of a society that existed before sovereignty; and
- must have had a continuous existence since sovereignty.

To have their native title rights and interests to fish recognised, Indigenous people must satisfy the requirements of Section 223, including those established in *Yorta Yorta*.

While some native title claimants have submitted that their native title rights include a right to fish commercially, the courts have rejected these claims on various grounds. Many of these grounds appear to stem from the somewhat common (but perhaps not always legitimately held) presumptions that:

- customary rights and commercial rights are two mutually exclusive concepts and therefore commercial rights are not considered to be traditional; and
- commercial rights are intrinsically connected to, and require, exclusive possession, which will not be granted under the Native Title Act (as seen in the Croker Island case).



Thus, we find:

- in theory, Indigenous Australians may have traditional rights and interests of commercial fishing on which they could capitalise;
- in practice, in the vast majority of cases Indigenous Australians have been unable to use the courts and the Native Title Act to access these rights and interests.

### **Customary versus commercial**

Is there a valid distinction between customary and commercial practices?

The view that customary Indigenous laws and customs do not include commercial activity has created a false dichotomy that customary rights are mutually exclusive to commercial rights.<sup>6</sup>

There is growing evidence that this dichotomy is neither necessary nor accurate. For example, the story of the Gunditjmara people in Victoria provides evidence of an ancient aquaculture venture that was found to be the basis of a community grounded on economic exploitation (see the case study at the end of this chapter). This venture is now being revived with native title rights recognised by the Federal Court.

### **Significance of sea country**

Sea country has played an integral role in Indigenous society for thousands of years. The *Native Title Report 2000* identified the kinds of connections that are widely documented in relation to land, which are also present in relation to sea country. They include:

- many named places in the sea including archipelagos, rocks, reefs, sand banks, cays, patches of seagrass;
- named zones of the sea defined by water depth;<sup>7</sup>
- bodies of water associated with ancestral dreaming tracks;
- sacred sites that are the physical transformation of the dreaming ancestors themselves or a result of their activities;
- cloud formations associated with particular ancestors;
- sacred sites that can be dangerous because the power of the dreaming ancestors is still there (for example important places on reefs that can be used either to create storms or make them abate);
- ceremonial body painting and other painted designs using symbols of the sea (such as the tail of a whale, black rain clouds over white foaming waves, reefs, sandbanks, islands, foam on the sea, a reef shelf);
- particular kin groupings having a special relationship with tracks of the sea (by virtue of their inheritance of the sacred stories, songs, ceremonies and sacred objects associated with it and by exercising control over that area).



As identified by the claimants in the Croker Island case, the sea is a significant part of an 'elaborate system of laws and customs that had been substantially maintained to the present day'. The claimants gave evidence that, when they talk about sea country, it is with the understanding that there is no essential difference between land and sea country.

The close connection is represented in the many stories of the physical and social world passed on by ancestors – stories that often start out at sea and move closer to land – stories creating seascapes of islands, reefs, sandbars – and travel on to create the landscapes.<sup>8</sup> They are evidenced in song and storylines, ceremonies, dance, art works, coastal shell middens, and many sacred sites, places and artefacts along the coastline of Australia. They have also formed the basis for claims to country according to traditional law and custom.

### **Significance of fish and fishing**

Fishing is an essential part of the connection with sea country. It provides the community with a source of food and nutrition, is important for ceremonial occasions, and is needed for barter and exchange.<sup>9</sup> It provides Indigenous communities with an invaluable component of their cultural lifestyle and allows them to fulfil their traditional responsibilities related to kinship and land management.<sup>10</sup> Through control of fisheries, Indigenous people can manage who can fish, where to fish, which fish, and how many fish can be taken at different times of the year.<sup>11</sup>

Fish and fishing are an important component of many cultural, ceremonial and social events. Cultural and social events involving fish can vary from entertaining visiting relatives to a cultural ban on eating red meat following a death in the family. During these times, the demand on fish and fishing becomes stronger. Some of what are viewed by Indigenous peoples as cultural events have evolved since pre-colonisation and are not restricted to traditional cultural events.

Sharing of fish is important socially and communally. Catches of fish are shared among the family, extended family and others who are not able to fish for themselves, such as the elderly. Sharing often extends to barter and exchange of fish for other items and other food sources within Aboriginal communities.<sup>12</sup>

### **Evidence of Indigenous trade**

A significant amount of anthropological and archeological research supports the existence and operation of trade between Australian Indigenous peoples and others. The trade was with other Indigenous peoples domestically and with Indigenous peoples internationally. This enterprise and economy has yet to be fully recognised by the native title system and the courts.

One reason for a continuing dichotomy between customary rights and commercial rights could be the difficulty that Indigenous people have faced in proving that they were involved in commercial fishing prior to colonisation.

In the Croker Island case, trial judge Justice Olney refused to grant recognition of the native title right to commercially fish due to insufficient evidence.<sup>13</sup> With this finding (which was not supported on appeal) Justice Olney left open the possibility of claimants having these rights recognised when more compelling evidence of traditional customs of trade and barter is presented.



Similarly, in *Neowarra v State of Western Australia*<sup>14</sup> the Federal Court held that the applicants did not possess a native title right to trade in the resources of their traditional land due to insufficient evidence.<sup>15</sup> Justice Sundberg reasoned that on the balance of probabilities, it was difficult to certainly establish that there was a traditional trade in resources.<sup>16</sup>

Langton and others argue that:<sup>17</sup>

Aboriginal economic relations have been misconstrued as a type of primitive exchange ... the profound alterity [otherness] of Aboriginal relationships among persons and things, as the Croker Island evidence of property and trade relations demonstrates, have been reconstituted in legal discourse as an absence of economic relations.

However, developments in anthropological and archaeological research and evidence support a change in approach, potentially allowing for a growth in evidence of commercial traditions in Indigenous Australia.

### Indigenous trade routes

In inland Australia, Aboriginal people conducted widespread trade, of amongst other things, red ochre and a narcotic called pituri. The trade of these goods followed dreaming tracks that connected the waters of intermittent rivers ...<sup>18</sup>

The trade routes linked coastal Australia with the inland, and Australia's northern shores with the Indonesian archipelago and New Guinea. The items of trade were diverse ... including pigments, narcotics, adornments, everyday utensils, even songs and stories. In some places, plentiful supplies of food allowed people to congregate at exchange centres to feast and trade. Some of the best known of these trading events were associated with the migrations of bogong moths in the Southern Alps of New South Wales, eels in Victoria, fish on the Darling River, and the ripening of bunya nuts in Queensland.

Despite popular belief, Australia was not an isolated continent. At the time of European colonisation there were trade links with Indonesia and Papua New Guinea. Macassan seafarers from the island of Sulawesi, in what is now Indonesia, made annual journeys to Australia's northern shores to collect sea-slugs, also known as trepang or beche-de-mer. The trepang collected from Australia was in turn traded as far north as China, where they remain a culinary delicacy today. Aboriginal people exchanged trepang and turtle shell, out-rigger canoes, sails and tobacco, and even accompanied the traders to Macassar and back...

This trade ceased in the early twentieth century when Australia passed laws to protect the developing trepang industry in Australia. The influence of the Macassans on the spiritual and material life of northern Australian Aborigines is still evident today.

The weakening distinction between customary and commercial rights can also be seen in a recent native title consent determination between the Victorian Government and the Gunditjmarra people (see the case study at the end of this chapter).





## Exclusive possession and commercial rights

Australian courts have referred to a possible interpretation that the non-exclusive nature of native title rights and interests over the sea, consequently results in an inability to grant native title rights and interests of a commercial nature. Approaching exclusivity as a necessary pre-condition to the granting of commercial rights is another confusing approach to Indigenous peoples' traditional rights and customs.

The Croker Island case was the first judgment to analyse the nature and extent of native title rights over sea country.<sup>19</sup> In the first instance, Justice Olney found that although native title rights did exist within the determination area, as a matter of law they were not exclusive in nature.<sup>20</sup> This was due to the fact that the native title rights were affected by, and considered to yield to, the right of innocent passage and the common law right of the public to fish and navigate.<sup>21</sup> The right of the claimants to use their traditional lands operated only to the 'extent of the inconsistency'<sup>22</sup> and as such could not be utilised to prevent others from fishing or carrying out commercial activities in the area. In determining commercial native title rights and interests, Justice Olney held that there was not enough evidence to support this claim.<sup>23</sup>

The approach of Justice Olney to commercial native title rights was not followed by either the Full Federal Court or the High Court. The majority of the Full Federal Court held that the successful assertion of exclusivity was a necessary prerequisite to establishing a native title right to trade.<sup>24</sup> Due to the fact that exclusive native title rights over sea country were held not to exist, the court did not consider the evidentiary merits of the claim to commercial fishing rights:<sup>25</sup>

... as a matter of experience in practical affairs, as well as for logical reasons, if it be accepted that the claimant community had no right to occupy these waters to the exclusion of all others, it is difficult to envisage how, in accordance with traditional custom, the group could assert, and effectively assert, a right to trade in the area's resources.

While this appears to conflict with any potential finding of commercial native title fishing rights, commentators such as Lisa Strelein believe this is not so.<sup>26</sup> Strelein argues that this determination should be narrowly construed as only applying to *exclusive* rights to trade in resources obtained from traditional land. Presumably, this does not affect the ability of Indigenous people to obtain a non-exclusive *qualified* right to trade<sup>27</sup> – that is, the right of Indigenous people to trade in fish they catch, while simultaneously permitting the general public to fish in that area for either recreational or commercial purposes. Providing there is no policy intervention in the creation of such a system, it suffices to say that it is entirely within the realms of the Croker Island decision that this scheme could be established.

There is an interesting counterpoise in the Blue Mud Bay case, where exclusive rights were granted under Northern Territory law, where exclusive rights would not have been available under the Native Title Act. A study of this case is at the end of this chapter.



## Indigenous economic development

Results of the survey conducted for the *Native Title Report 2006*, found that above all other roles, the majority of Indigenous people consider their roles as custodians and managers of their land and seas as more important than any other activity. This could be due to the fact that while Indigenous peoples were positive about enterprise development,<sup>28</sup> the majority of survey respondents described a lack of capacity to develop potential economic opportunities.

They considered that while 'economic development is an important tool in which to gain self determination and independence, it should not come at the expense of the collective identity and responsibilities to traditions, nor the decline in the health of country'.<sup>29</sup>

One traditional owner responded:

[We have no enterprise] as yet but have plans and need support to develop the ideas. We would like to develop fishing, aquaculture and tourism ventures. We need a management plan to include these ideas.<sup>30</sup>

In December 2007, the new Australian Government has identified economic development as a significant factor which 'lies at the heart of efforts to improve the lives of Indigenous Australians' and 'supports Indigenous peoples using their lands for economic development'.<sup>31</sup> This policy direction will play a significant role in Australia meeting the objectives of Article 1 of the *Declaration on the Right to Development*.<sup>32</sup>

Indigenous peoples (like every other person, and all peoples) are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development.

Crucial to the successful implementation of the right to development for Indigenous people is the government's obligation to ensure that its policies, legislations and practices make provision for the following:

- the right to self-determination;
- the right to protection of culture;
- economic, social and cultural rights;
- free, prior and informed consent; and
- equality.

As outlined in the preamble to the Native Title Act, native title should provide the foundation for Indigenous peoples' economic development. The preamble provides that governments have an obligation '(where appropriate) to facilitate negotiation on Indigenous economic land use'.<sup>33</sup> A grant of the native title right to fish for commercial purposes would allow traditional owner groups to use their land and waters for economic purposes and fulfil the objectives of the Native Title Act.



## Enterprise development

Recognising the value of traditional knowledge and custom, many commentators have analysed the potential to create much needed economic opportunities for the Indigenous community. Instead of simply fishing for subsistence purposes, the Indigenous community could use their skills and knowledge to enter into the highly lucrative commercial fishing industry – in 2006 it was worth over \$2.13 billion.<sup>34</sup> This would not only provide communities with financial independence and employment opportunities, but would also significantly contribute towards allowing Indigenous people to control and manage country.<sup>35</sup>

Despite these benefits there is currently only a handful of Indigenous-owned commercial fishing businesses in operation throughout Australia, and only a small percentage of Indigenous employees within the industry itself.<sup>36</sup> This distinct lack of active participation has been chiefly blamed on the licensing system currently operating in Australia, which requires each commercial fisher to obtain a license before they can sell the fish they catch. These licenses can only be obtained by purchasing them from either a stipulated Commonwealth or state authority or, in the event that all available licenses have been issued, from another commercial fishing company. Such licenses can command market prices in excess of \$45,000;<sup>37</sup> a sum many Indigenous fishermen simply cannot afford.

In recognition of the many economic and other barriers to Indigenous involvement in the fishing industry, in 2003, the then Aboriginal and Torres Strait Islander Commission (ATSIC), called for an Indigenous Fishing Strategy which included a ten million dollar purchase of fishing licences and quotas across Australia. This was implemented through a partnership between ATSIC and Indigenous Business Australia (IBA) as the Indigenous Fishing Trust. The Trust is still in existence and is run through IBA's self-funded investments.<sup>38</sup>

However some Indigenous people are making attempts to engage with the fishing industry including:

- the development of sponge farms at York and Goulburn Islands;
- farming mudcrabs in the Top End, Bynoe Harbour, south-west of Darwin, Darwin city and Maningrida;
- lobster fishing in Lockhart River, far north Queensland;
- trochus shell production north of Broome in the Kimberley; and
- farming eels in Victoria.

A number of government programs have been designed to assist with such enterprise development opportunities, including funding and support programs provided by:

- the Department of Agriculture, Fisheries and Forestry;
- Indigenous Business Australia;
- the Department of Employment and Workplace Relations;
- the Department of Industry, Tourism and Resources;
- the Indigenous Land Corporation; and
- State and Territory departments and agencies.



These programs are integral to the successful development of Indigenous economic and entrepreneurial aspirations.

### Management and conservation

Much of the activity on Indigenous land and waters has been land management and cultural heritage. Some state governments have made provision for joint management of national parks while others have not. Other traditional owners have negotiated agreements whereby they are able to meet their land management responsibilities (including cultural heritage) as community rangers. Often this work is voluntary or paid through the CDEP. Therefore, many of these Indigenous rangers are not paid at the same rate as if they were employed as Departmental rangers positions. There is grave concern as to the employment status of many Indigenous workers if CDEP is abolished.

Mining agreements, in particular, have provided opportunities for traditional owners to conduct cultural heritage site clearances – and be paid for their services.

More recently, Indigenous people have been engaged on management boards and committees concerned with land and waters. Some examples are;

- traditional owners from the Kimberley, Top End of the Northern Territory, southern Gulf of Carpentaria, Cape York and the Torres Strait, have joined forces with the North Australian Indigenous Land and Sea Management Alliance on the Dugong and Marine Turtle management project, to develop community-driven sustainable management of marine turtles and dugongs in northern Australia.
- The Great Barrier Reef Marine Park Authority (GBRMPA) and traditional owner groups along the Great Barrier Reef are working together to establish cooperative arrangements for sea country management. Traditional Use of Marine Resource Agreements (TUMRAs) are being developed by traditional owner groups to describe formal management arrangements for a range of issues.
- The Australian Government *Working on Country* program builds on the history of land management. It contracts Indigenous people to provide environmental services in remote and regional areas. Also it is ideal for supporting traditional owner aspirations to conduct land management and conservation on their country. Their work will also help to maintain, restore, protect and manage Australia's environment – the land, sea and heritage. This program will provide employment opportunities where traditional owners can be financially compensated for the work they do.
- The Northern Gulf Natural Resource Management Group manages the Carpentaria Ghost Nets Programme (CGNP), a program which involves removing 'ghost' fishing nets from the Gulf of Carpentaria and Torres Strait to stop the indiscriminate killing of marine life. While collecting the nets, the Sea Rangers also record information about the nets (only 5% of which originate in Australia) and treat and release any animals that are caught in the nets. The program works within five resource management regions including Cape York, Northern Gulf, Southern Gulf, Torres Strait and the Northern Territory.<sup>39</sup>



- Indigenous tourism permits aim to achieve cooperative management arrangements between government, traditional owner groups and industry.

## Policy and the Native Title Act

The immense difficulty Indigenous people face in having their traditional commercial fishing rights recognised under the Native Title Act may prove to be another example of how Indigenous peoples' ability to use native title rights and interests for economic development is frustrated by the very nature of the rights recognised, and the legal framework of native title.

... while customary fishing rights speak to rights of cultural self-determination and the preservation of a distinctive identity, commercial fishing rights are an important part of the right to economic determination. The co-existence and cross-fertilisation of these two sets of rights is currently recognised and implemented in practice in New Zealand, Canada and the United States – the three countries in which Indigenous peoples have a legal position close to that of Aborigines and Torres Strait Islanders in Australia ...

Australia currently stands outside these international developments given that the overwhelming emphasis is on customary rights as opposed to commercial fishing rights ...

The bulk of academic commentary also supports the assumption that Aboriginal and Torres Strait Islander peoples should be confined to exercising rights of customary use and small scale subsistence fishing only.<sup>40</sup>

Tony McAvoy argues that native title is the tool whereby economic use and benefit of resources may be achieved.<sup>41</sup> The current Indigenous economic policy direction could be furthered by enabling Indigenous people to access and use their traditional commercial fishing rights through the Native Title Act.

## Fishing licenses

Section 211 of the Native Title Act provides for the interaction of:

- native title rights and interests that include recognising a right to undertake certain activities (such as fishing or hunting); and
- Commonwealth, state or territory government regulation of that activity (such as licensing).

If a government regulates an activity under the section, then that regulation does not apply to restrict native title rights and interests to the extent that the activities are undertaken for personal, domestic or non-commercial needs. The necessary conclusion from this is that government regulation applies if the fishing is to be undertaken for commercial reasons.

Under the Native Title Act, native title holders can exercise their rights to fish for personal, domestic or non-commercial needs without obtaining a permit or licence.<sup>42</sup>



The interaction will always be complex and will differ from case to case. As an aside, in the majority in the Croker Island case<sup>43</sup> the court said that, in ascertaining the existence of the right to trade, it will need to specifically look at how this common law recognition will be impacted on by the relevant legislation enacted in the jurisdiction in which the traditional lands are located.<sup>44</sup>

... any final consideration of a claim of a right to fish, hunt and gather within these waters for the purposes of trade, would need to take into account the impact of relevant respective fishing legislative regimes of South Australia, the Territory and the Commonwealth ...

It will suffice for us to say that, by this means, any right of the public to fish for commercial purposes, and any such traditional right, were at least regulated and possibly wholly or partially extinguished by statute or executive act or both.

As a result, even if Indigenous people can overcome all of the Section 223 requirements – and prove that their tradition, rights, and customs include commercial fishing – these rights can be significantly curtailed by government regulation.

### **And after the voyage**

Commercial fishing rights are essential to Indigenous people of Australia. Not only are they traditional rights but they are also integral to the economic development of Indigenous communities.

The importance of fishing and the use of all land and sea resources are recognised in the Native Title Act by both the preamble and Section 223(2) which expressly includes fishing rights as one of the rights and interests which may be protected by the recognition of native title.

Yet the courts have rejected many claims for native title rights to fish commercially. When examining these cases, there appears to be a somewhat common, but perhaps ungrounded distinction between customary rights and commercial rights.

On the other hand, the cases also appear to point to commercial rights being intrinsically connected to, and in fact requiring, exclusive possession in order to be granted as a native title right or interest.

Indigenous Australians may theoretically have native title rights and interests of commercial fishing on which they could capitalise, however, in the vast majority of cases the courts have rejected this in practice.

Nevertheless there is a growing desire for Indigenous economic policy to enable Indigenous people to gain access and use of their traditional commercial fishing rights through the Native Title Act.



### The Gunditjmara: World's oldest aquaculture venture?

In March 2007, Justice North handed down the Federal Court's native title consent determination in *Lovett on behalf of the Gunditjmara People v State of Victoria*.<sup>45</sup> The case determined that native title rights and interests did exist in the claim area. The area being primarily sea and some land:<sup>46</sup>

... bounded on the west by the Glenelg River, to the north by the Wannon River and extends as far east as the Shaw River. It includes Lady Julia Percy Island and coastal foreshore between the South Australian border and the township of Yambuk. The application for native title determination relates to Crown land and waters within the application area including state forests, national parks, recreational reserves, river frontages and coastal foreshores comprising 140,000 hectares.

An eight-year research study revealed that for nearly 8,000 years the Gunditjmara people commercially farmed eels.<sup>47</sup> In what is considered to be Australia's earliest and largest aquaculture venture, this settled Aboriginal community systematically farmed eels as both a source of food and for barter and trade.

The Gunditjmara modified more than 100 square kilometres of the landscape. They built stone dams to hold the water in the areas, created ponds and wetlands in which they grew short-fin eels and other fish, and constructed channels to interconnect the wetlands.<sup>48</sup> The community then traded their product to others, becoming an important part of the local economy of Indigenous clans.<sup>49</sup>

The native title determination recognises that the Gunditjmara People have non-exclusive native title rights over 133,000 hectares of land and sea:

... to access or enter and remain on the lands and waters, to camp on the lands and waters landward of the high water mark of the sea, to use and enjoy the land and waters, to take the resources of the land and waters, and to protect places and areas of importance ...

However, the determination provides that:

... to the extent of any inconsistency between the native title rights and interests and the other interests, native title rights and interests have no effect during the currency of the other interests. The proposed determination specifies areas amounting to 7600 hectares over which the parties agree native title has been extinguished.

The determination set out the extent and nature of other interests, including those of the interests of people holding licences, permits, statutory fishing rights, or other statutory rights pursuant to state and Commonwealth legislation.<sup>50</sup>



After originally not agreeing to a mediated consent determination, mediation was given further impetus by an early evidence hearing at the conclusion of which Justice North expressed surprise at the lack of progress in negotiation given the strength of the evidence. This evidence included the Commonwealth of Australia Gazette of 20 July 2004 which listed the area in the Register of the National Estate:

The eel traps along the Tyrendarra lava flow are of outstanding heritage value. ...

The remains of the system of eel aquaculture in the Mt Eccles/Lake Condah area demonstrate a transition from a forager society to a society that practised husbandry of fresh water fish ...

Eventually an agreement was made and the Federal Court endorsed it. Justice North, in ordering the determination, referred to the significance of the area to the Gunditjmara people as:<sup>51</sup>

Dating back thousands of years, the area shows evidence of a large, settled Aboriginal community systematically farming eels for food and trade in what is considered to be one of Australia's earliest and largest aquaculture ventures. ...

They built stone dams to hold the water in these areas, creating ponds and wetlands in which they grew short-fin eels and other fish. They also created channels linking these wetlands. These channels contained weirs with large woven baskets made by women to harvest mature eels.

The modified and engineered wetlands and eel traps provided an economic basis for the development of a settled society with villages. Gunditjmara used stones from the lava flow to create the walls of their circular stone huts. Groups of between two and sixteen huts are common along the Tyrendarra lava flow and early European accounts of Gunditjmara describe how they were ruled by hereditary chiefs.

Justice North made the Federal Court's order on the determination saying (in paragraphs 5, 8 and 9) that the native title rights and interests of the Gunditjmara people consists of:

5. Subject to Orders 6-9, the native title that exists in the Native Title Area ("native title rights and interests") consists of the non-exclusive:

- (a) right to have access to or enter and remain on the land and waters;
- (b) right to camp on the land and waters landward of the high water mark of the sea;
- (c) right to use and enjoy the land and waters;
- (d) right to take the resources of the land and waters; and
- (e) right to protect places and areas of importance on the land and waters.

8. The native title rights and interests do not confer possession, occupation, use and enjoyment of the land and waters on the native title holders to the exclusion of all others.





9. The native title rights and interests are subject to and exercisable in accordance with:

- (a) the traditional laws and customs of the native title holders;
- (b) the laws of the State in which the land or waters concerned are situated and of the Commonwealth, including the common law.

The other interests listed in Schedule 4, that will continue to exist, includes any public right to fish, and 'the interests of persons holding licences, permits, statutory fishing rights, or other statutory rights' under Victorian or Commonwealth legislation.<sup>52</sup>

The determination therefore explicitly provides the Guditjmara people with a right to take resources from the sea. Nowhere in the determination are they limited by their use of these resources and the extent to which these resources may be taken except to the extent that these conflict with state or Commonwealth law.

The Guditjmara people have already started to use these rights to re-establish eel farming and smoking in the area inline with their tradition, including by reversing the drainage system installed by Europeans. The Guditjmara people are considering using the eel to create a brand for Budj Bim smoked eel.<sup>53</sup>

### **Blue Mud Bay: Exclusivity and fishing rights**

In the Blue Mud Bay case,<sup>54</sup> the court held that the Indigenous claimants have exclusive access rights to inter-tidal zones granted under the Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA).<sup>55</sup>

Blue Mud Bay is a small inlet located in north-east Arnhem Land in the Northern Territory. In a previous claim, the Commonwealth had granted this bay to the Yolgnu people<sup>56</sup> as part of the Arnhem Land Trust under the ALRA.

In June 2002, the Yirritja moiety clans<sup>57</sup> and the Dhuwa moiety clans<sup>58</sup> (of the Yolgnu people) lodged a claim seeking clarification of the rights provided under the ALRA, and a determination of their native title rights and interests over the area. One aspect was whether or not the clans of the two moieties possessed the right to exclude others from entering onto, taking resources from or using the foreshore area (more commonly called the inter-tidal zone). Specifically, the claimants sought a declaration of the operation of the Northern Territory *Fisheries Act 1998* which allows the Director of Fisheries to issue commercial fishing licenses for fishing in the area.



Initially, Justice Selway ruled in accordance with the Croker Island decision, holding that the fee simple estate in the tidal foreshore did not authorise the land trust to exclude those exercising common law public rights to fish or navigate in the inter-tidal zone and/or that people exercising public rights to fish or navigate can come onto the inter-tidal zone without breaching the ALRA.<sup>59</sup> All native title rights recognised by the common law were to be held subject to the other rights and interests operating in that region.<sup>60</sup>

This decision was appealed by the claimants to the Full Federal Court. They sought a declaration that grants made pursuant to the ALRA conferred exclusive possession on the title holders and allowed them to exclude others from fishing in the inter-tidal zones. In reaching a conclusion on this issue the Full Court considered it necessary to 'independently consider the correctness of *Commonwealth v Yarmirr*.'<sup>61</sup>

The judgment criticised the majority decision in *Yarmirr* for not looking at the ALRA when determining the nature of inter-tidal zone rights attached to land granted under the ALRA.<sup>62</sup> The court said:<sup>63</sup>

the answer to [the] question [of exclusivity] is to be found not simply in the general law relating to what is ordinary comprehended by an estate in fee simple in an inter-tidal zone or otherwise. It requires, first and foremost, a consideration of the Land Rights Act itself.

The court found that under Section 73(1)(d) of the ALRA, the legislative power of the Northern Territory extends to prohibiting entry into, and controlling fishing and other activities in

... waters of the sea ... adjoining and within 2 kilometers of Aboriginal land whilst still providing for the right of Aboriginals to enter and use the resource of, those waters in accordance with Aboriginal tradition.<sup>64</sup>

Thus, in order to ascertain whether the clans of the Yirritja moiety and the clans of the Dhuwa moiety possessed exclusive title, it was necessary to identify whether the foreshore (inter-tidal zone) fell within the scope of the definition of the 'water of the sea'.<sup>65</sup>

In characterising the inter-tidal zone, the courts followed the majority reasoning in the Full Court judgment of *Risk*.<sup>66</sup> In that case, the issue was whether the seabed of bays and gulfs beyond the low water mark could be the subject of a claim under the ALRA; that is, whether it was classified as 'land in the Northern Territory'.<sup>67</sup> The majority judgment in *Risk* concluded that it was not. The Full Court in *Gumana* reiterated this finding by stating:<sup>68</sup>

a grant of an estate in fee simple to the low water mark under and in furtherance of the purposes of the Land Right Act as revealed in its text and context conferred a right to exclude from the inter-tidal zone including a right to exclude those seeking to exercise a public right to fish and navigate.



The consequence was that the Fisheries Act had no application to areas within the boundary lines of the ALRA grant. As a result, the Northern Territory Director of Fisheries had no power to grant a licence in areas subject to the grant. The licenses that had been granted over the ALRA grant areas were invalid and this included the water that flowed over the land subject to those grants.<sup>69</sup>

The decision is being appealed to the High Court and the decision is expected to be handed down in early 2008. If upheld, Indigenous people will hold exclusive possession rights to the inter-tidal zone of over 80% of the Northern Territory coastline.



- 1 *Commonwealth v Yarmirr* (2001) 208 CLR 1.
- 2 *Commonwealth v Yarmirr* (2001) 208 CLR 1.
- 3 See National Native Title Tribunal, *Fishing and Native Title: What rights apply?*, Native Title Facts, National Native Title Tribunal, available online at: [http://www.nntt.gov.au/publications/1021874397\\_11824.html](http://www.nntt.gov.au/publications/1021874397_11824.html).
- 4 Australian Labor Party, *ALP National Platform and Constitution 2007*, available online at: <http://www.alp.org.au/platform/index.php>.
- 5 *Members of the Yorta Yorta Aboriginal Community v Victoria & others* (2002) 194 ALR 538.
- 6 See Tsamenyi, M., and Mfodwo, K., *Towards Greater Indigenous Participation in Australian Commercial Fisheries: Some Policy Issues*, Aboriginal and Torres Strait Islander Commission National Policy Office Policy Paper Series, Australian and Torres Strait Islander Commission, 2000, p13.
- 7 Chase, A., and Sutton, P., 'Hunter-Gatherers in a Rich Environment: Aboriginal Coastal Exploitation in Cape York Peninsula' in Keats, A., (ed) *Ecological Biogeography in Australia*, W. Junk, London, 1981, cited in Myers, G., O'Dell, M., Wright, G., and Muller S., *A Sea Change in Land Rights Law: The Extension of Native Title to Australia's Offshore Areas*, Native Title Research Unit, Legal Research Monograph, Australian Institute of Aboriginal and Torres Strait Islander Studies, Canberra, 1996, p11.
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- 9 Coleman, P.M., Henry, G.W., Reid, D.D., and Murphy J.J., *Indigenous Fishing Survey of Northern Australia*, FRDC Project No. 99/158, National Recreational and Indigenous Fishing Survey.
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- 12 Government of Western Australia, Department of Fisheries, *Customary Fishing*, available online at: <http://www.fish.wa.gov.au/docs/pub/IndigenousFisheries/index.php?0007>, accessed 25 October 2007.
- 13 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370, per Olney J, para [130].
- 14 *Neowarra v State of Western Australia* [2003] FCA 1402.
- 15 *Neowarra v State of Western Australia* [2003] FCA 1402, per Sundberg J, para [481].
- 16 *Neowarra v State of Western Australia* [2003] FCA 1402, per Sundberg J, para [481].
- 17 Langton, M., Mazel, O., Palmer, L., 'The Spirit of the Thing: The Boundaries of Aboriginal Economic Relations at Common Law', *The Australian Journal of Anthropology*, 2006, 17:3, 307 – 321, p1.
- 18 Macleay Museum News, *Shaping Australia*, pp1-2, available online at: <http://www.usyd.edu.au/su/macleay/cnews18.htm#18top>, accessed 25 October 2007. There are various other reports of trade internationally and domestically. See for example, *Sustainable Development for Traditional Inhabitants of the Torres Strait Region*, David Lawrence, Coordinator, Torres Strait Baseline Study, Great Barrier Reef Marine Park Authority, pp482-483, available online at: [http://www.gbrmpa.gov.au/\\_\\_data/assets/pdf\\_file/0015/4173/ws016\\_paper\\_41.pdf](http://www.gbrmpa.gov.au/__data/assets/pdf_file/0015/4173/ws016_paper_41.pdf), accessed 25 October 2007 and National Oceans Office, *Sea Country, and Indigenous Perspective The South-east Regional Marine Plan Assessment Reports*, 2002, p6, available online at: <http://eied.deh.gov.au/coasts/mbp/publications/pubs/indigenous-perspective.pdf>, accessed 26 October 2007.
- 19 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370.
- 20 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370, per Olney J, para [423].
- 21 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370, per Olney J, para [431].
- 22 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370, per Olney J, para [389].
- 23 *Yarmirr v Northern Territory of Australia (No 2)* (1998) 156 ALR 370, per Olney J, para [130].
- 24 *Commonwealth v Yarmirr* (1999) 168 ALR 426, per Beaumont and von Doussa JJ, para [480].
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- 38 Wanganeen, K., *Indigenous participation in the Australian commercial fishing industry*, Presentation given at the Indigenous Fishing Conference: Moving Forward 2003, Freemantle, 28 October 2003, available online at: [http://www.nntt.gov.au/metacard/files/Fishing\\_conference/Fishing\\_conference/presentations/KlyntonWanganeen.pdf](http://www.nntt.gov.au/metacard/files/Fishing_conference/Fishing_conference/presentations/KlyntonWanganeen.pdf). See also Indigenous Business Australia website, available online at: <http://www.iba.gov.au/ibainvestments/agriculture,forestryandfishing/>
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- 43 *Commonwealth v Yarmirr* (1999) 168 ALR 426.
- 44 *Commonwealth v Yarmirr* (1999) 168 ALR 426, per Beaumont and von Doussa JJ, para [481].
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- 47 Builth, H., *Identifying A Site Signature of Gunditjmarra Settlement in Southwest Victoria*, Paper presented at Barriers, Borders, Boundaries Australian Archaeological Association Annual Conference, Hervey Bay, Queensland, 2001.
- 48 Builth, H., *Identifying A Site Signature of Gunditjmarra Settlement in Southwest Victoria*, Paper presented at Barriers, Borders, Boundaries Australian Archaeological Association Annual Conference, Hervey Bay, Queensland, 2001.
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- 52 *Lovett on behalf of the Gunditjmarra People v State of Victoria* [2007] FCA 474, schedule 4.
- 53 Mosig, J., 'Gunditjmarra to resurrect an ancient aquaculture', *Koori Mail*, 21 November 2007, p33.
- 54 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292. The case is currently being heard on appeal by the High Court. The High Court's decision is expected to be handed down early in 2008.
- 55 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292.
- 56 The Yolngu people are the traditional owners of parts of north-east Arnhem land, including areas of Blue Mud Bay.
- 57 The eight Yirritja Moiety clans claiming native title were (1) Yarrwidi Gumatj, (2) Manggallili, (3) Gumana Dhalwangu, (4) Wunungmurra (Gurrumuru) Dhalwangu, (5) Dhupuditj Dhalwangu, (6) Munyuku, (7) Yithuwa Madarrpa, (8) Manatja.
- 58 The seven Dhuwa Moiety clans claiming native title were (1) Gupa Djapu, (2) Dhudi Djapu, (3) Marrakulu 1, (4) Marrakulu 2, (5) Djarrwark 1, (6) Djarrwark 2, (7) Galpu.
- 59 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292.



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- 60 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292, para [331].
- 61 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292. *Gumana v Northern Territory of Australia* [2007] 158 FCR 349, para [92].
- 62 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292, para [92].
- 63 *Gumana v Northern Territory of Australia* (2005) 218 ALR 292, para [92].
- 64 *Aboriginal Land Rights Act (Northern Territory) 1976* (Cth), s73.
- 65 *Gumana v Northern Territory of Australia* [2007] 158 FCR 349, para [92].
- 66 *Risk v Northern Territory* (2002) 210 CLR 392.
- 67 Webb, R., 'Is the Inter-tidal zone 'land' or is it 'sea'- and some native title issues' (2007), 1, *Northern Territory Law Journal*, 33, p47.
- 68 *Gumana v Northern Territory of Australia* [2007] 158 FCR 349, para [90].
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# Chapter 11

## Study: Central Queensland ILUA template

### Indigenous land use agreements

While the native title system is able to deliver social and cultural outcomes through determinations of native title, Indigenous land use agreements (ILUAs) are one of the only ways in which native title holders can pursue economic development.

According to Professor Ciaran O’Faircheallaigh (Griffith University), outcomes for Indigenous groups could be better negotiated through organised approaches that identify traditional owner aspirations.<sup>1</sup> The case study on the central Queensland ILUA template (the CQ ILUA template), later in this chapter, is one such approach.

As pointed out by the President of the National Native Title Tribunal, there is considerable scope for making agreements in the form of ILUAs. For example:

- as part of the package of documents that formalise native title applications to areas of land and waters; or
- as ‘stand alone’ agreements that deal with native title issues independently of the native title determination process.<sup>2</sup>

Central Queensland’s local government ILUA template is the result of three years of negotiation. The Gurang Land Council Aboriginal Corporation (GLC), worked with three native title claim groups from central Queensland, the Local Government Association of Queensland (LGAQ) and 16 local governments, represented by MacDonnells Law, to develop a template for future ILUA negotiations.

In this chapter we will talk about ILUAs and their interaction with local government, then the greater part of the chapter will look at a case study of the central Queensland ILUA template.

### What is an ILUA?

Indigenous land use agreements are voluntary agreements between native title groups, and others, about the use and management of land and waters. Once finalised an ILUA is entered on the Register of ILUAs and is legally binding on all parties to the agreement.

ILUAs are a tool of the native title system.<sup>3</sup> The Native Title Act provides for them. They allow native title groups to negotiate flexible, pragmatic, legally binding agreements that meet their particular needs and aspirations. While they can be developed as part of a native title determination process, ILUAs can also be made separately from the formal native title application process.<sup>4</sup> Thus Indigenous people do not need to have a native title application to enter into an ILUA.



Where there is no native title application or determination, the onus is on industry, government, or the representative body to establish who the right people are to be involved.<sup>5</sup>

### ***Clarifying terminology***

The terms 'native title claimant', and 'native title holders' are sometimes used loosely. Indigenous people often refer to themselves as 'native title holders' when asserting their native title interests.

- For the purposes of Indigenous land use agreements, Indigenous parties are referred to as native title holders (because the agreements are negotiated on the basis that the Indigenous party may hold native title to the area concerned).
- For the purposes of a native title claim process, a native title holder is one who has been determined by the Federal Court to have native title rights and interests (after determination). A native title claimant has a current registered native title claim.

### **Who uses ILUAs?**

ILUAs can be negotiated across a number of topics including development, access, extinguishment, compliance procedures, cultural heritage and compensation. They may prescribe the relationship between native title rights and interests and the rights and interests of other people. That can make them an important tool in the resolution of native title issues. They don't have to deal with native title matters.

For example, an ILUA between a native title claim group and a local government<sup>6</sup> may stipulate how the rights, interests and responsibilities of the local government can coexist with those of the native title holders. At the same time they ensure that the local government continues to perform its functions, and native title holders are able to exercise their recognised native title rights and interests in accordance with the law.

An appendix to this report gives examples of the range of rights and interests often sought by native title groups, and the categories of rights, interests and responsibilities often either held or exercised by local government. The relationship between such interests is considered in native title negotiations.

An ILUA allows developments on land to happen before or after determination of native title.<sup>7</sup>

### **What does an ILUA deal with?**

An ILUA may be a stepping stone on the way to a native title determination, be part of the determination process, or it may suit the parties better than a determination. The advantage of an ILUA is its flexibility – it can be tailored to suit the needs of the people involved and their particular land use issues.<sup>8</sup>





The Federal Court of Australia determines native title. A determination deals only with:

- the identity of the people who hold the native title; and
- the nature of the native title rights and interests held by those people; and
- the area over which the rights are held; and
- the nature of other interests in the area; and
- the relationship between the native title and other rights (for example, whether the other rights prevail over native title); and
- whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.<sup>9</sup>

A determination order does not deal with the 'on the ground' issues such as future acts compliance, cultural heritage matters, or compensation for the extinguishment of native title. It is increasingly common practice for such issues to be addressed through an ILUA either before or concurrently with a consent determination order.

### Creation and types of ILUAs

ILUAs are created under the *Native Title Act 1993* (Cth) (the Native Title Act). There are three types of ILUA:

- body corporate agreements
- area agreements
- alternative procedure agreements.<sup>10</sup>

### Mining ILUAs

In many areas of Australia, particularly the desert regions, opportunities are limited for traditional owners to gain economically through ILUAs.<sup>11</sup>

Mining ILUAs have to date appeared to produce the most substantial economic benefits. This is because large long-term mining projects can give royalty payments to native title parties, as well as other benefits including economic and employment opportunities, compensation, recognition of their native title, and cultural heritage. These ILUAs often relate to specific projects and do not necessarily address the resolution of the native title claim between the parties involved.

### ILUAs and local government

Where there are no mineral riches and no plans for future development, the economic opportunities for ILUA agreements can be more limited.

### Local government ILUAs

To date, local government authorities have been involved in 30 ILUAs, either as an applicant or a party. Of these, 25 have been registered and the remaining five are either in notification or have recently come out of notification.<sup>12</sup>



Several local government ILUAs are providing innovative models for how parties can contribute to the resolution of native title claims by agreement. Recently, agreements between local government and native title parties have also provided an opportunity for:

- traditional owners to discuss with local government how their social and cultural aspirations can be achieved locally;
- the development of more effective communication;
- local government to support scrutiny into a range of areas that may improve the economic capacity of traditional owner groups, particularly in training and employment; and
- local government to advocate for and support local projects identified during native title negotiations.

There is an overview of ILUAs where a local government authority is an applicant or a party in an appendix at the end of this report.

### **ILUA templates**

ILUAs can be established for various purposes. In this chapter we are discussing templates for local government Indigenous land use agreements. We have chosen to call such a template by the shortened name 'ILUA template'.

A number of ILUAs have been negotiated for individual situations. However, templates have been developed recently, and they provide a time and cost effective way of assisting parties to negotiate – without 'reinventing the wheel' every time. A generic template can be adapted to provide tailored outcomes.

Templates may include standard clauses, terms and conditions that can then be applied to individual agreements to suit each particular situation.<sup>13</sup>

Parties have discretion in the issues dealt with in an agreement; there is flexibility and freedom to identify important issues. They can negotiate outcomes learning from experiences of those that have gone before.

Framework agreements can also be developed to provide a uniform process for all future acts of similar kinds or setting out a process for negotiating more substantive outcomes.

A Process or Framework agreement is an agreement between a native title party and other interested parties, binding them to a particular process rather than substantive issues. For example, a framework or process agreement may set out the process agreed to between the parties for the negotiation of an ILUA.<sup>14</sup>

(The use of the word 'framework' is used in the same sense as the word 'template' or 'model'.)

The National Native Title Tribunal encourages the use of templates when negotiating ILUAs, in particular, regional template agreements.



... while not everyone will want to use template or framework agreements, it is important that tools like these are available so that negotiations can proceed more effectively.<sup>15</sup>

ILUA templates also have limitations. The use of them has the potential to influence or limit the scope of negotiations and outcomes. A template may be based on previous inappropriate examples. It is easy to adopt ideas without careful scrutiny. It is important that templates are seen as models to be adapted to the specific needs and aspirations of the parties using them.



The South Australia Local Government ILUA template is an example of a template agreement developed from a particular ILUA, the Narungga Local Government ILUA. The Tagalaka ILUA developed in Northern Queensland is an example of another template agreement.

### **Example 1: South Australia Local Government ILUA template**

The South Australia ILUA template was developed after consultations between the Aboriginal Legal Rights Movement, the local government association and the state government as part of the South Australia state-wide ILUA negotiations.<sup>16</sup>

The template originated from the Narungga Local Government ILUA.<sup>17</sup> It was negotiated between the Narungga people of South Australia, the Yorke Peninsula Region of Councils (YPRC) (comprising of the District Councils of Yorke Peninsula, Copper Coast and Barunga West, the Wakefield Regional Council), and the State of South Australia. The agreement was signed in December 2004.

The agreement set out a process for planning infrastructure development, and protocols for the protection of Aboriginal heritage. It reflects negotiated native title outcomes that are specific to the participating local governments.

The template agreement is based on key provisions of the Narungga Local Government ILUA. The template will also take into account the differences between the particular circumstances of the Yorke Peninsula, and other Councils.<sup>18</sup>



## Example 2: Tagalaka ILUA

The Tagalaka ILUA<sup>19</sup> in North Queensland was developed using a template developed by Andrew Kerr of MacDonnells Law. The parties to this agreement include the Tagalaka native title party, the State of Queensland, and Croydon Shire Council.

The agreement is made up of two separate agreements:

- a relationship agreement between the native title party and the council (which establishes how the parties will work together in the future);
- a technical agreement which includes the state. The technical agreement requires state involvement in matters like the regularisation of roads and tenure for community infrastructure.

The ILUA considered the issues of the Tagalaka People who were keen to find ways to move back to country. Croydon Shire Council was able to address native title issues in township areas, such as the provision of public infrastructure, release of additional freehold land for township expansion, and development in the town.

The ILUA between the Tagalaka, the council and the state included a process for tenure resolution in Croydon, allowing all unallocated state land (USL) to be reallocated under the terms of a Queensland Land Act policy, the *Exchange of state land for native title interests*. This policy deals with an exchange of tenure grants in unallocated state land, in return for the surrender of native title. Under the terms of this policy, the Tagalaka have been granted freehold land, the state has gained freehold land, and a number of reserves have been created for community purposes.

There is an ancillary agreement which addresses:<sup>20</sup>

- the validation of various acts;
- the process by which approval for future works and cultural heritage clearances will be managed;
- employment and training opportunities;
- other relationship matters including the purchase of a number of freehold blocks from the Tagalaka by the council for development, and a guaranteed period of rates-remission for those freehold blocks retained by Tagalaka.



## Advantages of templates

The National Native Title Tribunal has identified advantages to using ILUA templates or frameworks. They are also conscious that each agreement needs to be tailored to suit each situation.

Key advantages of template agreements are:<sup>21</sup>

- they provide a time and cost effective way of assisting parties to negotiate. As a consequence, there is a financial benefit because fewer resources are required for each agreement;
- flexibility.

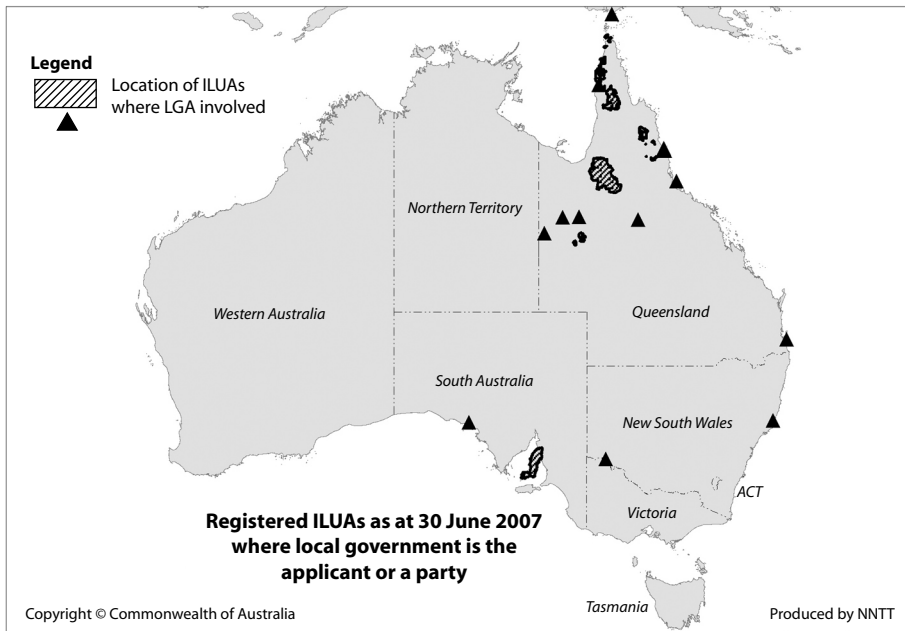
The tribunal warns that standardised agreements may make ILUAs less flexible. They may limit the issues that parties will bring to the table for negotiation, and the development of more creative outcomes. Consequently, it can be argued that ILUA templates could restrict negotiations, preventing parties from identifying issues which are unique to their particular circumstances, particularly where one party is more experienced in the ILUA process. In the past, for example:<sup>22</sup>

Large mining companies have come to the negotiation table with a template ILUA, which native title groups have seen as a 'poor deal'. This has had the propensity to get relationships off to a bad start and effect subsequent negotiations.

However, ILUA templates are being used more, particularly in:

- South Australia where the state government has strongly advocated the use of ILUA templates to facilitate future ILUA negotiations;
- Queensland where legal firms have developed template agreements for local government and public utilities such as electricity providers and Telstra;
- Victoria where ILUA templates have been used in granting mining and exploration holdings.<sup>23</sup>

The following map gives an idea of the extent of registered ILUAs where a local government authority is an applicant or a party.



Registered Indigenous land use agreements where a local government authority is an applicant or a party

## The central Queensland project

This case study profiles a project to develop a template Indigenous land use agreement that may be used for future ILUA negotiations. Native title parties and local governments in central Queensland were involved. Of particular interest, are the processes of mediation and negotiation used to develop the template.

### Summary of the project

Central Queensland's local government ILUA template (the CQ ILUA template) is the result of three years of negotiation. The Gurang Land Council Aboriginal Corporation (GLC), worked with three native title claim groups from central Queensland, the Local Government Association of Queensland (LGAQ) and 16 local governments, represented by MacDonnells Law, to develop a template for future ILUA negotiations.

The combined area of the three native title claims covers approximately 45,259 hectares.

This CQ ILUA template has been adopted for use by many native title and local government parties in the Gurang Land Council region.

The template is a useful framework for others entering into native title mediation. Particularly, it can narrow broad common issues, and provide flexibility to consider specific claim outcomes.

The CQ ILUA template cannot, however, be registered because it is incomplete, and designed only to be used as the framework for substantive negotiations between the parties. The intent is that substantive negotiations would focus on completing the ILUA, taking into account individual and local circumstance. Alterations, adapt-



ations and other departures from the template may also be agreed to ensure flexibility and enable creative variations.

Once claim groups have used the template to negotiate a substantive agreement, the native title party would authorise the ILUA, and apply to have it registered as a legally binding agreement on the National Register of Indigenous Land Use Agreements.

The key elements of the ILUA template include provisions for:

- claims resolution;
- future acts;
- cultural heritage; and
- other outcomes and initiatives.

### **Background to the central Queensland project**

In 2004 a regional group representative model was introduced at the instigation of the Commonwealth Attorney-General's Department.<sup>24</sup> It was for Queensland local government native title negotiations. The Local Government Association of Queensland (LGAQ) supported the initiative and agreed to act as a group representative for all of the Queensland local government groups.<sup>25</sup>

Negotiations were conducted with one claim group represented by Gurang Land Council, and two local government regional groups. Two separate negotiations were conducted. After discussion between the group and legal representatives, about how such negotiations could be streamlined, the idea of developing a template emerged for the Gurang Land Council region.

Broadly, the objective of the project was to:

- develop a framework agreement that would expedite the mediation and resolution of native title between native title claim groups and local governments;
- reduce the associated negotiation costs; and
- provide the opportunity to develop simplified compliance processes.

The scope of the project broadened during the negotiations.

In order to prepare this case study, all parties have authorised the Human Rights and Equal Opportunity Commission to access documents and other materials, released with the consent of respective representatives and which provide background to the agreed frameworks and outcomes of the process.<sup>26</sup>



### **Aim of the project**

The aim of the project was to develop an ILUA template that:

- could be recommended by Gurang Land Council, MacDonnells Law and LGAQ as the starting point for negotiations between native title parties and local government groups throughout the Gurang region; and
- in the longer term, could be introduced throughout Queensland with the support of other native title representative bodies.



## Preparations

The parties wanted to draw on the range of difference in the Gurang Land Council region, and yet ensure the negotiations were of a manageable size.

■ It was agreed that the Gurang Land Council would identify three native title claim groups for involvement in the project. This was to ensure a workable group. The factors taken into account to select the participating groups included:

- the relative stability of the claim group and it's representatives;
- the stage of any research being conducted to support the claim;
- the differing range of issues that each group may bring to the negotiation table;
- the availability and capacity of claim group representatives to attend regular meetings;
- the willingness of the claim group to work constructively with other claim groups for the period of the project; and
- the extent of overlapping claim issues.

Finally, representatives from the following three native title claimant groups participated in the project: QUD6005/01 Port Curtis Coral Coast, QUD6144/98 Gangalu, and QUD6162/98 Iman People Number 2.

■ After the groups were selected, the Local Government Association of Queensland (LGAQ) invited each affected local government area (in part or in whole) to participate in the project. MacDonnells Law was instructed to represent local government throughout the project.

In all, sixteen local governments agreed to participate in the project. They were:

Banana Shire Council; Bauhinia Shire Council; Biggenden Shire Council; Bundaberg City Council; Burnett Shire Council; Calliope Shire Council; Chinchilla Shire Council; Daringa Shire Council, Fitzroy Shire Council; Gayndah Shire Council; Kolan Shire Council, Miriam Vale Shire Council; Monto Shire Council; Mount Morgan Shire Council; Perry Shire Council; and Taroom Shire Council.

■ In May 2006 representatives of the claim group and local governments were invited to a workshop organised and facilitated by Gurang Land Council, MacDonnells Law and LGAQ. Prior to the workshop, the organisers jointly developed a proposed negotiation framework for consideration at the workshop.

This workshop represented the initial joint briefing about the project and provided an opportunity for people to raise questions and also discuss the negotiation framework proposed. The project was endorsed at the workshop and it was also decided to formalise the agreed negotiation framework in a memorandum of understanding (MoU).

■ The parties also agreed at the workshop to invite the National Native Title Tribunal to facilitate the ILUA template negotiations as a formal mediation under the Native Title Act, and there was discussion between the relevant tribunal members and the representatives before the MoU was signed.





## Process used in the project

The project negotiations were to consist of two stages. To mediate:

- development of the ILUA template; and
- specific localised ILUAs between the local governments and the native title parties using the ILUA template as the starting point.<sup>27</sup>

The negotiation framework outlined in the MoU entailed the formation of the following two groups.

General working group	Legal working group
<ul style="list-style-type: none"> <li>▪ up to two from each council</li> <li>▪ up to two from each claim group (it was subsequently agreed to increase this to three)</li> <li>▪ MacDonnells Law</li> <li>▪ LGAQ</li> <li>▪ Gurang Land Council</li> <li>▪ an independent facilitator.<sup>28</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ MacDonnells Law</li> <li>▪ LGAQ</li> <li>▪ Gurang Land Council.</li> </ul>

## Memorandum of understanding

The framework for the negotiations adopted by the parties was recorded in three memorandums of understanding (MoU). Identical terms were used between each separate claim group and the respective local governments. The MoUs were executed at a signing ceremony held on 19 October 2006.

Memorandums of understanding, or accords, are documents that demonstrate political will but are not legally binding. They can be used to create a framework for further action, clarifying roles and responsibilities of the parties. MoUs can be based on community consultations and negotiations rather than on a legal framework involving lawyers. The aim is to reach an amicable and workable arrangement for the long-term benefit of the community.<sup>29</sup>

### *Aim of the MoU*

- engender good faith at the start;
- separately address some of the legal complexities, which could potentially delay the negotiations;
- resolve any underlying adversarial aspect of mediation, and move towards a collective resolution of issues and development of options; and
- narrow the issues to assist in structuring proposed mediation.<sup>30</sup>



This process of understanding each others' responsibilities, aspirations and priorities set the foundation for positive relationships and inclusive participation for everyone.

### ***Outline***

The memorandum of understanding outlined:

- acknowledgements made by each party;
- the aims of the template ILUA project;
- the negotiation framework that would be adopted;
- broad discussion points identified at the May 2006 workshop; and
- confidentiality provisions.

### ***Discussion points***

The broad points for discussion included:

- recognition of rights of native title claim groups, as the native title claim group for the area under claim;
- cultural and other aspirations and priorities of native title parties, such as the protections and rights of decision-making in respect of cultural heritage;
- social and economic benefits, opportunities and development for members of the native title parties;
- involvement of the native title parties in decisions which may impact upon the council's Indigenous issues;
- the council's responsibilities to provide services and facilities in its local government area for the public benefit;
- the relationship between native title and local government planning processes and outcomes;
- the inclusion of, and participation by, the native title parties in community events and festivities; and
- working cooperatively to source community funding.

### ***Settings used***

In addition to recording aspirations and a framework in the MoU, the legal representatives and the group representative also organised a number of events in the early stages of the negotiation to encourage the parties to interact on an informal basis. In particular:

- A formal lunch (including speeches and traditional ceremonies) was held to mark the signing of the MoU.
- An informal bar-b-que dinner for all the Working Group representatives was held at the conclusion of the first day of mediation which included a traditional dance performance.
- Group exercises which encouraged the Working Group representatives to interact with each other were organised just prior to commencement of the formal mediation.



- A half day interactive workshop that provided insight into Aboriginal culture, law and history, conducted by an independent facilitator, was attended by all the Working Group representatives.<sup>31</sup>

These activities set the scene for positive engagement in the formal mediation process.

## Mediation

The working group agreed to meet for two consecutive days, every six to eight weeks until the template was completed. The template was broadly agreed at the fifth meeting (10 days of negotiation in total), then settled by the legal working group.

The parties involved were briefed separately. Each local government formally resolved to adopt the template and move into stage two of the negotiations.

The first mediation meeting identified categories of specific issues (drawing on the MoU). Subsequent meetings addressed each identified category. Most meetings were held in Bundaberg.

The two-day mediation meetings were usually conducted in the following phases:

- The native title claim group representatives met separately with their legal representative during the morning of the first day (and usually also met for the full day before).
- The local government representatives met separately with their legal representative during the morning of the first day. (A separate full day meeting with the local government representatives was also held once during the mediation.)
- The afternoon of the first day, when the formal mediation started, the working group reviewed changes made to the draft template by the legal working group since the last meeting. This review also enabled discussion of any other issues arising from the draft (or previous meetings).
- The second day focused on the next category of issues identified at the first mediation meeting, aiming at consensus on how to address the related issues in the next draft of the ILUA template.

Some of the features identified by the legal representatives, and the group representative, that assisted in the progress of these negotiations included:

- an emphasis on developing relationships between the working group representatives;
- a history within some of the local areas of local government assisted to address local Indigenous issues;
- the decision to discuss most of the legal and drafting issues at a separate meeting of the legal working group (there were usually two or three meetings of the legal working group between each mediation meeting), allowing the mediation to focus on the broad issues of interest to the representatives;



- the time spent preparing for the mediation during the morning of the first day (and in the case of the native title representatives, also the previous day); and
- the enthusiasm amongst the working group representatives to look positively towards the future and produce an outcome that would work 'on the ground'.

### **Contents of the central Queensland ILUA template**

The template that arose from the process outlined above will form the basis of individual ILUAs between local governments and native title groups. Two ILUA templates have been drafted for:

- a single government party; and
- multiple local government parties.

It is intended that a final ILUA will be settled before the associated native title claim is finalised, and probably before the conclusion of negotiations between the native title group and other respondent parties.

The CQ ILUA template provides for options on how native title and cultural heritage issues may be resolved in the claims resolution process and also provides for an innovative approach to future mediation through the introduction of 'other outcomes'.<sup>32</sup>

The template is divided into five distinct parts.

- Part 1 – Preliminary
- Part 2 – Resolving the native title claim
- Part 3 – Native title compliance
- Part 4 – Aboriginal cultural heritage compliance
- Part 5 – Other outcomes

#### **Part 1 – Preliminary**

This part of the CQ ILUA template covers a number of technical issues. However it also contains the following important features:

- recognition of traditional ownership (regardless of the native title claim outcome);
- an expectation that the claim group may ultimately be represented by a corporate entity (regardless of the native title claim outcome);<sup>33</sup>
- review of the ILUA (within 5 years of execution);
- a comprehensive dispute resolution process; and
- termination provisions with a high degree of flexibility. They anticipate how the native title claim may be finalised, and how the final outcome of the native title claim will impact on each individual Part of the ILUA. (Each possibility is detailed in Part 2 of the template.)



## Part 2 – Resolving the native title claim

This part of the CQ ILUA template deals exclusively with the resolution of the native title claim. It recognises that there are four possible ways that a claim may be finalised, assuming the ILUA is concluded in the relatively early stages of negotiation (as is anticipated). Once the native title claim is finalised, this part of the ILUA automatically terminates as the issue is resolved.

The template deals with what the parties agree will occur in the event of any of the following four possibilities summarised in the table below.<sup>34</sup>

<b>Possible outcomes for the native title proceedings</b>	
<b>Scenario</b>	<b>Meaning</b>
<b>1. Consent determination</b>	Determination orders are made with the consent of all parties to the native title claim required for a determination recognising the existence of native title. <sup>35</sup> The local government and native title group agree to work towards resolving the native title claim under this possibility.
<b>2. Contested final hearing</b>	There is no consent determination and the native title claim proceeds in such a way (for example by way of a final hearing before the Federal Court), that there could ultimately be either an order made that native title does or does not exist.
<b>3. Native title is surrendered</b>	The native title party agrees to surrender any native title in the ILUA area to the State of Queensland.
<b>4. Native title claim discontinued, struck out or dismissed</b>	The native title claim is discontinued by the native title party, or struck out or dismissed by order of the Federal Court.

In summary, the template indicates that the local governments will support a consent determination subject to the satisfaction of a number of conditions.

In anticipation of a consent determination the template includes acknowledgment of:

- respective interests in the area (that is, the asserted native title rights and interests and the categories of local government interests listed in an Appendix to this report);
- certain community interests, the particulars of which would be included in the final ILUA.

The template records the co-existing relationship between these respective interests and the extent of native title extinguishment in the area.

In the event of a contested final hearing of the native title claim in the Federal Court, the template states:



- that the ILUA may be tendered as evidence and that parties will cooperate to minimise the time and cost involved in any such hearing.

The template also provides that local governments agree to participate and assist (when relevant and appropriate), in any negotiations between the native title group and other respondent parties about non-native title outcomes.

As observed by Gilkerson (from MacDonnells Law):<sup>36</sup>

The structure and content of the template ILUA ensures that real value is added to the basic claim resolution provisions and that both native title parties and local governments will gain enduring benefits from the final ILUAs however claims are resolved.

### Part 3 – Native title compliance

This part of the central Queensland ILUA template details a process that is alternative to the 'future act' regime in the Native Title Act. (It was developed and agreed to by the working group.)

Basically, a future act involves a proposed activity or development on land and/or waters that affects native title rights and interests. Generally, rights to be informed and consulted about a future act are given to native title claimants.<sup>37</sup>

The working group was keen to develop a simple and streamlined procedure that addressed:

- most local government obligations under the Native Title Act;
- local governments' statutory duty of care obligations under the *Aboriginal Cultural Heritage Act 2003* (Qld) (the Aboriginal Cultural Heritage Act).<sup>38</sup>

The ILUA template records how both the native title compliance arrangements (in Part 3) and the Aboriginal cultural heritage compliance arrangements (in Part 4) are coordinated. This has been achieved through two simple steps:

- A range of local government activities are rated as having either a 'high impact' or 'low impact' – to the extent that they may affect native title and to the extent that they may impact on Aboriginal cultural heritage.
- The ILUA template provides that a notice must be given to the native title claim group of any high impact activity proposed (the same notice can be used for both native title and Aboriginal cultural heritage high impact activities).

The template broadly allows low impact activities to proceed, whilst high impact activities can only proceed with agreed compliance procedures.



<b>Native title impact activities in the ILUA template<sup>39</sup></b>	
<b>Low native title impact activity - procedures</b>	<b>High native title impact activity - compliance procedure</b>
<ul style="list-style-type: none"> <li>▪ Maintenance</li> <li>▪ Low impact infrastructure</li> <li>▪ Statutory approvals</li> <li>▪ Low impact tenure grants</li> <li>▪ Invalid past acts</li> <li>▪ Pest control</li> <li>▪ Access and site investigation</li> <li>▪ Contractual interests</li> <li>▪ Operational activities</li> <li>▪ Emergencies</li> <li>▪ Contractual interests with third parties</li> <li>▪ Works/infrastructure otherwise agreed at a capital works forum</li> </ul>	<ul style="list-style-type: none"> <li>▪ High impact infrastructure</li> <li>▪ High impact tenure grants</li> <li>▪ Activities preventing the exercise of native title</li> <li>▪ High impact works/infrastructure otherwise agreed at a capital works forum</li> </ul>

A high impact native title activity cannot proceed unless consultation occurs. The consultation process is to be negotiated during the second stage of negotiations.

### ***Consensus alternative***

As an alternative to the notice and consultation compliance procedure, a consensus decision on the impact of an activity may be made at a capital works forum. Whilst this innovative mechanism is recorded in Part 4 of the central Queensland ILUA template, an explanation of the capital works forum process follows.

The template contains specific compliance procedures including notification and participation in the decision-making processes for high impact future acts, that may affect Aboriginal cultural heritage, or that fit both the other categories.

The capital works forum combines the consideration of the native title future act, and cultural heritage into one practical process that provides the parties with more flexibility to work outside the specific compliance procedures if they choose.

The native title parties will regularly meet with the capital works forum to review the local government's proposed capital works, their possible impacts on native title and cultural heritage, and any additional compliance action necessary. The working group discussed this concept at length, and details of how the forum will operate are included in the template.

Part 5 of the ILUA template provides for the establishment of a broader communication mechanism.



Importantly, the non-extinguishment principle applies to any future acts carried out in accordance with the ILUA template. Consequently, the template does not address the acquisition of native title. Native title acquisition must still be undertaken in accordance with a separate agreement, to which the State of Queensland is a party, and which is registered as an ILUA.

#### **Part 4 – Aboriginal cultural heritage compliance**

Part 4 of the ILUA template records procedures to ensure Aboriginal cultural heritage is not harmed or damaged.

Aboriginal cultural heritage is protected under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) and, specific to the current case study, the *Aboriginal Cultural Heritage Act 2003* (Qld).

The inclusion of ILUAs as a compliance option under the Aboriginal Cultural Heritage Act means that:

- the parties to an ILUA can include in the agreement their own procedures to ensure that activities avoid, or otherwise reasonably minimise, harm to Aboriginal cultural heritage;
- an activity can also proceed lawfully if it is covered by an ILUA (or by certain other provisions in the Aboriginal Cultural Heritage Act).<sup>40</sup>

As the memorandum of understanding between the parties indicated:<sup>41</sup>

Completed ILUAs based on the ILUA template will constitute 'native title agreements' for the purposes of the *Aboriginal Cultural Heritage Act 2003*. [Consequently], the Councils will be complying with their cultural heritage obligations if they proceed in accordance with completed agreements.

Unless the native title group is no longer recognised under the Aboriginal Cultural Heritage Act as the 'Aboriginal party'<sup>42</sup> this part of the ILUA may continue indefinitely, regardless of the outcome of the native title claim. However the parties are not prevented from making other agreements affecting Aboriginal cultural heritage.

The recognition of ILUAs under both the Native Title Act and the Aboriginal Cultural Heritage Act enables and encourages parties to address the legally distinct issues of native title and Aboriginal cultural heritage in the same ILUA which adds value to the agreement reached. A table of the cultural heritage impact activities in the CQ ILUA template follows.<sup>43</sup>





<b>Cultural heritage impact activities</b>	
<b>Low cultural heritage impact – procedures</b>	<b>High cultural heritage impact – compliance procedure</b>
<ul style="list-style-type: none"> <li>▪ Maintenance</li> <li>▪ Pest control</li> <li>▪ Access and site investigation</li> <li>▪ Works/infrastructure on a disturbed area</li> <li>▪ Emergency</li> <li>▪ Works/infrastructure otherwise agreed at a capital works forum</li> </ul>	<ul style="list-style-type: none"> <li>▪ Works/infrastructure on an established cultural heritage area</li> <li>▪ Works/infrastructure where a cultural heritage find is made</li> <li>▪ Works/infrastructure on an undisturbed area</li> <li>▪ High impact works/infrastructure otherwise agreed at a capital works forum</li> </ul>

A high impact cultural heritage activity cannot proceed unless prior notice is given (as discussed in Part 3, the same notice covers both native title and cultural heritage) and a clearance procedure is completed. The details of the clearance procedure including remuneration will be negotiated during the second stage of negotiations.

An alternative to a notice and clearance procedure, as mentioned earlier, is a consensus decision reached at a capital works forum, about the impact of activities and the appropriate action (if any) required.

## **Part 5 – Other outcomes**

Part 5 of the ILUA template has two broad areas.

■ The template records the practical outcomes agreed between local governments and the native title group that are unrelated to the outcome of the native title claim. This may include a range of social, cultural, economic and community matters.

The parties believe that by working together, they can achieve additional, practical outcomes on issues which affect the lives and values of the native title parties and other Indigenous people in the local community.<sup>44</sup>

Particulars to be included in this Part of the ILUA would be negotiated during the second stage of negotiations. Examples identified by the working group include:<sup>45</sup>

- arts and cultural programs;
- community recognition;
- employment and training initiatives;
- Indigenous business development initiatives;
- involvement in environmental protection and land management;
- opportunities to secure Commonwealth and state funding for identified activities;
- partnership programs;
- reconciliation statements;
- social and equal access programs;
- traditional owner recognition; and
- tenure resolution approved by the State government.



The ILUA template anticipates that the agreed outcomes may fall into two areas:

- those that local government can commit to; and
- those policies and programs that require further discussion and consideration for a variety of reasons including future budget allocation uncertainties, the need for the support of third parties, and the general capacity of a local government and the native title claim group to undertake projects.

■ The template provides for the establishment of a consultative committee as a forum for regular communication. It is an addition to the technically focused capital works forum discussed earlier.

The purpose, structure and functions of the consultative committee would be determined in the second stage of negotiations to ensure that individual ILUAs meet the local needs and aspirations of the parties involved. The committee would meet on a regular basis to discuss the implementation of the ILUA and other local issues.<sup>46</sup>

This Part of the ILUA provides parties with a tangible opportunity to establish a framework for a long-term relationship aimed at building a stronger and enduring local community that ensures effective communication between the native title party and local government.

The template recognises that mistakes may be made along the way. Accordingly, the template provides two separate communication forums where new ideas and proposals for mutual consideration can be put forward and concerns may be addressed. This ensures that a permanent relationship between the parties at the local level is maintained.

### **Implementing the central Queensland ILUA template**

Implementation of the local government ILUA template will involve the development of individual final ILUAs between native title claim groups and the councils specific to their claim areas. The final ILUAs will use and adopt the template to ensure tailored and locally-focussed results.

The template is a progressive tool that provides a model, and detailed guidance for mediation and negotiation. It assists parties to identify issues of importance, develop solutions to problems, and achieve outcomes.

On completion of the negotiations for substantive agreements, native title parties will authorise the ILUA in accordance with Section 24CG of the Native Title Act. An application would be made to have the ILUA registered as a legally binding agreement on the National Register of Indigenous Land Use Agreements.

The amalgamation of many Queensland local governments in March 2008 was announced during the ILUA template negotiations. The parties recognised that this structural change could delay the commencement of Stage 2 negotiations.

When adopting the ILUA template, the councils involved in the negotiations ensured the newly amalgamated local governments would move into the second stage of these negotiations by mid 2008. Consequently, the local government amalgamations should not have a significant effect on the second stage of negotiations towards final ILUAs.



Parallel to the template negotiation process, two of the participating groups have begun developing their corporate governance structures, taking into consideration how they manage and implement their responsibilities under a final ILUA.

Strategic planning workshops have been held or are due to be held, to develop governance structures and rules for claim groups. Those involved would be Gurang Land Council, claim groups working with independent legal advisers, and claim anthropologists. These governance structures will reflect law and custom elements such as claim group membership, representation and distribution of benefits. These governance structures are provided for under *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act).<sup>47</sup>

It is contemplated that the structures will be:

- multi-dimensional, anticipating representative and decision-making structures, asset holding structures, business development operations, and cultural heritage operations;
- developed to operate as social, cultural and business entities; and
- in the event of a determination, possibly nominated as regional cultural heritage bodies and as prescribed bodies corporate (PBC).<sup>48</sup> (A detailed analysis of changes to PBCs is provided in another chapter of this report.)

### **The legacy of the central Queensland ILUA template**

As this report was being written, the ILUA template was being adopted for mediation purposes with up to four claim groups in the Gurang Land Council region, and was being forwarded to Queensland South Native Title Services (QSNTS) for its consideration.

As observed by the previous Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Native Title Report 2003*, native title parties are often only afforded 'a right to be consulted on ways to minimise the impact of the development on native title rights and interests'. He highlighted the lack of Indigenous participation in benefits from development.<sup>49</sup>

The ILUA process that the native title parties and local governments have embarked upon contributes significantly to the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples. Daes argues that the exercise of these rights is preconditioned on consultation with Indigenous peoples.<sup>50</sup>

An agreement process such as described in this chapter provides for native title parties to decide their own priorities for the process of social, cultural and economic development.<sup>51</sup> In particular it takes steps to ensure the progressive realisation of Indigenous peoples' right to development that encourages participation in decisions directly affecting their lives, beliefs, institutions and their lands.<sup>52</sup>

This process seeks to provide a level of recognition of Indigenous people, without argument. To some degree, it is almost akin to local government adopting the Declaration on the Rights of Indigenous Peoples and incorporating elements of governance and care for country in their protocols.<sup>53</sup>



- 1 Corbett T. and O'Faircheallaigh C., *Unmasking the Politics of Native Title: The National Native Title Tribunal's Application of the NTA's, Arbitration Provisions*, Department of Politics and Public Policy, Griffith University, Brisbane, 2006.
- 2 Neate, G., *Indigenous Land Use Agreements: Some legal issues*, Paper presented by the President of National Native Title Tribunal at the Native Title Forum, Brisbane, 1-3 August 2001. Available online at: [http://www.nntt.gov.au/metacard/files/Negot\\_neate1/ILUAs\\_some\\_legal\\_issues.pdf](http://www.nntt.gov.au/metacard/files/Negot_neate1/ILUAs_some_legal_issues.pdf), accessed 13 September 2007.
- 3 See Division 3, Subdivisions B, C, D & E of the *Native Title Act 1993* (Cth) for more information about ILUAs and their registration.
- 4 National Native Title Tribunal, *Indigenous Land Use Agreements*, Fact Sheet, Commonwealth of Australia, 2006. Available online at: <http://www.nntt.gov.au/ilua/index.html>, accessed 13 September 2007.
- 5 National Native Title Tribunal, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for information in preparation of the Native Title Report 2007*, Telephone Interview, 19 December 2007.
- 6 For the purposes of this report 'local government' will be the term used to describe Local Councils as a general term. We acknowledge that different states will have different terms (Shire, District, etc) that they would usually use to describe their local authorities.
- 7 National Native Title Tribunal, *What is an indigenous land use agreement (ILUA)?*, available online at: [http://www.nntt.gov.au/publications/1021435535\\_10212.html](http://www.nntt.gov.au/publications/1021435535_10212.html), accessed 13 September 2007.
- 8 National Native Title Tribunal, *What is an indigenous land use agreement (ILUA)?*, available online at: [http://www.nntt.gov.au/publications/1021435535\\_10212.html](http://www.nntt.gov.au/publications/1021435535_10212.html), accessed 13 September 2007.
- 9 Finlayson Lawyers, *Native Title Briefing Paper for Local Councils*, December 2004, prepared for the Local Government Association, December 2004, p4. See also s225 of the *Native Title Act – Determination of Native Title*.
- 10 For more information on the types of ILUAs see the National Native Title Tribunal website available online at: [http://www.nntt.gov.au/metacard/files/Mediation\\_guide/102mid.html](http://www.nntt.gov.au/metacard/files/Mediation_guide/102mid.html), accessed 11 October 2007.
- 11 Identified in the *Native Title Report 2006*.
- 12 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 13 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 14 National Native Title Tribunal, *Local Government Agreements: Content Ideas*, Raine Quinn, Research Unit, August 2005, Commonwealth of Australia, 2005, p11.
- 15 Neate, G., (President, National Native Title Tribunal), *Mining template agreements help people to focus on the big picture*, Media Release, 21 April 2004, p1. Available online at: [http://www.nntt.gov.au/media/1082597924\\_744.html](http://www.nntt.gov.au/media/1082597924_744.html), accessed 13 September 2007.
- 16 For further information about the South Australia State-wide ILUA Negotiations see: Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, HREOC, Sydney, 2006, pp113-123.
- 17 This agreement is also known as the Yorke Peninsula Indigenous Land Use Agreement.
- 18 Finlayson Lawyers, *Native Title Briefing Paper for Local Councils*, December 2004, prepared for the Local Government Association, December 2004, p4.
- 19 Elston, K., Wade, R., Carse, K., Pickering, C., Kerr, A., *The Tagalaka ILUA*, Abstract of Presentation at the Native Title Conference 2007, Cairns, 6-8 June 2007, available online at [www.ntru.aiatsis.gov.au/conf2007/speakers.html](http://www.ntru.aiatsis.gov.au/conf2007/speakers.html), accessed, 13 September 2007.
- 20 Elston, K., Wade, R., Carse, K., Pickering, C., Kerr, A., *The Tagalaka ILUA*, Abstract of Presentation at the Native Title Conference 2007, Cairns, 6-8 June 2007, available online at [www.ntru.aiatsis.gov.au/conf2007/speakers.html](http://www.ntru.aiatsis.gov.au/conf2007/speakers.html), accessed, 13 September 2007.
- 21 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 22 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 23 National Native Title Tribunal, *Correspondence with the Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, 16 October 2007.
- 24 The Commonwealth Attorney-General's Department administers the financial assistance scheme for native title respondents.
- 25 The group representative is the initial and primary contact point for Qld local government about native title and the representative works in partnership with the legal representative selected by each group. Amongst a range of responsibilities, the group representative is tasked with ensuring each local government group's processes have to the greatest extent possible an overall commonality of approach.
- 26 This material was authorised for release and use and all privilege waived subject to the release being made with the consent of all representatives (Gurang Land Council, MacDonnells Law and LGAQ). At a mediation meeting in Bundaberg on 29 June 2007, the questions was asked of the Working Group if they were happy for the template ILUA to be the subject of a HREOC case study and they all agreed unanimously by show of hands.



- 27 Clause 4.1 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p6.
- 28 Clause 4.2 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p6.
- 29 National Native Title Tribunal, *Local Government Agreements: Content Ideas*, Raine Quinn, Research Unit, August 2005, Commonwealth of Australia, 2005, p11.
- 30 Gurang Land Council, *Model Indigenous Land Use Agreement between Native Title Parties and Local Governments*, Discussion Paper, 30 July 2007, p2.
- 31 Support for this workshop was firstly obtained through the National Native Title Tribunal.
- 32 Gurang Land Council, *Model Indigenous Land Use Agreement between Native Title Parties and Local Governments*, Discussion Paper, 30 July 2007, p3.
- 33 Two of the participating groups have begun developing their corporate governance structures that will reflect the law and custom with respect to elements such as claim group membership, representation and distribution of benefits.
- 34 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007, pp15-16.
- 35 The reference to 'all parties' means the respondent parties to the native title claim application, ie. the State of Queensland, pastoralists, other industry parties. Section 87A of the Native Title Act sets out the respondent parties that are required to give notice of their consent to any proposed determination orders.
- 36 Gilkerson, O., *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 28 September 2007, p14.
- 37 National Native Title Tribunal, *Glossary*, Commonwealth of Australia, 2006, available online at <http://www.nntt.gov.au/about/glossary.html>, accessed 25 September 2007.
- 38 s23(1) of the *Aboriginal Cultural Heritage Act (Qld) 2003* states – A person who carries out an activity must take all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage (the cultural heritage duty of care). Maximum penalty – (a) for an individual – 1000 penalty units; (b) for a corporation – 10,000 penalty units.
- 39 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 40 The *Aboriginal Cultural Heritage Act 2003* (Qld) provides that: (a) The parties to an ILUA can include in the agreement their own procedures to ensure that activities avoid, or otherwise reasonably minimise, harm to Aboriginal cultural heritage: and (b) That an activity can also proceed lawfully if it is covered by certain provisions in the Aboriginal Cultural Heritage Act. See Sections 23(3), 24(2), 25(2), and 26(2) of the Act.
- 41 Clause 4.5 of the Memorandum of Understanding between Port Curtis Coral Coast People and local government dated 19 October 2007, p8.
- 42 s35 of the *Aboriginal Cultural Heritage Act 1993* (Qld) defines an "Aboriginal Party".
- 43 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 44 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 45 Gilkerson, O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between the 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.
- 46 Gilkerson, O., MacDonnells Law, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, email 24 September 2007.
- 47 A detailed analysis of the *CATSJ Act* which commenced on 1 July 2007 is provided in this Report.
- 48 A detailed analysis of the native title reforms relevant to Prescribed Bodies Corporate is provided in this Report.
- 49 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2003*, p13, available online at: [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport03/index.htm](http://www.humanrights.gov.au/social_justice/nt_report/ntreport03/index.htm), accessed 27 September 2007.
- 50 Daes, E., *Indigenous Peoples Permanent Sovereignty over Natural Resources*, 2004, National Native Title Conference, Adelaide, 3 June 2004, p6, available online at [www.hreoc.gov.au/about/media/speeches/social\\_justice/natural\\_resources.html](http://www.hreoc.gov.au/about/media/speeches/social_justice/natural_resources.html), accessed 26 September 2007.
- 51 *International Labour Organisation Convention Concerning Indigenous and Tribal Peoples, 1989 (No.169)*, Article 7(1).
- 52 *Declaration on the Right to Development (1986)*, Article 8(2).
- 53 Escartin, M. (Gurang Land Council), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner*, Email, 27 September 2007.



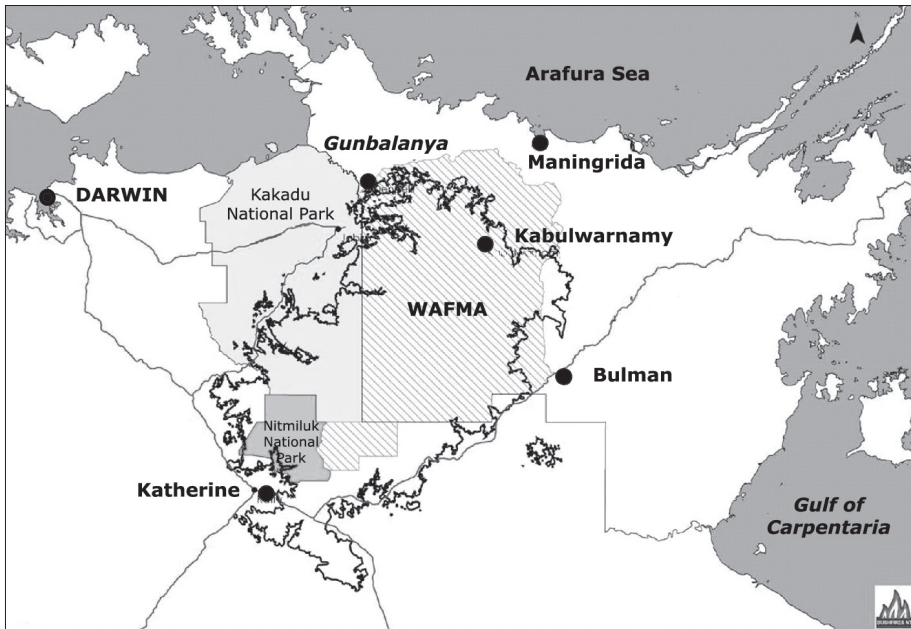


# Chapter 12

## Study: Western Arnhem Land fire management

Securing sustainable and just economic outcomes for Aboriginal traditional owners and residential communities in the remote regions of the Northern Territory has been an elusive goal for national and Territory governments, various public agencies and community groups for many years. The increasing value and intact environmental nature of much of the Indigenous estate across the North of Australia in a carbon trading context offers opportunities that could create sustainable on-country development for traditional owners in the region through new and exciting economies. The West Arnhem Land Fire Abatement (WALFA) project is the first of these opportunities to be put into operation. WALFA produces a carbon abatement<sup>1</sup> from improved fire management in West Arnhem Land, Northern Territory, that has been sold in a ground-breaking commercial agreement that is based on traditional Indigenous ecological knowledge. One of the strengths of WALFA is that it has the potential to deliver across the quadruple bottom line of: environmental, economic, social and cultural outcomes.

The WALFA project is a fire management project that produces a tradable carbon offset, through the application of improved fire management in West Arnhem Land. The WALFA project reduces the amount of country that is burnt in the project area each year and as a result reduces the emission of greenhouse gases that are released in wildfires. This reduction in greenhouse emissions is called creating a 'carbon abatement' because the project reduces (abates) the emission of greenhouse gases expressed as carbon dioxide equivalent. The WALFA project has been operating since 2006 and is popular with the local Indigenous people. Map 1, below, shows the WALFA (called WAFMA<sup>2</sup> in this map) project area in the West Arnhem region, Northern Territory.



Map 1: WALFA (WAFMA) project area and partner community locations.  
Source: Russell-Smith (2007).

## Fire management in West Arnhem Land

The WALFA project area was once home to many Indigenous people living in a traditional way and actively managing their land. The landscape in the WALFA project area (and much of Northern Australia) is tropical savannah characterised as 'woodlands with a grassy ground layer'.<sup>3</sup> This tropical savannah landscape is particularly prone to fire. The WALFA project region experiences an annual wet season from December to March, during which annual grasses can grow to over three meters in height (see Plate 1). This is followed by a long dry-season where those grasses dry or 'cure' and the landscape becomes extremely prone to fire. Indigenous land managers have traditionally burnt much of the country early in the dry-season (from May until midway through July) as they travelled. This protected the landscape from high frequencies of large, late, dry-season wildfires (August onwards, until the start of the early wet season in September). Early dry-season burning creates firebreaks. Thus, large areas of land have the fuel load reduced so that, when late dry-season fires start and hit an area that has been burnt earlier in the season, they go out due to a lack of fuel.





Plate 1: Long grass in West Arnhem Land.  
Source: Lendrum (2007).

Fires that burn early in the dry-season are relatively 'cool' and do not significantly damage the landscape; they do not burn the canopy of the trees or consume all of the fallen debris because there is still some moisture in the grasses and trees. An example of an early dry-season fire can be seen in Plate 2. Fires that burn late in the dry-season, however, burn very hot because the landscape has completely dried out or 'cured'. These late dry-season fires significantly damage the landscape, burn out the canopy of the trees and can burn out of control for months, destroying vast tracts of land. An example of a late dry-season fire can be seen in Plate 3. These fires emit greenhouse gases that account for 48% of the Northern Territory's total greenhouse gas emissions, and 2% of Australia's total emissions.<sup>4</sup> And they significantly damage the landscape.



Plate 2: Early dry-season fire – notice the placid nature of the fire and the minimal damage being done to the upper canopy. Source: Lendrum (2007).



Plate 3: Late dry-season fire – notice the violent nature of the fire and the damage that is being done to the upper canopy. Source: Lendrum (2007).



Since European settlement, Indigenous people have moved from their traditional way of life 'on country' into towns and settlements<sup>5</sup>. This migration has left much of the landscape unpopulated and unmanaged. It has meant that the traditional fire regimes that protected the landscape from late dry-season fires has ceased, and that the landscape has become extremely prone to very hot destructive late dry-season fires. Indeed, Figure 1 shows that:<sup>6</sup>

- an average of 40% of the WALFA project area was burnt each year in the absence of traditional fire regimes between 1995 and 2004; and
- the vast majority of these fires (being late dry-season fires) consequently represents fires that are very hot and damaging to the landscape.

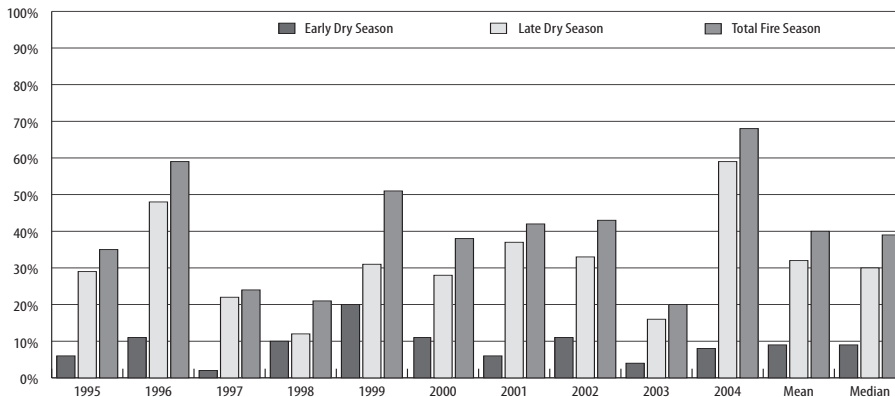


Figure 1: The proportion of area affected by fire of the 28,282 km<sup>2</sup> WALFA project area by season.  
Source: Russell-Smith.<sup>7</sup>

## The West Arnhem Land Fire Abatement project and how it works

The WALFA project reintroduces traditional Indigenous fire management regimes that reduce the total area of country burnt, and as a result, reduce the emission of greenhouse gases. This reduction in greenhouse gases has been sold in a commercial agreement and is discussed in more detail below. WALFA project burning is characterised by strategic burning early in the dry-season (from the end of the wet season in May until mid way through July), when the fires burn in a relatively sedate and controllable manner. This fire regime leaves the landscape in a 'mosaic of different post fire states'<sup>8</sup> and creates effective fire breaks that stop the spread of out of control hot, extremely destructive, and highly polluting late dry-season wildfires.

WALFA project burning is primarily concerned with creating a combination of long intact firebreaks across the project area, and a patchwork of burnt and unburnt country within these long breaks. This fire management strategy reduces the total area of burnt country. It is because late dry-season fires can only burn relatively small areas of land before they encounter a burnt area and then go out.



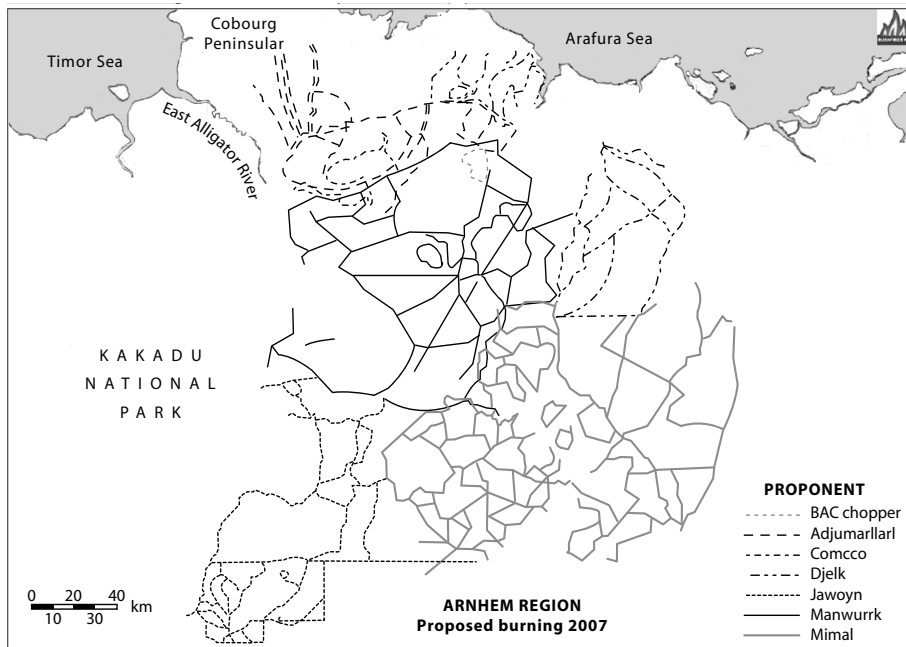


## How is WALFA burning carried out?

WALFA project burning has been developed and is carried out under the management of the Northern Land Council in conjunction with the community ranger groups of five partner communities. The ranger groups are:

- Adjumarllarl Rangers based in Gunbalanya (north west area);
- Djelk Rangers based in Maningrida (north east area);
- Jawoyn Association based in Katherine<sup>9</sup> (south west area);
- Manwurrk Rangers based in Kabulwarnamyo (central area); and
- Mimal Rangers based in Bulman (south east area).

The WALFA project burning for the year is planned in a meeting before dry-season fire – usually in early May – although the timing varies depending on the seasonal conditions each year. Land managers from the partner communities meet with the WALFA project coordinator, Peter Cooke, to discuss the coming season's required burning. These fire meetings produce a map that shows the firebreaks required from each ranger group for the coming season. The fire map for the 2007 season is shown in Map 2.



Map 2: 2007 WALFA proposed burning.  
Source: WALFA fire meeting 2007.



The fire work required to create a regime that reduces the level of burning is carried out in two ways.

- The first burning method is 'on-ground' burning which involves rangers travelling across the country in vehicles, or on foot to burn the country. They create strategic firebreaks along roads, streams and tracks. The result is the landscape is left in a mosaic of different post fire states. This protects the land from being completely burnt out in an out of control late dry-season fire.

WALFA project funds pay rangers on a casual basis for doing the on-ground burning. It makes up part of a range of activities that these groups carry out on a fee for service basis. The WALFA project represents a stable income-stream for the different ranger groups, but is seasonal work and concentrated early in the dry-season.

The WALFA project is currently funded through the Community Development Employment Projects (CDEP) scheme. CDEP is a Government employment program in Indigenous communities (similar to work for the dole). It enables participants to earn a base wage that is then 'topped up' for work that is over the base requirement. The WALFA project pays the CDEP participants 'top up' in varying rates, depending on the community and the type of work. The WALFA project is an example of CDEP operating successfully.

- The second burning method mimics the on-ground burning, but applies it on a larger scale carried out from a helicopter. Aerial burning is very effective in West Arnhem Land because it can create long stable firebreaks in the very rugged and remote landscape (much of the WALFA project area).

Plate 4 shows the aerial incendiary device used. Both forms of burning create the same outcome: when fires start late in the dry-season they soon run out of fuel and go out when they reach an area that has been burnt early in the season.



Plate 4: Aerial incendiary device attached to Jawoyn chopper.  
Source: Lendrum (2007).

### Details of WALFA

The core focus of the WALFA project is to implement directed, controlled or prescribed burning of native vegetation on the unmanaged lands of West Arnhem Land in such a manner as to reduce the total amount and intensity of wildfires. This reduces the emission of greenhouse gases from fire in the region, and creates a tradable carbon abatement (carbon removed from the atmosphere by a human activity, in this case by applying improved fire management).

By implementing strategic fuel reduction burns early in the dry-season, the annual extent of burning in the project area is reduced from the regime of 1995–2004 that has been used as the baseline for the project (see Figure 1). The baseline represents a total mean burn of 40% per annum, with a mean of 8% burnt early in the dry-season and 32.5% being burnt in the late dry-season. The mean annual burning on this baseline data is used to compare subsequent burning regimes, to determine how much reduction there has been and how much abatement has been created.

While there will always be a combination of early and late dry-season fires due to the highly combustible nature of the landscape, the WALFA project aims to implement a regime that will produce the required abatement<sup>10</sup> and significantly reduce the amount of country burnt in the late dry-season. Table 1 demonstrates a number of combinations of early and late season burning. It provides an indication of the abatement created by each combination. The horizontal rows represent a



hypothetical percentage of early burning, and the vertical columns represent a hypothetical percentage of late season burning. The shaded combinations represent a regime that will create the minimum 100,000 tonnes of carbon abatement. For example, a regime that represents 15% of the land burnt in the early dry-season coupled with 15% burnt in the late dry will produce an abatement of 127,000 tonnes of carbon dioxide equivalent greenhouse gas.

% Late burnt	% Early burnt					
	5	12	15	20	25	30
5	273	248	223	198	173	148
10	225	200	175	150	125	100
15	177	152	127	102	77	52
20	130	105	80	55	30	5
25	82	57	32	7		
30	34	9				

Source: WAFMA 2006 Annual Report.

### **The history of WALFA**

A fire management program, the precursor to the WALFA project, called the Arnhem Land Fire Abatement (ALFA) project, had been underway in Arnhem Land since 1998. It was an attempt to tackle the out of control fire regimes that prevailed across Arnhem Land since the area had been largely depopulated after the 1950s. A group of land managers, which included many Indigenous managers, assembled in West Arnhem Land in 1998 in an attempt to implement a regional response to these fires.

The Northern Land Council (NLC) sourced \$768,040 initial funding and \$533,570<sup>11</sup> from the National Heritage Trust (NHT), and began a coordinated burning program that sought to replicate the traditional mosaic burning of Indigenous fire regimes. During the ALFA project a number of people (Jeremy Russell-Smith, Dick Williams and Peter Cooke amongst others) began to realise that improved fire management in West Arnhem Land could significantly reduce the emission of greenhouse gases. This realisation and the subsequent commercial arrangements led to the creation of the WALFA project (a joint initiative of the Northern Territory Government and NLC). It was the first carbon abatement project of its kind anywhere in the world.



## The WALFA agreement

In 1997 Darwin Liquid Natural Gas (Darwin LNG) (a subsidiary of the mining giant Conoco-Phillips) applied to construct a Liquid Natural Gas processing plant at Wickham point in Darwin Harbour. This plant processes natural gas from two offshore gas fields in the Timor Sea.

The Northern Territory Government granted an Exceptional Development Permit that required Darwin LNG to:<sup>12</sup>

- take action to offset the greenhouse gas emissions from the plant (approximately 100,000 tonnes of carbon dioxide equivalent); and
- work with the Territory Government to identify a suitable area of dry rainforest in the region to be acquired for conservation purposes to offset the rainforest cleared to accommodate the plant.

Following a joint proposal prepared by the NT Government and the NLC, the WALFA project was chosen as the project that would deliver both these requirements. It was implemented in 2006. The WALFA project area is an area that has been particularly prone to devastating late dry-season wildfires. The area was chosen because:

- the area had a poor fire regime;
- it was Aboriginal land tenure;
- it was largely depopulated; and
- it received very little commercial development opportunities.<sup>13</sup>

The WALFA project includes a number of agreements. A significant one is between Darwin LNG and the Northern Territory Government, signed on 24 August 2006. It certifies that the WALFA project will create a minimum annual abatement of 100,000 tonnes of carbon dioxide equivalent. It was made because, as the WALFA project was the first of its kind, the commercial agreement required a government guarantee that the project would deliver the required carbon abatement.

Darwin LNG pays the Northern Territory Government approximately \$1 million each year, as a fee to create the carbon abatement<sup>14</sup>. This figure is based on \$10 per tonne for carbon abatement. The agreement includes some renegotiation clauses over the life of the project and this figure may be increased depending on the market value of carbon abatement in the future.

The Northern Territory Government pays the NLC (which provides bookkeeper and coordination support for the project). Subsequently the NLC distributes the money to the local Aboriginal partners in each community area. The partners carry out the work to create the abatement through a project coordinator.

The wages component of the WALFA project money is paid directly into bank accounts of the local Indigenous people engaged in the ranger programs, as income for providing the service of fire management by each ranger group (not to a small number of traditional owners).

The long-term advantage of the WALFA project is that the project can employ a large number of rangers from the five partner communities, for the 17-year duration of the contract. Currently, all of the available money is distributed as expenditure or wages. In the future, as the project reaches maturity and the start up costs of





the project are reduced, any excess could be invested on behalf of the traditional owners, or for on-country programs.

In 2007, of the \$1 million:<sup>15</sup>

- \$130,000 was paid to the Tropical Savannas CRC which monitors and audits the project;
- \$380,000 was paid in employment to carry out the required fire work; and
- approximately \$500,000 was spent on operations which includes providing vehicles, helicopter charter and fuel to carry out the required burning.

### The science of WALFA: Creation of the offset

To determine the amount of abatement created by improved fire management, the amount of biomass burnt in different fire scenarios across the landscape setting must be measured and calculated.<sup>16</sup> The WALFA project abates carbon dioxide equivalent in the form of methane and nitrous oxide only; the carbon dioxide released by fire is assumed to be reabsorbed by the landscape in the next growing season.<sup>17</sup>

The WALFA abatement is calculated using methodology approved by the National Greenhouse Gas Inventory (NGGI).<sup>18</sup> In simplistic terms, the baseline mean figure (as displayed in Table 2 as 371.92 gigatonnes) is used as a pre-project baseline. Emissions in each year of the project's operation are subtracted from the baseline figure to determine the annual abatement (or if the project year is higher, the increase in emissions). Emissions are measured by satellite and a methodology that involves significant rigor in measuring the carbon emitted from a wide variety of fires across the project area.<sup>19</sup>

The fire patterns are highly variable from year to year. This requires WALFA to work on a 'banking' system – if the abatement falls below the 100,000 tonnes in a given year, credit built up in previous years can be used to make up the shortfall.

	<b>1995</b>	<b>1996</b>	<b>1997</b>	<b>1998</b>	<b>1999</b>
<b>Early</b>	58.63	97.58	20.57	95.83	186.4
<b>Late</b>	267.17	444.86	210.59	113.01	282.27
<b>Total</b>	325.8	542.44	231.16	208.84	468.66



	2000	2001	2002	2003	2004	Mean
<b>Early</b>	100.03	61.14	102.88	45.91	69.39	83.84
<b>Late</b>	245.29	331.1	304.1	137.97	544.46	288.08
<b>Total</b>	345.32	392.24	406.98	183.88	613.85	371.92

Source: WAFMA 2006 annual report.

### Benefits of WALFA – quadruple bottom line outcomes

WALFA has the potential to:

- successfully produce positive outcomes in remote Indigenous communities through the creation of meaningful employment on country;<sup>20</sup>
- create significant biodiversity and environmental benefits;<sup>21</sup> and
- maintain and strengthen traditional cultural practices of fire management.<sup>22</sup>

In this manner the WALFA project is seen as producing positive ‘quadruple bottom line outcomes’<sup>23</sup> – economic, environmental, social, and cultural – as is now described.

- **Environmental outcomes** reduce greenhouse gases and help to mitigate climate change. The WALFA project also creates positive biodiversity outcomes that are the byproduct of good fire regimes, and creates a healthy landscape that is managed in the manner that it has been for thousands of years. The landscape of West Arnhem Land has developed as a managed landscape that depends on fire for many seeds to germinate over many generations. A healthy landscape is a landscape that includes people as active land managers. Land managers keep the country healthy, and the management of fire is the principal land management tool available.<sup>24</sup> Dean Yibarbuk describes land management via the management of fire below:<sup>25</sup>

Opening up the areas [sic] ... that is accessible for people walking making it more easy [sic] for plants and animals to be able to come together there. We burn and we encourage our environments, our ecosystems, to come alive again. For animals we encourage them by burning country; we bring them back onto the burnt area.

- **Economic outcomes** provide employment opportunities in remote Indigenous communities that are largely economically marginal and have very few inflows of investment of the type that the WALFA project represents. The capital that is created through the WALFA project is secure long term commercial funding (17 years of \$1 million per annum). It represents the opportunity to create sustainable cultures of change and growth in remote Indigenous communities because it is significantly different from much current government funding that operates within short funding horizons under high administrative burdens.



The WALFA project provides rare on-country employment opportunities because it employs and engages local ranger programs which offer culturally appropriate careers in the bush. They are often the only careers available in the region.

- **Social outcomes** provide opportunities for people to develop social capital<sup>26</sup> and social benefits from engaging together in the project at a local scale. The WALFA project provides the opportunity for people to meet and plan a regional scale fire management plan, and provides new emphasis for local fire expertise to be transferred to the next generation and to be developed further. The WALFA project also offers the opportunity for alternative lifestyles in the bush away from some of the negative social pressures such as 'grog culture' that can pervade townships in the region.
- **Cultural outcomes** engage with the cultural activity of fire and land management and the expansion and development of cultural capital.<sup>27</sup> The WALFA project allows people the opportunity to actively practice their culture and to get back to country with their families as part of the ranger programs. One of the major cultural advantages that the WALFA project gives is the ability to practice culture.

One example of this can be seen in Kabulwarnamyo as the senior traditional owner, Lofty Nadjamerrek, spends time painting and teaching art to his grandchildren in an on-country setting.<sup>28</sup> The teaching and intergenerational transfer of language, place names, and dreaming stories is also a significant cultural benefit of having a sustainable means of living on country.

The WALFA project offers opportunities for Indigenous people to actively practice and maintain their culture in an on-country setting in a similar manner across much of the project area.

## Wider contexts of WALFA

The WALFA project has been created within a number of important contexts. They include climate change, carbon trading, and Indigenous land management technologies. They have created the opportunity for the project to be developed as a commercial agreement from its beginnings as a government funded project (ALFA) (described above). The local Indigenous context in which the project is carried out also creates many unique opportunities and challenges.

### 1. Climate change

The recent Stern Review<sup>29</sup> notes that 'climate change presents a unique challenge for economics: It is the greatest and widest-ranging market failure ever seen'. It is a failure because the market has not had to factor in the costs of the emissions of greenhouse gases into production so far. It is in response to this challenge, in the space created as the global economy attempts to enter a low- (or post-) carbon phase that industries such as the WALFA project have been developed.



Post-carbon industries such as the WALFA project aim to mitigate the effects of climate change by reducing the amount of greenhouse gases that are released into the atmosphere. The WALFA project helps to mitigate climate change because it reduces the emission of greenhouse gases caused by human-induced fires.<sup>30</sup> Reducing emissions from savannah fires is the same (in climate change terms) as reducing emissions from other activities such as powering homes, industries, and transport. Examples of post-carbon industries include carbon sequestration in forestry, soils, and oceans; geo-sequestration; biofuel technologies; direct carbon capture technologies from power plants; and other abatement projects such as WALFA.

WALFA has emerged as a cutting edge project that won the *2007 Eureka prize for innovative solutions to climate change*. It employs a combination of Indigenous knowledge and Western science known as a 'two tool kit' approach.<sup>31</sup> The term 'two tool kit' is used because it demonstrates a pioneering and innovative approach to resource and environmental management in Australia that incorporates a combination of Indigenous and Western technologies and knowledges.

## 2. The Kyoto protocol and carbon trading

It has been the advent of carbon trading, born out of the Kyoto Protocol (1997) that has provided the specific framework for the WALFA project to develop as a post-carbon industry. Kyoto style carbon trading represents the integration of environmental pollution into the global market economy. It has created new economies in which the offset and abatement of greenhouse gases (measured as carbon dioxide equivalent) can be sold and traded.

The Kyoto protocol that has led to the reduction in greenhouse gas emissions being recognised as a tradable or saleable product. The WALFA project was developed in that context.

The Kyoto system is a market mechanism that seeks to engage international and domestic markets in developing the most efficient and cost effective technologies to move the global economy into a post- (or low-) carbon phase. It is a 'cap and trade' system where national emissions are capped at agreed levels and targets for reduction are mandated over time. Nations that have ratified the protocol are committed to meeting the reduced targets over time, either through actual domestic emissions reductions, or by purchasing excess carbon credits created in other countries. Under this system, nations that develop the most effective technologies, and reduce their emissions by more than they are committed, can sell any extra reductions in a global carbon market. The newly elected Labor party has committed to ratifying the Kyoto protocol for Australia.

Carbon trading is seen as only one step in a process to tackle climate change. By mandating that polluting industries and technologies have to be offset at a cost (i.e. purchasing carbon credits to match their emissions), it is hoped that clean energy technologies will become more economically viable.

The essential next step is that low (or non-) emissions technologies are developed and engaged to replace the polluting ones that have had their price inflated by paying to offset their emissions. Thus (in theory), through profit seeking and market forces, clean energy solutions are developed and the market is engaged in tackling climate change. Kyoto style carbon trading represents one framework



for carbon trading. Others may be developed over time such as the regional Asia Pacific carbon trading scheme that could include Australia, China, the US, Japan, South Korea and India.<sup>32</sup>

The WALFA project has been developed to fit into international Kyoto-style carbon trading. If Australia ratifies the protocol in the future the opportunity to trade carbon offset credits developed in the same manner as the WALFA project may exist under the Kyoto rules for carbon offset projects.

WALFA conforms to the Kyoto protocol's rules for a carbon abatement project. Thus it will also qualify as producing a tradable carbon abatement within the domestic carbon trading scheme planned for introduction by the new Australian Government.<sup>33</sup>

### **3. WALFA and the local communities**

There currently exists a disparity across a number of key social and economic indicators between mainstream and Indigenous Australians. The unique local circumstances of different remote Indigenous communities create different opportunities and challenges.

The WALFA project operates in remote Indigenous communities where the local population is much more likely to be poor, uneducated, unemployed, develop a disability or long term health complication, be incarcerated, and live a significantly shorter life (life expectancy is 17 years less) than mainstream Australians.<sup>34</sup> There are many reasons for these conditions.

Some of the challenges that the WALFA project and the local populations experience include exclusion from mainstream market activities, structural racism, population factors such as the isolated and remote location, the economic marginality of many Indigenous communities and lands,<sup>35</sup> the absence of adequate service provision such as infrastructure, education and health, and cultural factors such as different priorities from mainstream Australia.

One of the major challenges that people in remote Indigenous communities face is the lack of culturally appropriate careers and job opportunities. The market economy is largely absent from these places, and projects need to be tailored to suit the specific local conditions.

WALFA is a project that fits perfectly into the remote communities that it engages with because it represents commercial opportunities from carrying out the cultural activity of fire management. The WALFA project offers appropriate careers in the bush and uses the skills that the local people have such as knowledge of their country and knowledge of the traditional practice of fire management.

Working on the WALFA fire abatement project, local people can practice their culture in a strong and traditional manner. They can experience many benefits that come from a strong culture such as increased self and cultural esteem, increased material wellbeing through having an income, and the ability to ensure that their culture is practiced and passed on to the next generation.

The WALFA project has the capacity to overcome some of the challenges faced by remote Indigenous communities because it represents culturally appropriate careers in the bush, for local community members, based around the concept of caring for country and the local ranger programs. These community ranger programs



are the key mechanisms to run the WALFA project in the five partner communities. It is the ranger groups that carry out much of the prescribed burning. And it is the ranger groups who have the required local fire knowledge and fire history, as well as the specific fire management techniques required to create the burning on a fine scale to maximise biodiversity and land management outcomes.

The ranger groups form a cornerstone in remote Indigenous communities in many different ways: economically, culturally, and socially. The rangers are role models for young people (they often represent the only full time equivalent paid jobs), and they represent career paths in these remote places that are culturally appropriate.

The ranger programs represent culturally appropriate employment because local Indigenous people are able to create sustainable futures on country in a manner that does not require transforming themselves or their activities to engage with the Western economic paradigm. They are able to begin to realise some levels of sustainable futures on country through alternative pathways that are focused on maintaining and practicing specific local cultural activities. In the WALFA case, the local rangers are able to begin to realise some levels of economic sustainability by carrying out the traditional cultural practice of fire management.

Ranger groups carry out fee-for-service work such as weed management, feral animal control, AQUIS (quarantine) work, native harvest, and fire management.<sup>36</sup>

These jobs can be broadly defined as 'caring for country' and often require the application of traditional ecological knowledge, either on its own, or in combination with Western science in a 'two tool kit' approach such as that employed by the WALFA project.

Ranger programs represent an engagement with the dominant paradigm that does not require the normalisation and mainstreaming of life on country that have been the aims of much recent government policy. Instead, these 'caring for country' functions represent paid activities that Indigenous Australians carry out that do not require them to change to fit the dominant model.

I support this grassroots approach (rather than normalising and mainstreaming Indigenous communities).

The community rangers provide opportunities for local people to achieve economic, social and cultural sustainability from carrying out cultural practices such as fire management. They care for country and care for people in a setting that celebrates and engages with their roots. In this sense these ranger programs represent foundations that can be built on through engagement with the WALFA project, and similar future projects, to form a focal point for developing positive social and cultural outcomes on the ground in the communities.

## **Challenges and opportunities for WALFA**

The challenge of the WALFA project and other similar future projects is to maximise local Indigenous benefit from these new and exciting opportunities. While the WALFA project has the potential to deliver across the 'quadruple bottom line' (described above) the economic and environmental outcomes have priority over social and cultural ones. The challenge as the WALFA project progresses is to include the social and cultural outcomes that are as important to the success of the project as the environmental and economic outcomes.



The WALFA project is currently guided by a steering committee with members from the Northern Land Council, Bushfires NT, Tropical Savannas CRC, Darwin LNG, and the five partner community organisations. This steering committee will be responsible for ensuring that the WALFA project:

- maximises the benefits for local Aboriginal people; and
- set the benchmark for a new industry that is set to follow in the footsteps of WALFA based on the creation and sale of carbon abatement through improved fire management.

The steering committee and the leadership role that the Northern Land Council is playing in the project will be critical in ensuring that the new revenue stream that the WALFA project represents is transformed into sustainable futures on country for local Indigenous community members.

The WALFA project, under its current level of funding at \$10 per tonne of carbon abatement does not currently create much surplus, or profit. The \$1 million per annum covers the costs of creating the abatement but does not leave much surplus money.

A report of the previous federal government into an emissions trading scheme<sup>37</sup> in Australia recommended that a national carbon price be set at around \$20 per tonne in future carbon trading schemes.

If the WALFA project was renegotiated (renegotiation clauses do exist in the agreement) to a level of around \$20 per tonne, the project would create a surplus that could be used to generate community development outcomes. If this happened, the Northern Land Council could expand its role and work in partnerships with the five partner community organisations. They could develop community-driven development projects with profit created from the WALFA project.

## Conclusion

The WALFA project is the first in a number of similar projects being developed across the north of Australia on Indigenous lands. These projects represent new revenue streams into remote Indigenous communities that have suffered in the past from not engaging in the domestic market economy. These types of projects are special because they represent an engagement with the national market economy in a manner that does not require total transformation of traditional ways of life for Indigenous people in remote communities. Indeed, carrying out the required work that creates the carbon abatement is a continuation of the practice of traditional fire and land management that Indigenous people have practiced across the country for thousands of years.

The great strength of these projects lies in the culturally appropriate careers that they create in an on-country setting. They have the ability to lead to real benefits for the people who really matter in resource projects on Indigenous lands, the local Indigenous community members.





- 1 A carbon abatement refers to a net decrease in carbon dioxide through an activity – a reduction of carbon dioxide emissions.
- 2 WAFMA refers to the WALFA agreement itself and is an acronym for West Arnhem Fire Management Agreement; in many instances these terms are interchangeable.
- 3 Williams, D., and Cook, G., 'Savanna Landscapes', *Savanna burning – Understanding and using fire in northern Australia*, Darwin, 2001, p5.
- 4 Russell-Smith, J., *Emissions abatement opportunities from Savanna burning*, Paper presented at Workshop for greenhouse emissions offsets programs, Melbourne, July 2007.
- 5 Christie, 1992.
- 6 For further information on fire in the Australian savannas see: Williams, D., and Cook, G., 'Savanna Landscapes', *Savanna burning – Understanding and using fire in northern Australia*, Darwin, 2001; Russell-Smith, J., Start, T., and Woinarski, J., 'Effects of fire in the Landscape', *Savanna burning – Understanding and using fire in northern Australia*, Darwin, 2001; Myers, B., Allan, G., Bradstock, R., Dias, L., Duff, G., Jacklyn, P., Landsberg, J., Morrison, J., Russell-Smith, J., and Williams, D., 'Fire Management in the Rangelands – A report to the Australian Government Department of Environment and Heritage prepared by the Tropical Savannas and Desert Knowledge Cooperative Research Centres', CRC Australia, 2001.
- 7 Russell-Smith, J., *Emissions abatement opportunities from Savanna burning*, paper presented at workshop for greenhouse emissions offsets programs, Melbourne, July 2007.
- 8 Natural Resources, Environment and the Arts., 'Aboriginal Burning Practices', *Bushfire Council Publications NT*, Northern Territory Government, Darwin, 2006.
- 9 The Jawoyn nation is very dispersed across a wide area and do not have a typical Ranger core group; instead a wide range of people across a wide area carry out WALFA burning on a casual basis (Interview with Ray Whear, Katherine, June 14 2007).
- 10 An annual abatement of 100,000 tonnes is required under the WALFA project agreement; this is discussed in more detail below.
- 11 Natural Heritage Trust, 'Community Rangers tame Arnhem land bushfires', *The Journal of the Natural Heritage Trust*, Australian Government, Canberra, Autumn 2004, no 19.
- 12 For a detailed description of the plant and its environmental impacts see the EIA available online at: <http://www.nt.gov.au/nreta/environment/assessment/register/phillipsexpansion/pdf/assessmentreport39.pdf>.
- 13 Interview with Jeremy Russell-Smith, Darwin, 23 May 2007.
- 14 It is important to note that WALFA is not officially a carbon trading agreement. Darwin LNG cannot on-sell the credits as they were a requirement made for a development application. WALFA is instead seen as a fee for service arrangement that produces a carbon offset. This distinction has been made due to the fact that carbon trading in Australia is not yet operational and there are many uncertainties and no clear industry regulations. WALFA operating as a fee for service arrangement simplifies the agreement significantly.
- 15 These figures have been gathered from the 2007 WALFA project budget and only represent that year of operational budget. These figures will change over time depending on the amount of aerial burning required for each season.
- 16 Wildfires release greenhouse gases through the combustion of biomass in the form of grass, leaf litter, and trees etc.
- 17 Savannah fires also emit other greenhouse gases such as ozone and other volatile organic compounds. While these are not currently counted towards its abatement there is potential in the future to include these gases and increase the measured abatement.
- 18 For detailed information on the measurement of greenhouse gas abatement in Australian savannas see Meyer, C., *Establishing a Consistent Time-series of Greenhouse Gas Emission Estimates from Savanna Burning in Australia*, A paper prepared for the Australian Greenhouse Office, CSIRO Atmospheric Research, 2004.
- 19 For details on the science of the carbon abatement see: Meyer, C., *Establishing a Consistent Time-series of Greenhouse Gas Emission Estimates from Savanna Burning in Australia*, A paper prepared for the Australian Greenhouse Office, CSIRO Atmospheric Research, 2004.
- 20 Edwards, A., 'Community rangers tame Arnhem land bushfires', *N. H. Trust* 19, 2004.
- 21 Yibarbuk, D., Whitehead, P., Russell-Smith, J., Jackson, D., Godjuwa, C., Fisher, A., Cooke, P., Choquenot, D., and Bowman, D., 'Fire ecology and Aboriginal land management in central Arnhem Land, northern Australia: a tradition of ecosystem management', *Journal of Biogeography*, 2001, 28: 325 343.
- 22 Bowman, D., Cooke, P., Yibarbuk, D., and Fell, R., 'Traditional and non-traditional viewpoints Arnhem Land Fire Stories', *Tropical Savannas CRC*, 2001, 1 2.
- 23 Quadruple bottom line is an adaptation of the term 'triple bottom line' that is used widely in resource management to discuss a project in terms of its economic, environmental and social outcomes. Quadruple bottom line represents a more holistic means for discussing project on Indigenous lands because it expands the framework to include the cultural factors as well as the other three outcomes.
- 24 Interview with Shawn Ansell, Bawinanga Aboriginal Corporation, Maningrida, 7 June 2007.





- 25 Interview with Dean Yibarbuk, Chairperson of Demed Association and Fire Ecologist, Gunbalanya 29 May 2007.
- 26 Social capital in this instance is based on Edwards, R.W., *Measuring Social capital – An Australian framework and indicators*, Australian Bureau of Statistics, Canberra, 2004 and relates to the resources available within communities in networks of mutual support, reciprocity, and trust.
- 27 The term cultural capital refers to the accumulation and development of cultural knowledge.
- 28 Filed observation and interview with Lofty Nadjamerrek, Gunbalanya, 8 June 2007.
- 29 Stern, N., *Stern Review on the Economics of Climate Change*, Her Majesty's Treasury, UK, 2006, pi.
- 30 Studies have shown that almost all of the fires in the NT are actually started by humans in one way or another. They are started by accident, from backburning that has gotten out of control, or by arson.
- 31 Eureka, 2007, available online at: <http://www.austmus.gov.au/eureka/index.cfm?objectid=B8571ED8E569-EC02-3DF65CB2178B1DD8>, accessed 28 October 2007.
- 32 The Australian, 19 May 2007, available online at: [http://www.theaustralian.news.com.au/story/0,20867,21757380601,00.html?from=public\\_rss](http://www.theaustralian.news.com.au/story/0,20867,21757380601,00.html?from=public_rss), accessed 10 October 2007.
- 33 The newly elected Labor party has committed to introducing an effective emission trading scheme by 2010. See Swan, W., *Climate change, carbon trading*, doorstep interview, 2 November 2006, available online at: <http://www.alp.org.au/media/1106/dsitre020.php>.
- 34 For further details see: Trewin, D., and Madden, R., *The Health and Welfare of Australia's Aboriginal and Torres Strait Islander Peoples*, Australian Bureau of Statistics, Canberra, 2005.
- 35 Much of the land that has been claimed back under Land Rights in NT is marginal, remote and traditionally economically marginal (Altman, 2004).
- 36 Field interviews with ranger coordinators: Piers Peters (Adjumarllarl Rangers in Gunbalanya), Matthew Ryan & Shawn Ansell (Djelk Rangers in Maningrida), Ray Whear (Jawoyn association in Katherine), and Ben Lewis (Mimal Rangers in Bulman).
- 37 Available online at: <http://www.pmc.gov.au/publications/emissions/index.cfm>.





# Appendix 1

## Implementation of the claims resolution review

Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<b>Options for institutional reform</b>			
1. Provide the National Native Title Tribunal (the tribunal) with an exclusive mediation jurisdiction for a period of three years.			
<b>2. Tribunal exclusive mediation power</b> Provide the tribunal with an exclusive mediation role with no time limitation on Federal Court (the court) intervention.	This was the accepted option.	<i>Native Title Act 1993</i> (Cth) (NTA) s86B(2) repealed	Removal of Federal Court's general discretion not to refer matters to tribunal for mediation, court must order there be no mediation by the tribunal in certain circumstances.
3. Provide the Federal Court with greater flexibility in relation to alternative dispute resolution.			
4. Introduce a modified pre-1998 model for resolving native title claims.			



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>5.</b> Create a new native title court. Subsidiary option Create a native title panel or division within the Federal Court. Dr Levy supported the creation of a native title division, Mr Hiley supported the creation of a native title panel.</p>	<p>Not appropriate to enact legislation to create a native title division within the court. Any decision to create a native title panel a matter for the Chief Justice.</p>		
<b>Recommendations</b>			
<p><b>1. One body mediating at a time</b></p> <p>That the NTA be amended to provide that, consistent with paragraphs 4.31 and 4.32 [of the Review], mediation should not be carried out by more than one body at the one time.</p>	<p>Accepted. Given its acceptance of Option 2, the Government considered that while a claim is in mediation before the tribunal, the court should be precluded from mediating any aspect of the claim.</p>	<p>NTA s86B(6)</p>	<p>If the Federal Court refers a proceeding to the tribunal for mediation:</p> <ul style="list-style-type: none"> <li>■ no aspect of the proceeding is to be referred for mediation under the <i>Federal Court of Australia Act 1976</i>;</li> <li>■ no order is to be made requiring the parties to attend before a Federal Court Registrar for a conference with a view to satisfy the registrar that all reasonable steps to achieve a negotiated outcome of the proceedings have been taken.</li> </ul>



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p><b>2. New tribunal mediation powers</b></p> <p>That the tribunal be given the following powers in relation to a matter referred to it by the Federal Court for mediation:</p> <ul style="list-style-type: none"> <li>▪ to direct a party to attend or participate in a mediation conference;</li> <li>▪ to direct a party to produce documents for the purposes of mediation within a nominated period or by a nominated date;</li> <li>▪ to conduct a review of material provided by the applicant (or any other party) to establish whether the native title claim group has, by its traditional laws and customs, connection to the land or waters claimed;</li> <li>▪ to assess whether the material would support a determination of native title; and</li> <li>▪ to provide that assessment to a party or parties to the proceedings (subject to an order under s136F of the NTA).</li> </ul>	Accepted.	NTA s136B(1A) s136CA s86A(1), (2) s136G(3B) s86D(3) Div 4AA: ss136GC-GE	<p>Tribunal may direct a party to attend a mediation conference (s136B(1A)).</p> <p>Tribunal may, for the purposes of a conference, direct a party to produce document (s136CA).</p> <p>Tribunal may review the issue of whether a native title claim group who is a party to a proceeding holds native title rights and interests, as defined in subsection 223(1), in to relation land or waters within the area that is subject to proceedings (Div 4AA).</p>
<p><b>3. New tribunal inquiry power</b></p> <p>That the tribunal be given a new inquiry function enabling the tribunal to collect evidence and make non-binding recommendations about overlapping claims and other inter-Indigenous and intra-Indigenous issues and about the kinds of matters covered by s225 [of the NTA].</p>	Accepted.	NTA ss138A-G	The tribunal may hold an inquiry in relation to a matter or an issue relevant to the determination of native title under s225.



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p>After an application has been referred to the tribunal under s86B of the NTA, the president of the tribunal should be empowered to, of his/her own motion or at the request of a party to the proceeding, direct that the tribunal conduct an inquiry in relation to an issue that, if resolved, is likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.</p> <p>The president should be empowered to so direct where he/she is satisfied that:</p> <ul style="list-style-type: none"> <li>▪ the applicant and other relevant parties would participate in the inquiry</li> <li>▪ the issue is sufficiently important to justify an inquiry, and</li> <li>▪ the results of the inquiry are likely to lead parties to agree to action that would result in the application being withdrawn or amended, the parties being varied, or any other thing being done in relation to the application.</li> </ul> <p>Before directing an inquiry (having regard to the fact that each application is a proceeding before the Federal Court), the president should be required to first consult with:</p>			



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<ul style="list-style-type: none"> <li>▪ the Chief Justice of the Federal Court;</li> <li>▪ the relevant NTRB (or body performing NTRB functions) for the relevant area;</li> <li>▪ the federal minister;</li> <li>▪ the relevant State or Territory government; and</li> <li>▪ the applicant of any affected native title application.</li> </ul> <p>Such inquiries may be directed and conducted in relation to two or more applications where the same issue arises in relation to those applications.</p>			
<p><b>4. Good faith obligation</b></p> <p>That consideration be given to formulating a good faith obligation to be included in the NTA and developing a code of conduct for parties involved in native title mediations.</p>	<p>Accepted.</p> <p>Government giving further consideration to possible sanctions for breach of the good faith obligation by legal practitioners.</p>	<p>NTA s136B(4)</p>	<p>Each party and each person representing a party must act in good faith in relation to the conduct of the mediation.</p>
<p><b>5. User group, regional call overs, Tribunal/Federal Court communication</b></p> <p>That the court should convene regular user group meetings and regional call overs involving the tribunal. The tribunal and the court should actively seek new methods of improving institutional communication.</p>	<p>Accepted.</p>		<p>The Federal Court has convened regular user group meetings.</p>



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>6. Tribunal right to appear before Federal Court</b></p> <p>The NTA should be amended to give the tribunal a right to appear before the court and to provide assistance to the court.</p>	Accepted.	NTA s86BA	The tribunal has a right to appear before the Federal Court at a hearing that relates to any matter that is before the tribunal for mediation for the purpose of assisting the court in relation to a proceeding.
<p><b>7. Federal Court to take into account reports</b></p> <p>The NTA should be amended to require the Federal Court to take into account any report provided by the tribunal under s136G of the NTA when considering whether to make an order in relation to an application that has been referred to the tribunal for mediation.</p>	Accepted.	NTA s94B	<p>If an application under s61 NTA is referred to the tribunal for mediation, the Federal Court must take into account:</p> <ul style="list-style-type: none"> <li>▪ any report relating to the mediation under s136G(1), (2) or (3); and</li> <li>▪ any regional mediation report or regional work plan provided to the court under s136G(2A) or (3A) that covers a state, territory or region that includes the area covered by the application;</li> </ul> <p>when it decides whether to make an order relating to the application.</p>





Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>8. Regional mediation reports and regional work plans</b></p> <p>That the tribunal's reporting functions be expanded to enable the court to obtain relevant feedback on a regional basis.</p> <p>The court be empowered to request the tribunal to prepare a regional mediation progress report and/or a regional work plan in respect of a state, territory or region.</p> <p>When so requested the tribunal must prepare such a report.</p> <p>The tribunal may prepare a regional mediation progress report and/or a regional work plan in respect of a state, territory or region to assist the court in progressing the proceedings in the state, territory or region.</p>	Accepted.	NTA s86E s136G(2A)	<p>The Federal Court may request the tribunal to provide:</p> <ul style="list-style-type: none"> <li>▪ a regional mediation progress report – on the progress of all mediations conducted by the tribunal in relation to areas within the state, territory or region</li> <li>▪ a regional work plan – setting out the priority given to each mediation being conducted by the tribunal in relation to areas within the state, territory or region.</li> </ul>
<p><b>9. Particularisation of claims</b></p> <p>That further consideration be given to how claims can be better particularised at an earlier stage of proceedings in order to assist in the identification of relevant issues. This may require applicants to file evidentiary material earlier, preferably at the time of lodging the application (or within a stipulated time thereafter, for example, where the application is made in response to a future act notice).</p>	Government to give further consideration to these issues.		



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p>The court should consider making orders for pleadings or other kinds of particularisation. Consideration should also be given to amending the requirements of s61A and s62 [of the NTA] regarding the Form 1.</p>			
<p><b>10. NNTT's research facilities</b> More use should be made of the tribunal's research facilities and, in particular, its ability to produce research reports. In cases where the tribunal is requested to prepare a research report by the member conducting a mediation, the contents of the report should be disclosed to any party who makes a request. These reports should be supplied following the exercise of a discretion of the presiding member and taking account of any special circumstances.</p>	Accepted.		
<p><b>11. Database of tenure material</b> That further consideration be given to assisting the tribunal to continue to develop a database of current tenure material. This database should be publicly accessible to parties and their legal representatives.</p>	Government seeking further advice from the tribunal on this recommendation.		
<p><b>12. Registration test</b> That amendments be made to avoid the requirement for all amended applications to undergo the registration test again if the application has already passed the registration test. In particular:</p>	Considered in the context of the technical amendments to the NTA.		



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p>An amended application should not be subject to the registration test, unless the court orders otherwise, where a claimant application is amended to:</p> <ul style="list-style-type: none"> <li>■ reduce the area of land or waters covered by the application;</li> <li>■ reduce the list of asserted native title rights and interests; or</li> <li>■ remove the name of a deceased applicant where other applicants remain.</li> </ul> <p>Where a claimant application is amended to replace a deceased person as applicant, the amended application is not to be subject to the registration test if the Native Title Registrar is satisfied that:</p> <ul style="list-style-type: none"> <li>■ the amendment has been certified by the relevant representative body; or</li> <li>■ the amended application is accompanied by an affidavit sworn by the new applicant stating that the new applicant is authorised by the other persons in the native title claim group to deal with matters arising in relation to the application and stating the basis on which the new applicant is so authorised (see ss64(5) and 190C(4)) [of the NTA].</li> </ul> <p>Where an amendment is made which is not to be subject of the registration test, the Native Title Registrar must amend the Register to reflect that amendment as soon as possible.</p>			



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>13. Ambiguities in authorisation provisions</b></p> <p>That amendments be made to the authorisation provisions in the NTA to remove ambiguities. For example, it seems appropriate to clarify whether:</p> <ul style="list-style-type: none"> <li>▪ lack of authorisation is fatal to a claim;</li> <li>▪ authorisation that might have been effective can later be ratified or otherwise cured; and</li> <li>▪ the registered native title claimants must be unanimous in giving instructions, executing agreements and otherwise, or whether a majority is sufficient, or whether some other rules should apply, for example, rules similar to those in ss251A and 251B [of the NTA].</li> </ul>	<p>Considered in the context of the technical amendments to the NTA.</p>		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>14. Notification of people</b></p> <p>That the notification requirements in s66(3) of the NTA be amended to provide the court with greater flexibility in relation to who should be notified and as to when people are to be notified. In particular:</p> <p>Section 66 should be amended to allow the court to order notification of potentially affected interested holders at any time which it considers appropriate.</p> <p>The president of the tribunal should be empowered to direct the registrar not to notify an application under s66(3) of the NTA where:</p> <ul style="list-style-type: none"> <li>▪ a claimant application is lodged in response to a notice under s29 of the NTA and is registration tested within four months of the notification day (see s30(1)(a) and s190A(2)); and</li> <li>▪ it is apparent that the application is primarily for the purpose of securing the right to negotiate; and</li> <li>▪ if subsequently the President is satisfied that the application should be notified, the president should be required to direct the registrar to notify the application under s66(3).</li> </ul>	<p>Considered in the context of the technical amendments to the NTA.</p>		



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
<p><b>15. Dismissal of claimant applications: claims lodged in response to future act notices</b></p> <p>The NTA should be amended to require the court to order that a claimant application be dismissed where:</p> <ul style="list-style-type: none"> <li>▪ the application was made in response to a notice under s29 of the NTA;</li> <li>▪ the future act has occurred; and</li> <li>▪ the applicant has not produced connection material or sought to advance the substantive resolution of the application.</li> </ul> <p>The court should not be required to order a claimant application to be dismissed if there are compelling reasons not to do so.</p>	Accepted.	NTA s94C	<p>The Federal Court <b>must</b> dismiss an application made by a person under s61 if:</p> <ul style="list-style-type: none"> <li>▪ the application is for a determination of native title in relation to an area; and</li> <li>▪ it is apparent from the timing of the application that it is made in response to a future act notice given in relation to land or waters within the area; and</li> <li>▪ the future act requirements are satisfied in relation to each future act identified in the future act notice; and</li> </ul> <p>either:</p> <ul style="list-style-type: none"> <li>▪ the person fails to produce evidence in support of the application despite a direction by the court to do so, or to take other steps to have the claim sought in the application resolved despite a direction by the court to do so; or</li> </ul>



Claims resolution review recommendations	Government response	Legislative amendment	Short summary of change implemented
			<ul style="list-style-type: none"> <li>▪ in a case to which subparagraph (i) does not apply, the court considers that the person has failed, within a reasonable time, to take steps to have the claim sought in the application resolved.</li> </ul>
<p><b>16. Dismissal of claimant applications: failure to meet the merit test</b> part of the registration test</p> <p>Amend the NTA to deal with the following claims as follows:</p> <ul style="list-style-type: none"> <li>▪ Where a new claimant application does not satisfy all of the conditions of the relevant part of the registration test in s190B of the NTA (conditions about the merits of the claim), the Federal Court must order that the claim be dismissed unless the court is satisfied that: <ul style="list-style-type: none"> <li>– the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period;</li> <li>– there are good prospects of a negotiated outcome; or <ul style="list-style-type: none"> <li>– there are other reasons why the application should not be dismissed.</li> </ul> </li> </ul> </li> </ul>	Accepted.	NTA ss190F(5), (6)	<p>Where the claim has not been accept for registration because:</p> <ul style="list-style-type: none"> <li>▪ it does not satisfy all of the merit conditions for registration in s190B; or</li> <li>▪ it is not possible to determine whether all of the conditions in s190B have been satisfied because of a failure to satisfy the procedural conditions in s190C, and the court is satisfied certain avenues of reconsideration and review of the decision have been exhausted without the registration of the claim, the court <i>may</i> dismiss</li> </ul>



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<ul style="list-style-type: none"> <li>▪ In deciding whether an application should not be dismissed, the court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.</li> <li>▪ One year after the proposed amendments to the NTA commence to operate, the Native Title Registrar must apply the registration test to:               <ul style="list-style-type: none"> <li>– all claimant applications that are not on the Register of Native Title Claims; and</li> <li>– claimant applications that did not have to undergo the registration test.</li> </ul> </li> </ul> <p>The registration test should be re-applied (or applied as the case may be) to determine whether each application would satisfy all of the conditions of the relevant part of the registration test in s190B of the NTA (conditions about the merits of the claim). If an application would not satisfy all those conditions, the Native Title Registrar must inform the applicant of the reasons why the application would not satisfy the conditions and invite the applicant to amend the application or provide additional information within a nominated period. If the application is not amended or the additional information is not provided, the Native Title Registrar must report to the Federal Court about the</p>			<p>the application in which the claim was made if:</p> <ul style="list-style-type: none"> <li>▪ the court is satisfied the application has not been amended since consideration by the registrar and is not likely to be amended in a way that would lead to a different outcome once considered by the registrar; and</li> <li>▪ in the opinion of the court, there is no other reason why the application in issue should not be dismissed.</li> </ul>





<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p>current status of the application and the reasons why it is not registered. Where the court receives such a report from the Native Title Registrar, the court must order that the claim be dismissed unless the court is satisfied that:</p> <ul style="list-style-type: none"> <li>▪ the application will be amended, or additional information will be provided to satisfy the conditions of the registration test within a specified period;</li> <li>▪ there are good prospects of a negotiated outcome; or</li> <li>▪ there are other reasons why the application should not be dismissed.</li> </ul> <p>In deciding whether an application should not be dismissed, the court may have regard to the reasons of the Native Title Registrar or delegate and any other relevant material.</p>			
<p><b>17. Referral to Federal Court</b> That the tribunal and parties are encouraged to make greater use of the provisions of the NTA and of the Federal Court Rules (such as Order 29 Rule 2) to refer particular issues of fact and law to the court for determination.</p>	Accepted.		



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p><b>18. Third party respondents</b></p> <p>The tribunal should refer to the Federal Court for determination of the question of whether a party should be removed if it considers that a party does not have a relevant interest. Such referral should be dealt with by a Federal Court registrar under judge-delegated powers.</p>	Accepted.	NTA s136DA	If the tribunal considers that a party to a proceeding does not have a relevant interest in the proceeding it may refer to the Federal Court the question of whether the party should cease to be a party to the proceeding.
<p><b>19. Industry bodies</b></p> <p>That consideration be given to amending the 'party' provisions of the NTA (s84) to allow an industry body to intervene in a representative capacity if one or more of its members is or was otherwise entitled to be a party and wishes the industry body to represent him, her or them. This should be subject to the court's discretion to refuse permission to intervene as appropriate, to allow intervention on terms, and to later remove the industry body if relevant circumstances change.</p>	Accepted.		
<p><b>20. Interests of third parties</b></p> <p>That consideration be given to limiting the right of participation of a third party (that is, a non-government respondent party) to issues that are relevant to its interests and the way in which they may be affected by the determination sought.</p>	Accepted.	NTA s84(3)(a)	



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p><b>21. Gathering evidence</b> That the court and other relevant participants be encouraged to give greater priority to the holding of limited evidence and preservation hearings, coupled with contemporaneous dispute resolution.</p>	<p>Accepted to the extent it is consistent with the Government response to Recommendation 1. While limited evidence and preservation hearings can be conducted by the court while a matter is in mediation before the tribunal, the court should not engage in mediation in relation to the preservation hearing while the claim remains before the tribunal. The court should also consult with the tribunal on the timing of such hearings, to avoid disruption to the tribunal mediation.</p>		
<p><b>22. Section 137 inquiries</b> That s137 of the NTA not be amended.</p>	<p>Accepted.</p>	<p>No change</p>	



<b>Claims resolution review recommendations</b>	<b>Government response</b>	<b>Legislative amendment</b>	<b>Short summary of change implemented</b>
<p><b>23. Federal Court power to request tribunal inquiries</b></p> <p>That the NTA be amended to empower the Chief Justice to request that the tribunal hold an inquiry of the kind outlined in Recommendation 3, subject to the president's consideration of the availability of resources and the likely workload of the proposed inquiry.</p>	Accepted.	NTA s138B(1)(c)	The president of the tribunal may at the request of the Chief Justice of the Federal Court direct the tribunal to hold an inquiry in relation to a matter or an issue relevant to the determination of native title under s225.
<p><b>24. Federal Court</b></p> <p>That the court be encouraged to adopt a practice note setting out the court's preferred method for managing native title claims to ensure all parties have a shared understanding of the process.</p>	Accepted.		Federal Court has adopted a practice note.



# Appendix 2

## Recommendations in the PBC Report resulting in changes to PBC-related legislation

Recommendation	Implementation	Implications
<p><b>1.</b> Advise all stakeholders the extent to which NTRBs may assist PBCs following their establishment and incorporation.</p>	<p><b>Policy development</b> Department of Families, Community Services and Indigenous Affairs, Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)<sup>1</sup></p>	<ul style="list-style-type: none"> <li>▪ NTRBs will be allowed to use their native title program funding to assist PBCs with their day to day operations in specific circumstances.</li> <li>▪ NTRBs will be required to report on the nature and level of support they expect to provide to PBCs, and on the implementation of such measures.</li> </ul>
<p><b>2.</b> Prepare and maintain information packages for PBCs outlining:</p> <ul style="list-style-type: none"> <li>▪ relevant State and Territory legislation</li> <li>▪ potential sources of assistance through government grants and programs</li> <li>▪ potential support from the private sector.</li> </ul>	<p><b>Policy development</b></p> <ul style="list-style-type: none"> <li>▪ AIATSIS NTRU, Native Title Resource Guide<sup>2</sup></li> <li>▪ National Native Title Tribunal, Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate<sup>3</sup></li> </ul>	<ul style="list-style-type: none"> <li>▪ Provides information to PBCs and other stakeholders about State/Territory legislation, native title policies and procedures and native title more broadly.</li> <li>▪ Provides a compilation of the support available for PBCs including direct assistance, application-based and funding program assistance, and private sector assistance.</li> <li>▪ Improves the ability for PBCs to access and utilise existing sources of assistance.</li> <li>▪ Improves access to information affecting PBCs and native title holders.</li> </ul>



Recommendation	Implementation	Implications
<p><b>3.</b> The Attorney General should press State and Territory Governments to agree to:</p> <ul style="list-style-type: none"> <li>▪ ensure PBC establishment needs and other requirements are considered by all parties as a matter of practice when negotiating consent determinations or future act agreements.</li> <li>▪ actively promote a better understanding of the functions, needs and responsibilities of PBCs among other stakeholders in the native title system.</li> </ul>	<p><b>Process development</b></p> <ul style="list-style-type: none"> <li>▪ Facilitation through multilateral forums, such as the Native Title Ministers' Meeting, Native Title Consultative Forum</li> <li>▪ Facilitation through bilateral meetings and consultations at ministerial officer level</li> </ul> <p><b>Policy development</b></p> <p>Guidelines for the behaviour of parties and their representatives in mediation in the National Native Title Tribunal</p>	<ul style="list-style-type: none"> <li>▪ Provides an avenue for the consideration of PBC needs to become an established part of the process, both in negotiating determinations of native title, but also native title agreements.</li> <li>▪ Provides all native title parties with an understanding of the functions, needs and responsibilities of PBCs and native title holders.</li> <li>▪ Potential for further assistance from third party proponents to assist with achieving aspirations and outcomes.</li> </ul>
<p><b>4.</b> Coordinate the provision of relevant information for PBCs in the lead-up to a determination of native title. This should include:</p> <ul style="list-style-type: none"> <li>▪ information and training on roles and responsibilities</li> <li>▪ related governance issues</li> <li>▪ sound decision-making processes</li> <li>▪ record keeping.</li> </ul>	<p><b>Policy and process development</b></p> <ul style="list-style-type: none"> <li>▪ Information to be provided by ORAC, the National Native Title Tribunal and the relevant native title representative body</li> <li>▪ ORAC have produced a detailed information package addressing issues specific to native title and RNTBCs, in the CATSI Act – commencing 1 July 2007, and provide assistance and training with establishment and incorporation.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Increase PBC and native title holders understanding of roles and responsibilities and statutory obligations.</li> <li>▪ Improve the capacity for native title holders and PBCs to make informed decisions about appropriate governance structures.</li> <li>▪ Assist with the identification of and addressing training needs to ensure sound governance.</li> <li>▪ Improves the overall structure and governance of the PBC to allow for increased concentration on protecting the native title rights and interests.</li> </ul>



Recommendation	Implementation	Implications
<p><b>5.</b> Amend the PBC regime to provide that the statutory requirements for PBCs to consult with and obtain the consent of native title holder on 'native title decisions'<sup>4</sup> are limited to decisions to surrender native title rights and interests in relation to land and waters.</p>	<p><b>Legislative development</b> The Native Title Act<sup>5</sup> has been amended to allow the PBC Regulations to make provision to this effect.</p>	<ul style="list-style-type: none"> <li>▪ The removal of the statutory requirement contained in Section 58 of the Native Title Act, for PBCs to consult with the common law holders on all agreements and decisions that affect native title.</li> <li>▪ Compulsory consultation is now only applied to decisions to surrender native title rights and interests in land or waters.<sup>6</sup></li> <li>▪ Amends regulations to provide for agent-PBCs to enter native title agreements on behalf of common law holders that are legally binding.</li> </ul>
<p><b>6.</b> Amend PBC regulations to:</p> <ul style="list-style-type: none"> <li>▪ clarify the circumstances in which 'standing authorisations' may be issued to a PBC, and</li> <li>▪ to provide that only one certificate needs to be issued with each authorisation.</li> </ul>	<p><b>Legislative development</b> The Native Title (PBC) Regulations 1999<sup>7</sup> will make provision to this effect.</p>	<ul style="list-style-type: none"> <li>▪ Allows PBCs to certify their compliance with the consultation and consent requirements pursuant to a written certificate of authority.</li> <li>▪ Provides that if the proposed decision is of a kind about which the common law holders have been consulted; and that the common law holders have decided that decisions of that kind can be made by the PBC, only one authorisation is required.</li> <li>▪ Not all members of the native title holders identified in a native title determination must become members of the PBC – does not protect members who are not members of the PBC.</li> <li>▪ May amount to non-compliance with authorised procedures to be enforceable as part of the statutory scheme and may affect the validity of agreements not complying with them.<sup>8</sup></li> </ul>



Recommendation	Implementation	Implications
<p><b>7.</b> Amend the PBC regime to enable an existing PBC to be determined as a PBC for subsequent determinations of native title in circumstances where the native title holders covered by all determinations agree.</p>	<p><b>Legislative development</b></p> <ul style="list-style-type: none"> <li>▪ the Native Title Act<sup>9</sup> has been amended to allow the PBC Regulations to make provision to this effect.</li> <li>▪ the Native Title (PBC) Regulations 1999<sup>10</sup> will make provision to this effect.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Allows a prescribed body corporate to be the trustee for, or act as an agent or representative for more than one group of common law holders in relation to a native title determination, if consented to by all native title holders.</li> <li>▪ Allows PBC infrastructure and resources to be used by more than one group of native title holders, encouraging economies of scale.</li> <li>▪ Regulations will prescribe how consent is obtained for use of the PBC by the native title holders.</li> </ul>
<p><b>8.</b> Amend PBC regulations to remove the requirement that all members of a PBC be native title holders and associated safeguards should be included to ensure the protection of native title rights and interests.</p>	<p><b>Legislative development</b></p> <ul style="list-style-type: none"> <li>▪ not relevant to PBCs – NTA not amended to provide for this recommendation.</li> <li>▪ the CATSI Act has been amended to include an Indigeneity requirement but also allow for non Indigenous membership.</li> </ul>	<p>This amendment does not apply to PBCs – NTA was not amended and while non Indigenous membership is provided for under the CATSI Act, the Native Title Regulations protect PBCs from this provision.<sup>11</sup></p>
<p><b>9.</b> Develop and distribute appropriate educative material regarding obligations and requirements under the CATSI legislation to all PBCs and NTRBs. This should include:</p> <ul style="list-style-type: none"> <li>▪ a Guide to Good Governance specifically tailored to PBCs</li> <li>▪ model rules for PBCs</li> <li>▪ additional information as appropriate.</li> </ul>	<p><b>Process development</b></p> <ul style="list-style-type: none"> <li>▪ ORATSIC is currently developing a good governance tool to be delivered to the PBC sector by mid 2008.</li> <li>▪ ORATSIC is also developing model rules for PBCs.<sup>12</sup></li> </ul>	<p>The governance tool is expected to address common issues facing native title corporations registered with ORATSIC including corporate structure, trusts and compliance with both the CATSI Act and Native Title Act.</p>





Recommendation	Implementation	Implications
<p><b>10.</b> Modify the process for allocating funds to NTRBs to ensure appropriate priority is given to the performance of NTRB functions associated with assistance to PBCs.</p>	<p><b>Policy development</b> The Native Title Program <i>Guidelines for Support of PBCs</i> provide the policy and legislative framework and procedures for the application and allocation of funds to NTRBs to support PBCs.</p>	<ul style="list-style-type: none"> <li>▪ This is an application process and funding can not be guaranteed under the Native Title Program, or may not be provided to the extent sought.</li> <li>▪ Funding applications can be made at any time of the year – in addition to annual program funding.</li> <li>▪ The Native Title Program should not be considered a first option and applications will be assessed on the basis of alternative applications for funding from other sources.</li> <li>▪ Funding will only be provided on an annual basis – no certainty for longer term projects, and no guarantee of future funding.</li> </ul>
<p><b>11.</b> Amend the NTA to:</p> <ul style="list-style-type: none"> <li>▪ authorise PBCs to charge a third party for costs and disbursements reasonably incurred in performing its statutory functions under the NTA or the PBC Regulations at the request of the third party</li> <li>▪ provide for an appropriate authority to investigate such arrangements on request to ensure the costs were reasonably incurred.</li> </ul>	<p><b>Legislative development</b></p> <ul style="list-style-type: none"> <li>▪ The Native Title Act<sup>13</sup> has been amended to allow the PBC Regulations to make provision to this effect.</li> <li>▪ The inclusion of a new Division 7 – Financial matters, in the Native Title Act makes provision for this – commences on 1 July 2008.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Allows for PBCs to seek reimbursement from or charge third parties for costs and disbursements expended or incurred in performing statutory functions under the NTA or PBC regulations.</li> <li>▪ The Registrar of Aboriginal Corporations will be given discretionary power to give binding opinions on whether the fee is one that the RNTBC may charge.</li> <li>▪ May control and constrict the capacity for PBCs to charge for their services.</li> </ul>



Recommendation	Implementation	Implications
<p><b>12.</b> Amend the General Terms and Conditions Relating to Native Title Program Funding Agreements to enable NTRBs to assist PBCs with their day to day operations in circumstances where this has been approved by OIPC.</p>	<p><b>Policy development</b> Department of Families, Community Services and Indigenous Affairs, Native Title Program – Guidelines for Support of Prescribed Bodies Corporate (PBCs)<sup>14</sup></p>	<ul style="list-style-type: none"> <li>■ NTRBs will be allowed to use their native title program funding to assist PBCs with their day to day operations in specific circumstances.</li> <li>■ NTRBs will be required to report on the nature and level of support they expect to provide to PBCs, and on the implementation of such measures.</li> <li>■ PBCs will also be able to apply for funding independent of the NTRB.</li> <li>■ there will be no additional funding for PBCs this financial year.</li> </ul>
<p><b>13.</b> Actively promote measures for providing support to PBCs via Shared Responsibility Agreements (SRAs) and/or Regional Partnership Agreements (RPAs).</p>	<p><b>Policy development</b> The Department of Families, Community Services and Indigenous Affairs identified the potential for PBCs to benefit from negotiating SRAs and RPAs through ICCs.<sup>15</sup></p>	<ul style="list-style-type: none"> <li>■ Ministers noted the possibility of PBCs receiving assistance for broader functions via Shared Responsibility Agreements, and Regional Partnership Agreements or both.<sup>16</sup></li> <li>■ Potential for SRAs/RPAs to promote the effective functioning of PBCs through establishment grants, infrastructure support, capacity building or funding employment for PBC staff.</li> </ul>
<p><b>14.</b> Consider possible measures to enable State and Territory land rights corporations to act as PBCs where the native title holders agree to this.</p>	<p><b>Process development</b> The Australian Government will consult state and territory governments on possible measures to enable state or territory land rights corporations to act as PBCs where the native title holders agree to this.<sup>17</sup></p>	<ul style="list-style-type: none"> <li>■ Ministers noted that consultation is to take place to advance this recommendation.</li> <li>■ Potential to avoid the duplication and wastage of resources.</li> <li>■ State and territory legislative requirements will be necessary.</li> <li>■ Potential conflict of interest.</li> </ul>



Recommendation	Implementation	Implications
<p><b>15.</b> Develop a mechanism for the determination of a 'default PBC'<sup>18</sup> in appropriate circumstances.</p>	<p><b>Legislative development</b> The Native Title Act<sup>19</sup> has been amended to allow the PBC Regulations to make provision to this effect.</p> <p><b>Policy development</b> The OIPC are currently drafting legislative and regulatory amendments for the establishment of 'default' bodies corporate to perform PBC functions in circumstances where there is no functioning PBC nominated by the native title holders.</p>	<ul style="list-style-type: none"> <li>▪ Regulations can be used to dictate to native title holders the body that will hold their native title and/or act as their exclusive agent in relation to the protection and management of their native title.</li> <li>▪ A 'transfer out' option will be provided by Regulation – common law holders will be able to transfer out of a default PBC and replace it with a new PBC.<sup>20</sup></li> </ul>



- 1 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate* (PBCs), Land Branch, Canberra, 2007, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/psc\\_rntbc.html](http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html), accessed 24 October 2007.
- 2 Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Unit, *Native Title Resource Guide*, available online at <http://ntru.aiatsis.gov.au/research/resourceguide/index.html>, accessed 24 October 2007.
- 3 National Native Title Tribunal, *Guide to Sources of Assistance and Funding for Prescribed Bodies Corporate*, Research Unit, May 2007, available online at: [http://www.nntt.gov.au/research/files/guide\\_to\\_sources.pdf](http://www.nntt.gov.au/research/files/guide_to_sources.pdf), accessed 24 October 2007.
- 4 A 'native title decision' is currently defined in Regulation 8(1) of the PBC Regulations to mean: a decision: (i) to surrender native title rights and interests in relation to land or waters; or (ii) to do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.
- 5 *Native Title Act 1993* (Cth), s58.
- 6 Native Title Amendment Bill 2006, *Explanatory Memorandum*, p73.
- 7 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 9(2).
- 8 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 8(7). Note this gives individual native title holders a cause of action against the PBC.
- 9 *Native Title Act 1993* (Cth), s59A.
- 10 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 5.
- 11 Native Title (Prescribed Bodies Corporate) Regulations 1999, Regulation 4(2)(a), all members of the corporation are persons who are included, or proposed to be included in the native title determination as native title holders, and Regulation (4)(2)(c) at all times after the determination is made, all members of the corporation are persons who have native title rights and interests in relation to the land or waters to which the native title determination relates.
- 12 Office of the Registrar of Aboriginal and Torres Strait Islander Corporations (ORATSIC), *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner – Request for Information in preparation of Native Title Report 2007*, Letter, 16 October 2007.
- 13 *Native Title Act 1993* (Cth), Part 2, Division 7, s60AB, s60AC, not yet included in the Native Title Act. As cited in Native Title (Technical Amendments) Act 2007, Schedule 3, Item 7, commences on 1 July 2008.
- 14 Department of Families, Community Services and Indigenous Affairs, *Native Title Program – Guidelines for Support of Prescribed Bodies Corporate* (PBCs), Land Branch, Canberra, 2007, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/psc\\_rntbc.html](http://ntru.aiatsis.gov.au/major_projects/psc_rntbc.html), accessed 24 October 2007.
- 15 Bauman, T., Tran, T., *First National Prescribed Bodies Corporate Meeting: Issues and Outcomes*, Canberra 11-13 April 2007, Australian Institute of Aboriginal and Torres Strait Islander Studies, Native Title Research Report no3/2007, p33, available online at: [http://ntru.aiatsis.gov.au/major\\_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf](http://ntru.aiatsis.gov.au/major_projects/PBC%20Workshop%20Report%2011-13%20April%202007%20final.pdf), accessed 23 October 2007.
- 16 Australian Government Attorney General's Department, Native Title Ministers Meeting, 15 December 2006, Canberra, Available online at: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle\\_Nativetitle\\_Nativetitleministersmeeting-15December2006Canberra](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitleministersmeeting-15December2006Canberra), accessed 24 October 2007.
- 17 Australian Government Attorney General's Department, Native Title Ministers Meeting, 15 December 2006, Canberra, Available online at: [http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle\\_Nativetitle\\_Nativetitleministersmeeting-15December2006Canberra](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Nativetitle_Nativetitleministersmeeting-15December2006Canberra), accessed 24 October 2007.
- 18 A 'default' body may be determined to perform the functions of a PBC in the absence of a body nominated by the native title holders. Attorney-General's Department, the Office of Indigenous Policy Coordination and the Office of the Registrar of Aboriginal Corporations, Structures and Processes of Prescribed Bodies Corporate, p28, available online at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/\\$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf/$file/c0000ReporttoGovernmentNativeTitlePrescribedBodiesCorporatePBCs.pdf), accessed 9 August 2007.
- 19 *Native Title Act 1993* (Cth), s59 and s60.
- 20 Native Title Amendment (Technical Amendments) Bill 2007, *Explanatory Memorandum*, p76, available online at: [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(878CAEAF8D7CA41B4CD31727CCC28450\)~Explanatory+Memorandum+-+Native+Title+Amendment+\(Technical+Amendments\)+Bill+2007.pdf/\\$file/Explanatory+Memorandum+Native+Title+Amendment+\(Technical+Amendments\)+Bill+2007.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(878CAEAF8D7CA41B4CD31727CCC28450)~Explanatory+Memorandum+-+Native+Title+Amendment+(Technical+Amendments)+Bill+2007.pdf/$file/Explanatory+Memorandum+Native+Title+Amendment+(Technical+Amendments)+Bill+2007.pdf), accessed 18 October 2007.



# Appendix 3

## Types of corporations holding land interests

Land corporation/association/trust	Legislation	Aim
<b>Jurisdiction: Commonwealth</b>		
Indigenous corporation, 'Prescribed Body Corporate (PBC)' as agent or trustee for common law native title holders	<i>Native Title Act 1993 and Native Title (Prescribed Bodies Corporate) Regulations 1999</i>	To recognise and protect native title, set up a process to determine claims for native title. Applies throughout Australia.
Aboriginal Land Trusts - consisting of Aboriginal people resident in the regional Land Council area	<i>Aboriginal Land Rights (Northern Territory) Act 1976</i>	Granting of title for traditional Aboriginal owners in the Northern Territory only.
Wreck Bay Aboriginal Community Council: ss4, 6(a)	<i>Aboriginal Land Grant (Jervis Bay Territory) Act 1986</i>	To grant land to the Wreck Bay Aboriginal community at Jervis Bay in the ACT.
Kerrup-Jmara Elders Aboriginal Corporation at Lake Condah. Kirrae Whurrong Aboriginal Corporation at Framlingham Forest	<i>Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987</i>	To provide for vesting of land for certain Aboriginal communities in Victoria by the Commonwealth at the request of the Victorian Government.



Land corporation/association/trust	Legislation	Aim
<b>Jurisdiction: New South Wales</b>		
Local Aboriginal Land Councils (LALC) or the New South Wales Aboriginal Land Council (NSWALC) can acquire, hold and deal with land	<i>Aboriginal Land Rights Act 1983</i>	To acknowledge the importance of land to Aborigines and its spiritual, social, cultural and economic significance and provide a process to return land.
NSWALC or LALC as per <i>Aboriginal Land Rights Act 1983</i> (NSW) – see above	<i>National Parks and Wildlife Act 1974</i>	Provides for the ownership of approved areas that are national parks, nature reserves, a historic site, or state conservation area, regional park, karst conservation reserve or Aboriginal areas that are of ‘cultural significance’ to Aboriginal people: s71D, 71Y.  The particular areas are in Schedule 14 of the Act.
<b>Jurisdiction: Northern Territory</b> The landmark Indigenous land rights legislation in Australia, the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth) applies to the Northern Territory, but is listed in the Commonwealth jurisdiction (above) because it is a federal Act.		
Aboriginal Association representing the community	<i>Pastoral Land Act 1992</i>	To provide land title for Aboriginal communities (a living area) on pastoral lease land based on historical association and present need: s92(1).
<b>Jurisdiction: South Australia</b>		
State-wide Aboriginal Land Trust – Aboriginal persons appointed by government including Minister’s representative	<i>Aboriginal Lands Trust Act 1966</i>	To grant land (previously set aside as Aboriginal reserves) directly to the control of an Aboriginal body.



Land corporation/association/trust	Legislation	Aim
Anangu Pitjantjatjara (AP) – a body corporate comprising all the traditional owners in the area	<i>Pitjantjatjara Land Rights Act 1981</i>	To provide ownership directly to the Traditional Owners.
Maralinga Tjarutja (MT) – a body corporate comprising all the traditional owners in the area	<i>Maralinga Tjarutja Land Rights Act 1984</i>	To provide ownership directly to the traditional owners.
<b>Jurisdiction: Queensland</b>		
Trustees appointed by the Minister: ss28, 65 and Part 3 Aboriginal Land Regulation 1991 (Qld)	<i>Aboriginal Land Act 1991</i>	To provide for the claim and grant of, land to Aboriginal people and foster self-development, self-reliance and cultural integrity.
As above. Similar provisions to <i>Aboriginal Land Act 1991</i> (Qld) apply	<i>Torres Strait Islander Land Act 1991</i>	As above. Similar provisions to <i>Aboriginal Land Act 1991</i> (Qld) apply.
Community Councils and later trustees of Aboriginal land under <i>Aboriginal Land Act</i> .	<i>Aborigines and Torres Strait Islanders (Land Holding) Act 1985</i>	To provide secure title (individual leases) to Indigenous community members on communal land.
Community Councils as trustee	<i>Land Act 1994</i>	Create public reserves including for Indigenous people (Schedule 1 Community Purposes).
<b>Jurisdiction: Victoria</b>		
Aboriginal Trust consisting of residents only	<i>Aboriginal Lands Act 1970</i>	To make permanent the land grant and vest the land in the local resident community. Applies to Lake Tyers and Framlingham Aboriginal communities only.
Aborigines Advancement League Inc	<i>Aboriginal Lands (Aborigines' Advancement League) (Watt Street) Northcote) Act 1982</i>	Vest the Crown grant of land in the trustees of the Advancement League.



Land corporation/association/trust	Legislation	Aim
Aborigines Advancement League Inc.	<i>Aboriginal Land (Northcote Land) Act 1989</i>	Permanently vest block of land for Aboriginal community purposes.
Wurundjeri Tribe Land and Compensation Cultural Heritage Council Inc. Goolum Goolum Aboriginal Co-operative Ltd. Gippsland & East Gippsland Aboriginal Co-operative Ltd.	<i>Aboriginal Lands Act 1991</i>	Grant of specific blocks of land for cultural and burial purposes.
Murray Valley Aboriginal Co-operative Ltd	<i>Aboriginal Land (Manatunga Land) Act 1992</i>	Grant of land at Robinvale and to extinguish existing leases and other encumbrances: s1.
<b>Jurisdiction: Tasmania</b>		
Aboriginal Land Council – state-wide elected Aboriginal body corporate	<i>Aboriginal Lands Act 1995</i>	To promote reconciliation . . . by granting certain parcels of land of historic or cultural significance.
<b>Jurisdiction: Western Australia</b>		
Crown through Aboriginal Land Trust (ALT) appointed by Minister or Aboriginal Affairs Planning Authority	<i>Aboriginal Affairs Planning Authority Act 1972</i>	For the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia.
Aboriginal person or approved Aboriginal Corporation: s83 Aboriginal reserves generally vested in ALT see <i>Aboriginal Affairs Planning Authority Act 1972</i> above; or resident Aboriginal Corporation.	<i>Land Administration Act 1997</i>	To provide Crown land for benefit of Aboriginal persons.





# Appendix 4

## Classification of corporations

<b>Classification</b>	<b>Threshold criteria under s45A, Corporations Act 2001<sup>1</sup></b>	<b>Threshold criteria under the CATSI Act</b>	<b>Reporting requirements</b>
<p>Small corporations will be those that satisfy 2 out of the 3 threshold criteria under the CATSI Act</p>	<ul style="list-style-type: none"> <li>▪ consolidated revenue of the company and any entities it controls for the financial year is less than \$25 million or any other amount prescribed by the regulations;</li> <li>▪ consolidated gross assets (CGA) at the end of the financial year of the company and any entities it controls is less than \$12.5 million or any other amount prescribed by the regulations;</li> <li>▪ the company and any entities it controls have fewer than 50 employees or any other number prescribed by the regulations at the end of the financial year.</li> </ul>	<ul style="list-style-type: none"> <li>▪ total consolidated gross operating income (CGOI) for the financial year is less than \$100,000;</li> <li>▪ total CGA at the end of the financial year of the corporation is less than \$100,000;</li> <li>▪ total employees at the end of the financial year are fewer than 5.</li> </ul>	<ul style="list-style-type: none"> <li>▪ Small corporations will need only to provide a general report which contains basic contact information such as name and address of current directors, members and contact person/secretary;</li> <li>▪ They are not required to lodge annual financial statements.</li> </ul>



<b>Classification</b>	<b>Threshold criteria under s45A, Corporations Act 2001<sup>1</sup></b>	<b>Threshold criteria under the CATSI Act</b>	<b>Reporting requirements</b>
Medium corporations will be those that satisfy 2 out of the 3 threshold criteria under the CATSI Act	Not applicable.	<ul style="list-style-type: none"> <li>▪ between \$100,000 and \$5 million CGOI;</li> <li>▪ between \$100,000 and \$2.5 million CGA;</li> <li>▪ between from 5 and 24 employees.</li> </ul>	In addition to the general report, medium corporations are required to prepare qualified financial reports covering all income and expenditure, assets and liabilities and be subject to special purpose audits.
Large corporations will be those that satisfy 2 out of the 3 threshold criteria under the CATSI Act	<ul style="list-style-type: none"> <li>▪ consolidated revenue of the company and any entities it controls for the financial year is \$25 million or any other amount prescribed by the regulations, or more;</li> <li>▪ CGA at the end of the financial year of the company and any entities it controls is \$12.5 million or any other amount prescribed by the regulations, or more;</li> <li>▪ the company and any entities it controls have 50 employees or more at the end of the financial year.</li> </ul>	<ul style="list-style-type: none"> <li>▪ \$5 million or more CGOI;</li> <li>▪ \$2.5 million or more CGA;</li> <li>▪ 25 or more employees.</li> </ul>	In addition to the general report, large corporations are required to meet the same reporting requirement as public limited liability companies, that is: financial statements and directors reports, and subject to audit by a registered company auditor.

CGA = consolidated gross assets

CGOI = consolidated gross operating income

<sup>1</sup> At least two of the threshold criteria must be satisfied for proprietary companies



# Appendix 5

## ILUAs where a local government authority is an applicant or a party

ILUA No.	ILUA short name	Date Lodged	Status	Date Registered
QI01/10	Urandangie (Marmanya) ILUA	23/08/2001	Registered	24/05/2002
QI01/26	Aurukun Township & Access Road Agreement	24/06/2002	Registered	18/03/2003
QI01/53	Bar-Barrum and Mareeba Shire Council ILUA	09/11/2001	Registered	08/03/2002
QI2002/043	Bar-Barrum and Herberton Shire Council	05/07/2002	Registered	28/10/2002
QI2002/064	Kalkadoon/Mt Isa Northridge Industrial Estate ILUA	11/03/2003	Registered	08/09/2003
QI2003/002	Wik& Wik Way and Cook Shire Council Agreement	29/10/2004	Registered	24/03/2005
QI2003/011	Hughenden Industrial Estate	08/05/2003	Registered	22/09/2003
QI2003/016	Yulluna Indigenous Land Use Agreement for backlog Exploration Permits	21/04/2003	Registered	24/11/2003
QI2003/021	Tagalaka Croydon Area ILUA #1	17/03/2005	Registered	19/08/2005
QI2003/038	Dauan Island Indigenous Land Use Agreement	02/03/2004	Registered	13/05/2004



<b>ILUA No.</b>	<b>ILUA short name</b>	<b>Date Lodged</b>	<b>Status</b>	<b>Date Registered</b>
QI2004/001	Northern Peninsula Area Infrastructure ILUA	28/06/2005	Registered	12/12/2005
QI2004/26	Mandingalbay Yidinji People and Cairns City Council	03/01/2006	Registered	18/05/2006
QI2004/033	Dingo Beach ILUA	30/01/2007	Registered	30/07/2007
QI2004/064	Western Yalanji & Cook Shire Council	25/11/2005	Registered	18/05/2006
QI2005/005	Reservoir Ridge Sub-division C	31/03/2005	Registered	02/09/2005
QI2005/007	Western Yalanji and Mareeba Shire Council	25/11/2005	Registered	18/05/2006
QI2006/009	Eastern Kuku Yalanji, the State of Queensland & Cook Shire Council	24/04/2007	In Notification	
QI2006/011	Eastern Kuku Yalanji, the State of Queensland & Douglas Shire Council	24/04/2007	In Notification	
QI2006/024	Eastern Kuku Yalanji & Douglas Shire Council – Local Government Agreement	10/04/2007	In Notification	
QI2006/025	Eastern Kuku Yalanji & Cook Shire Council	10/04/2007	In Notification	
QI2007/010	Aurukun Bauxite Project (Feasibility Study) Agreement	31/05/2007	Registered	06/08/2007
QIA2000/001	Cairns Esplanade Project Agreement	25/02/2000	Registered	25/09/2000
QIA2000/003	Kaurareg People/Torres Shire Council/State of Queensland – ILUA	12/10/2000	Registered	16/03/2001



<b>ILUA No.</b>	<b>ILUA short name</b>	<b>Date Lodged</b>	<b>Status</b>	<b>Date Registered</b>
QIA2000/011	Dunwich Sewage Treatment Plant	07/12/2000	Registered	22/06/2001
QIA2000/012	Cloncurry ILUA	18/12/2000	Registered	22/06/2001
QIA2001/002	Comalco ILUA	16/03/2001	Registered	24/08/2001
SI2003/004	Narungga Local Government	07/04/2005	Registered	06/10/2005
SI2005/007	Ceduna Keys Marina ILUA	07/04/2005	Registered	11/12/2006
VI2005/001	Mildura Marina	08/02/2005	Registered	06/10/2005
WI2005/01	SDWK Nyikina Mangala	28/08/2006	Notification ended	





# Appendix 6

## Coexistence of rights, interests and responsibilities of native title parties and local governments

Native title rights and interests	Categories of local government rights, interests and responsibilities
<ul style="list-style-type: none"> <li>■ rights to be acknowledged as the traditional owners of the claim areas</li> <li>■ rights to possess, occupy, use and enjoy the claim areas to the exclusion of all others</li> <li>■ rights to make decisions about the use and enjoyment of the claim areas and their natural resources</li> <li>■ rights to give or refuse, and determine the terms of any, permission to enter, remain on, use or occupy the claim areas by others</li> <li>■ rights to access and use the claim areas and their natural resources for customary purposes including to perform customary ritual and ceremony</li> <li>■ rights to hunt and gather flora and fauna</li> <li>■ rights to use and enjoy the natural resources of the claim areas for customary and commercial purposes</li> <li>■ rights to access and use water, sea and seabeds</li> <li>■ involvement in land use planning, management and environmental issues, including rights to protect, manage and maintain sites and places of importance under traditional laws, customs and practices in the claim areas</li> <li>■ future act and cultural heritage compliance issues</li> <li>■ employment and training</li> </ul>	<p><b>Property interests:</b> All interests in land or waters held at law by the local government in the claim area;</p> <p><b>Trustee interests:</b> All interests involving trusteeship by the local government, or which gave rise to the rights or powers of management and control by the local government, in relation to land or waters in the claim area;</p> <p><b>Interests under agreements:</b> All interests in, or derived from, any agreement, offer or undertaking between the local government and a third party which relates to land or waters in the claim area;</p> <p><b>Interests in improvements:</b> All ownership and operational interests in infrastructure, structures, earthworks, access routes, plantings, maintained areas and improvements of any kind, in or on land or waters in the claim area including the local government's interests derived from having constructed, funded, operated, used or maintained such improvements;</p> <p><b>Operational interests:</b> All interests involving access to, or the carrying out of activities on land or waters in the claim area undertaken as part of the local government's statutory responsibility to provide for the good rule and government of its local government area;</p> <p><b>Regulatory interests:</b> All interests, including any rights, powers and functions, derived from the local government's jurisdiction and as an entity exercising rights or powers under any law.<sup>1</sup></p>



- |   |  |
|---|--|
| <ul style="list-style-type: none"><li>▪ engagement and community building</li><li>▪ Indigenous business enterprises</li><li>▪ commercial partnerships/joint venture opportunities with councils e.g. residential subdivisions</li><li>▪ social initiatives.<sup>2</sup></li></ul> |  |
|---|--|

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1 Gilkerson O., Humphris J. (MacDonnells Law), Escartin M. (Gurang Land Council), Cartledge D. (LGAQ), *Indigenous Land Use Agreement between 'Native Title Party' and the 'Local Government'*, Working Draft, November 2007.

2 Gurang Land Council, *Model Indigenous Land Use Agreement between Native Title Parties and Local Governments*, Discussion Paper, 30 July 2007.





# Appendix 7

## Technical and legal aspects of central Queensland's local government ILUA template

### 1. Consent determination

Section 87 of the Native Title Act empowers the Federal Court to make a consent determination where agreement about a claim is reached between the parties. Section 94A requires all determinations of native title, including consent determinations, to set out details of the matters mentioned in Section 225 (which defines *determination of native title*).

Where a particular council and native title party adopt the ILUA template in the mediation of a claim, they commit to a consent determination as their preferred claim resolution outcome. Because determination orders must cover all of the matters in Section 225 and because a local government ILUA will generally be concluded early in the mediation process, the following conditions to a council's consent to final determination orders are included in the ILUA.

- The native title party agrees not to seek a determination of exclusive native title rights and interests in those parts of the claim area where there are *existing* local government or community interests. Exclusive native title can still be recognised for other parts of the claim area. For areas where there are existing local government or community interests, it is unlikely that the requisite exclusivity would apply to native title rights in any event.
- The nature and extent of local government interests and the relationship between those interests and native title must be stated in consent determination orders in a way which is consistent with the terms of the ILUA. Other provisions in the ILUA set out the relationship. This simply assures the council that, at a final determination hearing, the proposed consent orders will properly address the requirement in Section 225(c).
- There is a recognition that the State of Queensland will need to consent to the determination orders. This is a statement of the legal position in any event. It emphasises the need for the native title party to go on and mediate successfully with the state. The local government has the comfort of knowing that the state will address issues of connection when making its decision about whether to consent.



- It is acknowledged that the nature and extent of extinguishment over particular parcels of land needs to be included in the consent determination orders in a way that is consistent with the terms of the ILUA. Other provisions in the ILUA set out the agreed principles governing the identification of particular areas where extinguishment will have occurred. This is to ensure that, in terms of Section 225, there is accurate recognition in final determination orders about whether or not native title exists *in relation to a particular area*.
- As ILUAs take effect upon registration by the National Native Title Tribunal, there is a requirement that before the local government gives its consent, the ILUA is entered in the Register of Indigenous Land Use Agreements.

## 2. Conditions involving the state's requirements

The template ILUA anticipates a particular council respondent and the native title party as the parties to the agreement. In some cases the state as a respondent party to every claim, could choose to participate in the council/local government mediation and be included as a party to the ILUA.

The template ILUA, insofar as the conditions of a council's consent to a determination are concerned, specifies that the state's agreement will be required before consent determination orders are made by the court. That is a statement of the legal position that applies in any event. The condition does emphasise the need for native title parties to not only achieve agreement with council respondents, but with other respondents as well – most importantly the state.

## 3. Non-extinguishment principle and compulsory acquisitions

Sections 24EB(1)(d) and (3) of the Native Title Act, contain a technicality about the application of the statutory *non-extinguishment principle* to future acts covered by a body corporate or area agreement ILUA. In relation to the alternative future act compliance arrangements for local government activities in the template ILUA, the intention is that no act covered by those arrangements causes extinguishment. The parties expressly state that the non-extinguishment principle applies. The objective is to preserve native title to the greatest extent possible – even where council activities do affect native title.

There are very few acts where, for legal purposes, a council would require the extinguishment of native title. An example of where extinguishment would be necessary, is where council seeks a new grant of freehold title from the state over a particular parcel of land. The security of freehold title may, for example, be needed for a major project.

In cases like that, native title could only be cleared from the freeholding area by way of a surrender of native title under a further project specific ILUA (to which the state must be a party), or by way of the compulsory acquisition of native title. The ILUA template does not anticipate the state as a party. Consequently it does not provide for the surrender of native title (although the template could be varied in particular cases to provide for that where the state decides to participate).



In relation to the compulsory acquisition of native title for specific future council projects, where a freehold grant is required the template ILUA contains an innovative arrangement. Section 24MD of the Native Title Act provides that native title can be compulsorily acquired (and thereby extinguished) on the same basis as non-native title interests. The template ILUA includes an option for the council party to follow a process of reaching agreement with the native title party *before* a compulsory acquisition process is commenced in any particular case.

The process of attempting to reach agreement first, gives the parties an opportunity to resolve the native title issue in a non-controversial way. The native title party may agree not to object to the compulsory acquisition and agreed outcomes could be reached under which the council's compensation liability for the compulsory acquisition is resolved.



# Appendix 8

## Special measures



A special measure is an exception to the general rule that all racial groups must be treated the same. Special measures are permitted by section 8(1) of the *Racial Discrimination Act 1975*. Section 8(1) implements Articles 1(4) and 2(2) of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), as follows:

1(4) Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved;

2(2) States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

Special measures have some essential characteristics. They must:

- provide a benefit to some or all members of a group who share a common race, colour, descent, national origin or ethnic origin;
- have the sole purpose of securing the advancement of the group so they can enjoy human rights and fundamental freedoms equally with others;
- be necessary for the group to achieve that purpose; and
- stop once its purpose has been achieved and not set up separate rights permanently for different racial groups.





# Appendix 9

## UN Declaration on the Rights of Indigenous Peoples

*The General Assembly,*

Guided by the purposes and principles of the Charter of the United Nations, and good faith in the fulfilment of the obligations assumed by States in accordance with the Charter,

*Affirming* that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such,

*Affirming also* that all peoples contribute to the diversity and richness of civilizations and cultures, which constitute the common heritage of humankind,

*Affirming further* that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust,

*Reaffirming* that indigenous peoples, in the exercise of their rights, should be free from discrimination of any kind,

*Concerned* that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,

*Recognizing* the urgent need to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources,

*Recognizing also* the urgent need to respect and promote the rights of indigenous peoples affirmed in treaties, agreements and other constructive arrangements with States,

*Welcoming* the fact that indigenous peoples are organizing themselves for political, economic, social and cultural enhancement and in order to bring to an end all forms of discrimination and oppression wherever they occur,

*Convinced* that control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs,



*Recognizing* that respect for indigenous knowledge, cultures and traditional practices contributes to sustainable and equitable development and proper management of the environment,

*Emphasizing* the contribution of the demilitarization of the lands and territories of indigenous peoples to peace, economic and social progress and development, understanding and friendly relations among nations and peoples of the world,

*Recognizing in particular* the right of indigenous families and communities to retain shared responsibility for the upbringing, training, education and well being of their children, consistent with the rights of the child,

*Considering* that the rights affirmed in treaties, agreements and other constructive arrangements between States and indigenous peoples are, in some situations, matters of international concern, interest, responsibility and character,

*Considering also* that treaties, agreements and other constructive arrangements, and the relationship they represent, are the basis for a strengthened partnership between indigenous peoples and States,

*Acknowledging* that the Charter of the United Nations, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights as well as the Vienna Declaration and Programme of Action, affirm the fundamental importance of the right to self-determination of all peoples, by virtue of which they freely determine their political status and freely pursue their economic, social and cultural development,

*Bearing in mind* that nothing in this Declaration may be used to deny any peoples their right to self-determination, exercised in conformity with international law,

*Convinced* that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith,

*Encouraging* States to comply with and effectively implement all their obligations as they apply to indigenous peoples under international instruments, in particular those related to human rights, in consultation and cooperation with the peoples concerned,

*Emphasizing* that the United Nations has an important and continuing role to play in promoting and protecting the rights of indigenous peoples,

*Believing* that this Declaration is a further important step forward for the recognition, promotion and protection of the rights and freedoms of indigenous peoples and in the development of relevant activities of the United Nations system in this field,

*Recognizing and reaffirming* that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess collective rights which are indispensable for their existence, well-being and integral development as peoples,

*Recognizing* also that the situation of indigenous peoples varies from region to region and from country to country and that the significance of national and regional particularities and various historical and cultural backgrounds should be taken into consideration,





*Solemnly proclaims* the following United Nations Declaration on the Rights of Indigenous Peoples as a standard of achievement to be pursued in a spirit of partnership and mutual respect:

*Article 1*

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

*Article 2*

Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.

*Article 3*

Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

*Article 4*

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

*Article 5*

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.

*Article 6*

Every indigenous individual has the right to a nationality.

*Article 7*

1. Indigenous individuals have the rights to life, physical and mental integrity, liberty and security of person.
2. Indigenous peoples have the collective right to live in freedom, peace and security as distinct peoples and shall not be subjected to any act of genocide or any other act of violence, including forcibly removing children of the group to another group.

*Article 8*

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
  - (a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;



(b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;

(c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

(d) Any form of forced assimilation or integration;

(e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

#### *Article 9*

Indigenous peoples and individuals have the right to belong to an indigenous community or nation, in accordance with the traditions and customs of the community or nation concerned. No discrimination of any kind may arise from the exercise of such a right.

#### *Article 10*

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

#### *Article 11*

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.

2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

#### *Article 12*

1. Indigenous peoples have the right to manifest, practice, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.

2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

#### *Article 13*

1. Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.



2. States shall take effective measures to ensure that this right is protected and also to ensure that indigenous peoples can understand and be understood in political, legal and administrative proceedings, where necessary through the provision of interpretation or by other appropriate means.

#### *Article 14*

1. Indigenous peoples have the right to establish and control their educational systems and institutions providing education in their own languages, in a manner appropriate to their cultural methods of teaching and learning.

2. Indigenous individuals, particularly children, have the right to all levels and forms of education of the State without discrimination.

3. States shall, in conjunction with indigenous peoples, take effective measures, in order for indigenous individuals, particularly children, including those living outside their communities, to have access, when possible, to an education in their own culture and provided in their own language.

#### *Article 15*

1. Indigenous peoples have the right to the dignity and diversity of their cultures, traditions, histories and aspirations which shall be appropriately reflected in education and public information.

2. States shall take effective measures, in consultation and cooperation with the indigenous peoples concerned, to combat prejudice and eliminate discrimination and to promote tolerance, understanding and good relations among indigenous peoples and all other segments of society.

#### *Article 16*

1. Indigenous peoples have the right to establish their own media in their own languages and to have access to all forms of non-indigenous media without discrimination.

2. States shall take effective measures to ensure that State-owned media duly reflect indigenous cultural diversity. States, without prejudice to ensuring full freedom of expression, should encourage privately owned media to adequately reflect indigenous cultural diversity.

#### *Article 17*

1. Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic labour law.

2. States shall in consultation and cooperation with indigenous peoples take specific measures to protect indigenous children from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development, taking into account their special vulnerability and the importance of education for their empowerment.

3. Indigenous individuals have the right not to be subjected to any discriminatory conditions of labour and, inter alia, employment or salary.

*Article 18*

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

*Article 19*

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

*Article 20*

1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions, to be secure in the enjoyment of their own means of subsistence and development, and to engage freely in all their traditional and other economic activities.

2. Indigenous peoples deprived of their means of subsistence and development are entitled to just and fair redress.

*Article 21*

1. Indigenous peoples have the right, without discrimination, to the improvement of their economic and social conditions, including, inter alia, in the areas of education, employment, vocational training and retraining, housing, sanitation, health and social security.

2. States shall take effective measures and, where appropriate, special measures to ensure continuing improvement of their economic and social conditions. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities.

*Article 22*

1. Particular attention shall be paid to the rights and special needs of indigenous elders, women, youth, children and persons with disabilities in the implementation of this Declaration.

2. States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

*Article 23*

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.



#### *Article 24*

1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.
2. Indigenous individuals have an equal right to the enjoyment of the highest attainable standard of physical and mental health. States shall take the necessary steps with a view to achieving progressively the full realization of this right.

#### *Article 25*

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

#### *Article 26*

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

#### *Article 27*

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

#### *Article 28*

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

*Article 29*

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

*Article 30*

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

*Article 31*

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

*Article 32*

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.



#### *Article 33*

1. Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.
2. Indigenous peoples have the right to determine the structures and to select the membership of their institutions in accordance with their own procedures.

#### *Article 34*

Indigenous peoples have the right to promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices and, in the cases where they exist, juridical systems or customs, in accordance with international human rights standards.

#### *Article 35*

Indigenous peoples have the right to determine the responsibilities of individuals to their communities.

#### *Article 36*

1. Indigenous peoples, in particular those divided by international borders, have the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with their own members as well as other peoples across borders.
2. States, in consultation and cooperation with indigenous peoples, shall take effective measures to facilitate the exercise and ensure the implementation of this right.

#### *Article 37*

1. Indigenous peoples have the right to the recognition, observance and enforcement of treaties, agreements and other constructive arrangements concluded with States or their successors and to have States honour and respect such treaties, agreements and other constructive arrangements.
2. Nothing in this Declaration may be interpreted as diminishing or eliminating the rights of indigenous peoples contained in treaties, agreements and other constructive arrangements.

#### *Article 38*

States in consultation and cooperation with indigenous peoples, shall take the appropriate measures, including legislative measures, to achieve the ends of this Declaration.

#### *Article 39*

Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.

*Article 40*

Indigenous peoples have the right to access to and prompt decision through just and fair procedures for the resolution of conflicts and disputes with States or other parties, as well as to effective remedies for all infringements of their individual and collective rights. Such a decision shall give due consideration to the customs, traditions, rules and legal systems of the indigenous peoples concerned and international human rights.

*Article 41*

The organs and specialized agencies of the United Nations system and other intergovernmental organizations shall contribute to the full realization of the provisions of this Declaration through the mobilization, inter alia, of financial cooperation and technical assistance. Ways and means of ensuring participation of indigenous peoples on issues affecting them shall be established.

*Article 42*

The United Nations, its bodies, including the Permanent Forum on Indigenous Issues, and specialized agencies, including at the country level, and States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.

*Article 43*

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

*Article 44*

All the rights and freedoms recognized herein are equally guaranteed to male and female indigenous individuals.

*Article 45*

Nothing in this Declaration may be construed as diminishing or extinguishing the rights indigenous peoples have now or may acquire in the future.

*Article 46*

1. Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States.

2. In the exercise of the rights enunciated in the present Declaration, human rights and fundamental freedoms of all shall be respected. The exercise of the rights set forth in this Declaration shall be subject only to such limitations as are determined by law, and in accordance with international human rights obligations. Any such limitations shall be non-discriminatory and strictly necessary solely for the purpose of securing due recognition and respect for the rights and freedoms of others and for meeting the just and most compelling requirements of a democratic society.

3. The provisions set forth in this Declaration shall be interpreted in accordance with the principles of justice, democracy, respect for human rights, equality, non-discrimination, good governance and good faith.



# Appendix 10

## Acronyms



### Entities

AGM:	annual general meeting
AIATSIS:	Australian Institute of Aboriginal and Torres Strait Islander Studies
ALRC:	Australian Law Reform Commission
ASIC:	Australian Securities and Investments Commission
CDEP:	community development employment project
CERD:	International Covenant on the Elimination of All Forms of Racial Discrimination
CLC:	Central Land Council
Darwin LNG:	Darwin Liquid Natural Gas
DRIP:	Declaration on the Rights of Indigenous Peoples
FaCSIA:	Department of Families, Community Services and Indigenous Affairs (pre 2007 election)
FaHCSIA:	Department of Families, Housing, Community Services and Indigenous Affairs (post 2007 election)
GLC:	Goldfields Land and Sea Council
ICC:	Indigenous Coordination Centres
ICCPR:	International Covenant on Civil and Political Rights
ICESCR:	International Covenant on Economic, Social and Cultural Rights
ILC:	Indigenous land corporation
ILUA:	Indigenous land use agreement
JPC:	Joint Parliamentary Committee
KLC:	Kimberley Land Council
NLC:	Northern Land Council
NNTC:	National Native Title Council
NNTT:	National Native Title Tribunal
NQLC:	North Queensland Land Council




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NTRB:	Native title representative body
NTSDA:	Native title service delivery agency (sometimes abbreviated NTS)
NTS:	see NTSDA
NTSP:	Native title service provider
OIPC:	Office of Indigenous Policy Coordination
ORATSIC:	Office of the Registrar of Aboriginal and Torres Strait Islander Corporations
PBC:	prescribed body corporate (under the <i>Native Title Act 1993</i> )
RNTBC:	registered native title body corporate (under the <i>Native Title Act 1993</i> )
RPA:	Regional Partnership Agreement
SGM:	special general meeting
SRA:	shared responsibility agreement
WALFA:	West Arnhem Land Fire Management
WDCB:	Western Desert Cultural Bloc

### Legislation

ALRA:	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
ACA Act:	<i>Aboriginal Councils and Associations Act 1976 (Cth)</i>
CATSI Act:	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
Corporations Act:	<i>Corporations Act 2001 (Cth)</i>
NTA:	<i>Native Title Act 1993 (Cth)</i>
RDA:	<i>Racial Discrimination Act 1975 (Cth)</i>

# Appendix 11

## Recommendations



Twenty-five recommendations arise from this report, but overarching, there are two that stand out.

- Recommendation 1.1 deals with unscrambling the existing legislative gridlock in native title.
- Recommendation 1.2 proposes a national summit on the native title system.

The numbering of these recommendations reflects the chapter from which they arise (for example, 1.1 refers to Recommendation 1 in Chapter 1).

### **Chapter 1: Changes to the native title system**

- 1.1** That the Australian Government immediately appoint an independent person to conduct a comprehensive review of the whole native title system and report back to the Attorney-General by 30 June 2010. This review is to:
  - focus on delivering the objects of the Native Title Act in accordance with the preamble;
  - seek significant simplification of the legislation, and structures so that all is in an easily discernable form; and
  - call for wide input from all stakeholders in native title, especially ensuring that the voice of Indigenous peoples is heard.
- 1.2** That the government convene a national summit on the native title system with extensive representation.
- 1.3** That the Attorney-General monitor the 2007 changes to the Native Title Act and prepare a report to Parliament before the end of 2009, in such a way that it identifies:
  - the extent to which Indigenous people are gaining recognition and protection of native title in accord with the preamble to the Native Title Act;
  - the extent, if at all, to which the parties' rights are compromised by the changes; and
  - the extent to which the new powers given to the National Native Title Tribunal are used.



## Chapter 2: Changes to the claims resolution process

- 2.1** That funding be made available, for or through, the National Native Title Council to develop Plain English guides for Indigenous peoples to understand the recent changes to the native title system, and how to claim native title after the changes.
- 2.2** I support Recommendation 8 of the Senate Standing Committee on Legal and Constitutional Affairs, in its report on the Native Title Amendment Bill 2006, (February 2007).
- That the Attorney-General monitor the operation of proposed Division 4AA of Part 6 of the Native Title Act (the review power) and prepares a report to Parliament after two years of operation to assess the following:
- the extent to which these measures are used;
  - the effect they have on the cost and time for the resolution of claims;
  - the extent, if at all, to which the parties' rights are compromised by this process; and
  - the extent to which there is duplication between the functions of the Federal Court and the National Native Title Tribunal in this area.
- 2.3** That Section 94C of the Native Title Act be amended so that the Federal Court is not obliged to dismiss an application under Section 61 of the Act, in accordance with Section 94C.

## Chapter 3: Changes to representative Indigenous bodies

- 3.1** That the Australian Government immediately initiate a review that is at arm's length from government, to recommend the level of operational resourcing for NTRBs to ensure that they are well able to meet their performance standards, and fulfil their statutory functions.
- 3.2** That the minimum recognition period for representative bodies be increased to three years.
- 3.3** That the Australian Government establish an independent panel to advise the Minister for Families, Housing, Community Services and Indigenous Affairs on recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.4** That the Native Title Act be amended to specify criteria for the exercise of ministerial discretion in recognition, re-recognition, and withdrawal of recognition, of NTRBs.
- 3.5** That statutory plans, requiring ministerial approval, be reinstated as compulsory, and the Aurora Project be funded to provide training to representative bodies on the preparation of statutory plans.



## Chapter 4: Changes to respondent funding

- 4.1** That the Australian Government amend the Native Title Act and the Attorney-General's Guidelines (for provision of financial assistance pursuant to Section 183(4) of the Act), to ensure that funding is provided to assist only a party with a legal interest in proceedings where:
- the party's legal rights are not protected under the Native Title Act, or common law; and
  - the party is not represented in the proceedings by a government party that is also party to the proceedings.
- 4.2** That the Attorney-General (as part of the department's annual reporting) monitor, assess, and report on the respondent funding scheme to determine the extent to which it meets the objects of the Native Title Act and how (if at all) it furthers the intent of the law as set out in the preamble. The reporting should consider:
- whether litigation or mediation is being supported by the scheme;
  - the impact of the respondent party's participation in the proceeding itself and on the other parties involved;
  - the type of interests the assisted party has in the proceeding;
  - all parties' views of the contribution of the non-claimant party's participation; and
  - an evaluation of the additional costs to all parties from having the non-claimant party participate.

## Chapter 5: Changes to prescribed bodies corporate

- 5.1** That the Minister for Families, Housing, Community Services and Indigenous Affairs and the Attorney-General ensure that regulations which make provision for the development of a process – whereby requests to the registrar for an opinion about fees are made and considered – include a clear framework that:
- specifies a time period during which the registrar must give an opinion on whether a fee is to be paid;
  - requires that the registrar's opinion about fees be accompanied by the reasons for the decision;
  - when the registrar is to give an opinion about fees, PBCs may make submissions;
  - provides for an appeal mechanism where there is disagreement with the registrar's opinion, or where the procedures in the regulations have not been complied with.



- 5.2 That the Native Title Act and Regulations be changed to specify default times and review processes for default PBCs.
- 5.3 That efficient use of resources and infrastructure be fostered by allowing an existing PBC to be determined as a PBC for subsequent determinations of native title.
- 5.4 That AIATSIS (with the support of ORATSIC) monitor the changes to PBC legislation as part of its Prescribed Bodies Corporate Project, and report on the effectiveness of the changes relating to PBCs.

### **Chapter 6: The CATSI Act**

- 6.1 That ORATSIC report on the effects of the CATSI Act on under-resourced corporations, such as:
  - land trusts, state and territory land rights corporations; and
  - other corporations that hold title to Indigenous lands as a result of an Indigenous Land Corporation (ILC) divestment, or land purchase, or transfer of lands under land rights regimes.
- 6.2 That ORATSIC report on the financial burdens resulting from corporations redrafting their constitutions so that, if necessary, future Commonwealth budgets can increase funding for this work.
- 6.3 That the CATSI Act be amended so that:
  - decisions of the registrar be open to review in the Administrative Appeals Tribunal;
  - a requirement for appointment of a registrar must be that the applicant has a good understanding and experience of Indigenous peoples and communities; and
  - the Minister for Families, Housing, Community Services and Indigenous Affairs does not have complete discretion in the appointment of a registrar.
- 6.4 That ORATSIC report on non-Indigenous and corporate membership of PBCs. The report should consider whether non-Indigenous, corporate members and directors exercise their powers detrimentally to their Indigenous corporations and the communities that the corporations serve.

### **Chapter 7: Selected native title cases: 2006-2007**

(no recommendations)



## Chapter 8: Wheretof native title?

- 8.1** That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry:
- into how the compensation provisions of the Native Title Act are currently operating; and
  - whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation.

In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments.

The tribunal present to Parliament specific options for reform:

- to ensure Indigenous people can effectively and practically access their human right to compensation; and
  - to ensure the amount of compensation is just, fair and equitable.
- 8.2** That the Native Title Act be amended to insert a definition of 'traditional' for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests.
- 8.3** That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993.
- 8.4** That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.

## Chapters 9 to 12:

(no recommendations)





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