Chapter 1:
The state of land rights and native title policy in Australia in 2009

1.1 Introduction

The reporting period for this Report is 1 July 2008 to 30 June 2009. Throughout this period, there was significantly more activity in native title law and policy than I witnessed in the first five years of my term as the Aboriginal and Torres Strait Islander Social Justice Commissioner.

Throughout the reporting period, the Government pursued its commitment to improving the operation of the native title system. While no momentous improvements were made, many of the changes over the year will impact on the human rights of Aboriginal and Torres Strait Islander peoples.

In this Chapter, I examine changes and other decisions affecting native title which were made throughout the reporting period. I also summarise my view on how these developments impact on the human rights of Aboriginal and Torres Strait Islander people.

I begin this Chapter with a reflection on the previous Government's approach to land rights and native title, including its 1998 amendments to the *Native Title Act 1993* (Cth) (Native Title Act); the 2006 amendments to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA) and the 2007 compulsory acquisition of lands for the purposes of the Northern Territory Emergency Response. These significant policies have lingering effects on the operation of native title and land rights regimes today, and provide the starting point for discussion on what changes are now necessary.

Next, I consider the Rudd Government's response, including its new promises and whether a fresh approach to native title was seen in 2008-09. I look at the native title system in numbers, including the native title determinations which were made over the reporting period and the Government's budget allocation for native title. I then consider the legislative and policy changes including the:

- Native Title Amendment Bill 2009 (Cth)
- *Evidence Amendment Act 2008* (Cth)
- Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth)
- Australian Government's discussion paper on optimising benefits from native title agreements.[1]

1 Australian Government, *Australian Government Discussion Paper* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC (viewed 12 October 2009).

I have also identified policy areas in which the Government initiated action but where momentum now appears to be waning. These include financial assistance to the states and territories for compensation, the Joint Working Group on Indigenous Land Settlements, the Indigenous Economic Development Strategy, and regulation and funding of Prescribed Bodies Corporate (PBCs).

I then examine three significant decisions on native title and land rights. I summarise *Wurridjal v Commonwealth* (*Wurridjal)*[2] in which the High Court examined the constitutional validity of compulsory acquisition under the Northern Territory intervention. In *FMG Pilbara Pty Ltd v Cox (FMG Pilbara),*[3] the Federal Court gave greater guidance on what it means to negotiate in good faith under the Native Title Act. The National Native Title Tribunal (NNTT) gave its first decision that a mining lease must not be granted in *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd (Holocene)*.[4]

This Chapter also considers a number of international developments, directly relevant to Australia. In this reporting period, the Government signalled its support for the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples);[5] two United Nations treaty monitoring committees delivered concluding observations on Australia; a complaint against Australia was made to the United Nations Committee on the Elimination of Racial Discrimination; and once again, a delegation of Aboriginal and Torres Strait Islander people attended the annual session of the United Nations Permanent Forum on Indigenous Issues.

Finally, no examination of native title would be complete without a consideration of the policies of the states and territories. Therefore, I briefly look at significant developments at the state and territory level, particularly the development of an alternative settlement framework in Victoria.

1.2 Policy approaches to land rights and native title – the legacy of the Howard Government

John Howard served as the Australian Prime Minister for four consecutive terms over eleven years. It is misguided to consider current policies on Indigenous land rights and native title without reflecting on the lingering effects of the Howard Government's policies and the response of the current Australian Government.

The Howard Government's overarching policy on Indigenous affairs was to integrate Indigenous Australians into 'mainstream society', and ignore Indigenous peoples' distinct political, social and cultural identity and our status as the traditional owners of the country.

This policy extended to all areas. The Howard Government was unwilling to support the Declaration on the Rights of Indigenous Peoples and considered that endorsing the Declaration 'would lead to division in our country'.[6] In 2005, it dismantled the Aboriginal and Torres Strait Islander Commission (ATSIC), mainstreaming the delivery of services to Aboriginal and Torres Strait Islander people across all federal departments.

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2 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

3 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49.

4 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49.

5 GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 17 November 2009).

6 Gáldu Resource Centre for the Rights of Indigenous Peoples, AUSTRALIA: *Govt Consistent in Opposing Indigenous Rights,* http://www.galdu.org/web/index.php?odas=2327&giella1=eng (viewed 15 July 2009).

And yet, as my friend Peter Yu has said:

> We are not white people in the making, nor are we simply another ethnic minority group. We are, at a fundamental level part of the modern Australian nation. But, within this nation, we have a very particular position. We are Australia's Indigenous people, the first people of this land, and we continue to have – as we have always had – our own system of law, culture, land tenure, authority and leadership. It follows then, that treating us the same as everybody else will not deliver equality, but is in fact discriminatory.[7]

The Howard Government's approach to Indigenous peoples was easily identifiable in its policies on land rights and native title. Over its 11-year term, it made changes to native title and land rights policies to 'normalise' Indigenous peoples' interests in the land, and in doing so, reduced the recognition of Indigenous peoples' human rights.

Significant changes made to native title and land rights during the Howard Government's term included the:

- 1998 amendments to the Native Title Act
- 2006 amendments to the ALRA
- 2007 compulsory acquisition of lands for the purposes of the Northern Territory Emergency Response (the Northern Territory intervention).

The Howard Government accompanied these changes with words that misled the broader public on the law. For example, in 2006, after the Federal Court's first instance decision in the Noongar case (which determined that some native title rights existed over Perth), the Howard Government was reported as saying that Australia's beloved beaches were no longer 'protected' from native title.[8] Philip Ruddock, then the Attorney-General, stated:

> It is not possible to guarantee that continued public access to all such areas in major capital cities in Australia would be protected from a claim to exclusive native title.[9]

This is clearly not an accurate reflection of the law.[10]

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7 P Yu, *Forging a New Relationship Between Indigenous and non-Indigenous Australians* (Keynote Address delivered at the Australians for Native Title and Reconciliation Seminar, Sydney, 2 June 1999).

8 D Knight, 'The native title scaremongers are restless again', *The Sydney Morning Herald,* 22 September 2006. At http://blogs.smh.com.au/newsblog/archives/dom_knight/014011.html (viewed 15 July 2009). See also S Peatling, 'Fear of native title land grab in cities', *The Sydney Morning Herald*, 22 September 2006. At http://www.smh.com.au/news/national/fear-of-native-title-land-grab-in-cities/2006/09/21/1158431843986.html (viewed 15 July 2009).

9 S Peatling, 'Fear of native title land grab in cities', *The Sydney Morning Herald*, 22 September 2006, citing Philip Ruddock, the then Attorney-General. At http://www.smh.com.au/news/national/fear-of-native-title-land-grab-in-cities/2006/09/21/1158431843986.html (viewed 15 July 2009).

10 The Federal Court's decision of *Bennell v Western Australia* (2006) 230 ALR 603 was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Human Rights and Equal Opportunity Commission (2008), pp 146–150. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009). The Full Federal Court's appeal decision of *Bodney v Bennell* [2008] FCAFC 63 was summarised in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), pp 53–58. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009). The Full Federal Court found that Justice Wilcox had erred in his judgment in the decision at first instance. Consequently, the Full Federal Court did not determine whether native title rights existed or not, but sent the case back to a new judge to determine how the claim should proceed. The parties agreed to negotiate, and are still in that process. Neither decision of the Court impacted on the extinguishment provisions of the Native Title Act, which protect existing interests in the land.

Despite all this, the Howard Government told the United Nations that '[s]uccessive Australian Governments have implemented a range of initiatives in support or recognition of Aboriginal and Torres Strait Islander land rights'.[11]

It is necessary to reflect on the impact of past policies of the past decade when considering the status of the native title system today and how it could be improved tomorrow.

(a) The 1998 Wik Amendments

The most significant changes made to native title during the Howard Government's term was the *Native Title Amendment Act 1998* (Cth) (the Wik amendments), a legislative response to the High Court's decision in *Wik Peoples v Queensland* (*Wik*).[12] In *Wik*, the High Court held that native title could survive on a pastoral lease if there was no clear intention to extinguish it when the lease was granted.

In the *Native Title Report 1998*, the Social Justice Commissioner said that the High Court of Australia had laid the foundation in *Wik* for the coexistence and reconciliation of shared interests in the land and that '[i]n many ways the decision presented Australia with a microcosm of the wider process of reconciliation'.[13]

But the opportunity for reconciliation provided by *Wik* was lost. The reactions sparked by the decision were intense and deeply divisive, and the consequent amendments to the Native Title Act were a devastating blow to Indigenous peoples' rights.

Although there was discussion on amending the Native Title Act prior to the *Wik* decision, the earlier discussions focused on improving the 'workability' of the Act. However, after the *Wik* decision, the focus changed.

Legislative amendments became a vehicle for 'bucketloads' of extinguishment.[14] 'Certainty' for non-Indigenous land holders became the new catchcry for legislative change.[15]

The Howard Government responded with a ten-point plan,[16] and amendments were passed in 1998. The Wik amendments, which added 400 pages of law, drastically increased the complexity of the Native Title Act and changed the system markedly.

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11 United Nations International Human Rights Instruments, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), p 31. At http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf (viewed 16 November 2009).

12 *Wik Peoples v Queensland* (1996) 187 CLR 1.

13 Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), p 2. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

14 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–1997*, Human Rights and Equal Opportunity Commission (1997), p 37. At http://humanrights.gov.au/social_justice/nt_report/index.html#1997 (viewed 17 November 2009). See also Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

15 See Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

16 For more information on the Wik 10 point plan, see the archived Aboriginal and Torres Strait Islander Commission website, *Issues: Land – native title,* http://pandora.nla.gov.au/pan/41033/20060106-0000/ATSIC/issues/land/native_title/10_point_WIK_plan.html (viewed 1 September 2009).

The key changes included:

- *Extinguishment of native title.* The 'validation and confirmation provisions' of the amendments validated certain acts which took place on or after 1 January 1994 (the day the Native Title Act commenced) and before the 23 December 1996 (the day the High Court handed down its decision in *Wik*), and which may have not been valid at the time because the government had not complied with the Native Title Act. The amendments made these acts – which are called *intermediate period acts* – valid, and said that they were always valid. The amendments also deemed certain tenures granted before the *Wik* decision to have either extinguished or impaired native title. Where the interests were granted by the state governments, the amendments authorised the states to introduce complementary legislation to the same effect. Schedule 1 of the amended Native Title Act lists interests which are deemed to permanently extinguish native title. This list is 50 pages long.[17]
- *Changed the right to negotiate provisions.* The right to negotiate was included in the original Native Title Act in recognition of the 'special attachment of Aboriginal and Torres Strait Islander people to their land'.[18] The 1998 amendments authorised states and territories to introduce legislation that diminished the right to negotiate by introducing schemes which provide for exceptions to the right. The amendments also changed the right to negotiate in the Native Title Act itself, generally replacing it with the lesser rights to comment or be notified.
- *Changed the registration test.* The amendments established a higher threshold for the registration test and required that the Registrar be satisfied that certain procedures had been undertaken by the claimants, and that they had fulfilled certain merits.
- *Provided for Indigenous Land Use Agreements (ILUAs).* The ILUA provisions were a positive feature of the amendments, offering the foundation for parties to negotiate voluntary and binding agreements about the use of the land, the intersection of various rights and interests, and how the relationship would proceed in the future.
- *Changed the functions of Native Title Representative Bodies (NTRBs).* The amendments redrew the boundaries of representative body areas (reducing the number of NTRBs), reassessed the existing bodies' eligibility, increased the Minister's control over the bodies, removed the requirement that representative bodies be representative and increased their responsibilities and functions. Despite increasing the load on NTRBs, the changes were not accompanied by an increase in funding.

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17 See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1996–1997*, Human Rights and Equal Opportunity Commission (1997), at http://humanrights.gov.au/social_justice/nt_report/index.html#1997 (viewed 17 November 2009); Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), at http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999,* Human Rights and Equal Opportunity Commission (1999), at http://humanrights.gov.au/social_justice/nt_report/index.html#1999 (viewed 17 November 2009).

18 Commonwealth of Australia, *Mabo – The High Court Decision on Native Title: Discussion Paper* (1993), p 102.

Many of these amendments were justified on the basis of pursuing formal equality.[19] Yet it is now widely accepted that the amendments seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander people.

Nonetheless, the Howard Government considered that the *Wik* decision had simply accentuated the shortcomings of the original Native Title Act and that:

> The 1998 amendments addressed these difficulties, and followed an open and participatory consultation process with all interested parties. The amended Act clarifies the relationship between native title and other rights and gives the States and Territories the capacity to better integrate native title into their existing regimes. The amendments also established a framework for consensual and binding agreements about future activity known as Indigenous Land Use Agreements or ILUAs.[20]

That outlook was not shared by all. In 1998, Indigenous representatives rejected both the substance of the amendments and the process by which it was arrived at. The National Indigenous Working Group prepared a statement, which was read into the parliamentary record on the day before the amendments were debated:

> We, the members of the National Indigenous Working Group, reject entirely the Native Title Amendment Bill as currently presented before the Australian Parliament.
>
> We confirm that we have not been consulted in relation to the contents of the Bill… and that we have not given consent to the Bill in any form which might be construed as sanction to its passage into Australian law.
>
> We have endeavoured to contribute during the past two years to the public deliberations of Native Title entitlements in Australian law.
>
> Our participation has not been given the legitimacy by the Australian Government that we expected…
>
> We are of the opinion that the Bill will amend the Native Title Act 1993 to the effect that the Native Title Act can no longer be regarded as a fair law or a law which is of benefit to the Aboriginal and Torres Strait Islander Peoples…
>
> The National Indigenous Working Group is extremely disappointed that the Australian Government has failed to confront issues of discrimination in the Native Title laws and implicitly provoked the Aboriginal and Torres Strait Islander Peoples to pursue concerns through costly and time consuming litigation, rather than through negotiation…
>
> The National Indigenous Working Group on Native Title absolutely opposes the Native Title Amendment Bill, calls upon all parliamentarians to cast their vote against this legislation, and invites the Australian Government to open up immediate negotiations with the Aboriginal and Torres Strait Islander Peoples for coexistence between the Indigenous Peoples and all Australians.[21]

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19 See Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998,* Human Rights and Equal Opportunity Commission (1999), pp 13–14. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009). The Commissioner further states, at pp 4–5, that '[f]ormal equality asserts that all people should be treated in precisely the same way as each other: to recognise different rights is inherently unfair and discriminatory. … Within this construction, any distinctive right accorded to native titleholders or native title applicants is seen as inherently racially discriminatory'. This is compared to substantive equality, which recognises that different treatment is permitted and may be required to achieve real fairness in outcome.

20 United Nations, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), para 131. At http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf (viewed 17 June 2009).

21 Commonwealth, *Parliamentary Debates,* Senate, 7 July 1998, pp 5180–5182. At http://www.aph.gov.au/hansard/senate/dailys/ds070798.pdf (viewed 12 October 2009). See also Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), ch 1. At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 17 November 2009).

Although the 1998 amendments severely damaged the relationship between Indigenous peoples and the Government, the strength and resilience of Aboriginal and Torres Strait Islander people has meant that we have endeavoured to make the most out of the weakened system.

This Government has not made any commitment to reviewing the impact of the 1998 amendments nor identifying where they may be wound back. Although the original Act was also not perfect, the impact of the 1998 amendments and the operation of the original Native Title Act should be used to inform current debate over what amendments are necessary to ensure the native title system operates in a just, equitable and effective way.[22]

(b) The 2006 ALRA amendments

The Australian Government is only directly responsible for land rights policy in the territories. During its term, the Howard Government's policy toward land rights resulted in considerable changes to the Northern Territory's land rights regime. This shift in policy has become relevant across the country as it is now being applied to state land rights regimes via partnerships and funding arrangements between the federal and state governments. I discuss this further in Chapter 4 of this Report.

The Howard Government amended the ALRA in 2006.[23] The amendments covered a number of measures, one of which sought to 'promote individual property rights' on Aboriginal land by enabling a Northern Territory entity (such as the Northern Territory Government or a statutory authority established by it) to be granted a 99-year lease from the traditional owners over an entire township. Long-term subleases could then be granted to Aboriginal people and others without each sublease having to be negotiated with the relevant Land Council.[24]

Again, the intention was to 'normalise' Indigenous communities through the mainstreaming of service delivery and the creation of market economies. Mal Brough, the Howard Government Minister for Indigenous Affairs, said '[w]e are talking about creating an environment for the sort of employment and business opportunities that exist in other Australian towns'.[25]

At the time, I raised a number of concerns with the policy, including that it could lead to significant loss of control of land by Indigenous peoples; create complex succession problems; create smaller and smaller blocks as the land is divided amongst each successive generation; and cause tension between communal cultural values with the rights granted under individual titles. I was also concerned about the ability of

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22 Criticisms of certain core, structural principles of the legislation were made in the first Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report. See M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January – June 1994,* Human Rights and Equal Opportunity Commission (1995). At http://www.austlii.edu.au/au/other/IndigLRes/1995/3/NATIVE.RTF (viewed 12 October 2009).

23 The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA) was the first law of an Australian Government to recognise the Aboriginal system of land ownership. The ALRA was enacted on the recommendation of the Woodward Aboriginal Land Rights Commission, which introduced into Australian law the concept of inalienable freehold title 'meaning [land] could not be acquired, sold, mortgaged or disposed of in any way – and title should be held communally'. The Act allowed Aboriginal people, for the first time, to claim rights to their land based on traditional occupation. See Northern Land Council, *Land and Sea Rights*, http://www.nlc.org.au/html/land_act_wood.html (viewed 12 October 2009).

24 See Parliamentary Library, Parliament of Australia, *Aboriginal Land Rights (Northern Territory) Amendment Bill 2006*, Bills Digest (2006). At http://www.aph.gov.au/library/pubs/bd/2005-06/06bd158.pdf (viewed 16 July 2009).

25 M Brough (Minister for Families, Community Services and Indigenous Affairs), *Blueprint for Action in Indigenous Affairs* (Address to the National Institute of Governance: Indigenous Affairs Governance Series, Canberra, 5 December 2006).

traditional owners to confront these issues and give their free, prior and informed consent to long-term and large area leases while their capacity is inhibited.[26]

Another significant concern I voiced is that the amendments allow the government to use the Aboriginals Benefit Account (ABA) to pay for the 99-year head leases. The fund, which was set up to provide benefits to Indigenous people in the Northern Territory above and beyond basic government services, can now be used by the government to acquire, administer leases or pay the rent. For example, rents payable to traditional owners who agree to lease their land under the ALRA will come, at Ministerial direction, not from the lessee (eg the Northern Territory Government) but from the ABA.

In August 2007, the Howard Government told the United Nations that:

> Under the proposed reforms, traditional owners will be able to grant a 99 year head-lease over a township area. Granting a head lease will be entirely voluntary. Traditional owners and the Land Council will negotiate the other terms and conditions of the head-lease, including any conditions on sub-leasing. Sub-leases may be issued to individual tenants, home purchasers, and business and government service providers. The underlying inalienable title will not be affected.[27]

I do not believe this to be the case.

On 12 June 2007, the then Shadow Minister for Families, Community Services, Indigenous Affairs and Reconciliation, Jenny Macklin, spoke against the amendments.[28] However, as the current Minister for Indigenous Affairs, Jenny Macklin now supports the leasing scheme and is working with the states to have it applied across the nation.

Some traditional owners have expressed their dismay at this:

> When John Howard and Mal Brough lost their seats, we were happy. But now you are doing the same thing to us, piggybacking Howard and Brough's policies, and we feel upset, betrayed and disappointed. …
>
> This is our land. We want the Government to give it back to us. We want the Government to stop blackmailing us. We want houses, but we will not sign any leases over our land, because we want to keep control of our country, our houses, and our property.[29]

In a statement given by a Warlpiri delegation from Yuendumu when Parliament was opened in 2009, it is clear that there are very strong feelings that leases are not necessarily being entered into on voluntary and informed grounds.

> Land for Housing… We are just being blackmailed. If we don't hand over our land we can't get houses maintained, or any new houses built. …
>
> We got some land back under the NT Land Rights Act. Now they want to take the land our houses are on, so they can control us. They are talking about 60 or 80 year leases, but we know that we won't ever get it back.

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26 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 12 October 2009).

27 United Nations International Human Rights Instruments, *Core document forming part of the reports of States parties: Australia*, UN Doc HRI/CORE/AUS/2007 (2007), p 31. At http://www2.ohchr.org/english/bodies/cescr/docs/cescrwg40/HRI.CORE.AUS.2007.pdf (viewed 17 June 2009).

28 Commonwealth, *Parliamentary Debates*, House of Representatives, 12 June 2007, pp 91–95 (The Hon Jenny Macklin MP, Shadow Minister for Indigenous Affairs). At http://www.aph.gov.au/hansard/reps/dailys/dr120607.pdf (viewed 6 September 2009).

29 Yuendumu Statement, given to the Minister for Indigenous Affairs, Jenny Macklin, by H Nelson, representing the Yuendumu community, 27 October 2008, available at Rollback the intervention, *Statements*, http://rollbacktheintervention.wordpress.com/ (viewed 12 October 2009).

> We have cultural ties to our land. Our land is not for sale. Without the land we are nothing. Our spirit is in the land where we belong. If we give up our land we are betraying our ancestors. Every bit of our land is precious. …
>
> Every time Government officials come to Yuendumu to 'consult' with us, they don't listen to us. They just tell us what their plans are. When any of us speak up about our concerns, it's as if they have deaf ears. They just go on with their plans as if we had said nothing. There is no communication. They treat us like kids.
>
> We are proud Warlpiri people. It is a great insult to be treated like this.[30]

I am still concerned with various aspects of this policy, including how Indigenous people are being involved in the decision making process and what the long-term impacts on cultural, economic, political and social rights will be. I discuss these concerns in more detail in Chapter 4 of this Report.

(c) The 2007 compulsory acquisition of land for the purposes of the Northern Territory Emergency Response legislation

On 21 June 2007 the Howard Government announced the Northern Territory Emergency Response,[31] also known as the intervention. The intervention was originally a response to a report on child sexual abuse called *Little Children are Sacred*.[32] The current Government states that the intervention 'has a wide range of measures designed to protect children and make communities safe' and to 'create a better future for Aboriginal people in the Northern Territory'.[33]

The various measures which make up the intervention have significant implications for Aboriginal owned and controlled land.

The Government considered it necessary to control the land for aspects of the intervention to be done quickly.[34] Consequently, the Government compulsorily acquired five-year leases over Aboriginal owned land in the Northern Territory. It took over the control of town camps; allowed for the suspension of the permit system which ensures traditional owners can control who enters their land; and suspended the future acts regime in the Native Title Act. The Government introduced these measures with the intent that they would assist in building new houses, upgrading existing houses and bringing in new arrangements for the management of public housing in communities.[35]

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30 Statement by Warlpiri Delegation from Yuendumu on the occasion of the opening of Parliament 2009, available at Rollback the intervention, *Rollback the intervention,* http://rollbacktheintervention.wordpress.com/ (viewed 12 October 2009).

31 The legislation giving effect to the Northern Territory Emergency Response received Royal Assent on 17 August 2007. It consisted of a suite of legislation. The main provisions dealing with the Australian 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).

32 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007). At http://www.inquirysaac.nt.gov.au/ (viewed 23 November 2009).

33 Department of Families, Housing, Community Services and Indigenous Affairs, *About the Northern Territory Emergency Response,* http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_nter.aspx (viewed 23 July 2009).

34 See *Wurridjal v the Commonwealth* (2009) 237 CLR 309, 333 (French CJ).

35 Department of Families, Housing, Community Services and Indigenous Affairs, *About the Northern Territory Emergency Response,* http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/overview/Pages/about_nter.aspx (viewed 23 July 2009).

In the *Native Title Report 2007*, I raised my concerns with these aspects of the intervention. Particularly:

- the use of compulsory acquisition and the lack of consultation or discussion with the Aboriginal land owners
- the possibility of a significant interruption to community living
- the breadth of the Minister's discretion over what happens on the lands subject to compulsory acquisition and the lack of accountability of those decisions to Parliament
- the apparent displacement of traditional rights of use and occupation (under Section 71 of the ALRA) in compulsorily leased Aboriginal lands[36]
- the ability of the Australian Government to remove the rights of an Indigenous person to even reside on compulsorily leased Aboriginal lands
- the uncertain relationship between the leases and other laws such as the Native Title Act.[37]

At the date of writing this Report, two years after the intervention was imposed in the Northern Territory, not a single house had been built.[38] No rent or compensation has been paid to the land owners.[39]

All the leases which were compulsorily acquired under the intervention will expire on 18 August 2012. However, I am concerned that the Government will then seek long-term leases from the traditional owners, which triggers the significant concerns I have already raised with the long-term leasing policy.[40]

1.3 The Rudd Government's response – new promises, a fresh approach in 2008–09?

In order to gain a full appreciation of the native title system and land rights today, the remnants of the Howard Government's policy approaches must be contemplated. Many aspects of these policies have continued under this Government. The concerns that I and previous Social Justice Commissioners have raised over that time remain disregarded.

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36 Since the Native Title Report 2007 was published, the High Court has delivered its decision in *Wurridjal v Commonwealth* (2009) 237 CLR 309 (see later in this Chapter). In the case, the High Court held that s 71 of the ALRA was not displaced by the intervention legislation.

37 The intervention legislation says that the non-extinguishment principle applies to any of the acts done by or in accordance with the intervention legislation, or any act that is related. It also says that the future acts provisions of the Native Title Act do not apply. However, the long-term impact of acts done for the purposes of the intervention on native title rights and interests is unclear. This is of particular concern when the rights are effectively extinguished or impaired, a circumstance which should trigger the compensation provisions of the Native Title Act. See *Northern Territory National Emergency Response Act 2007* (Cth), s 51.

38 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *ABC Radio AM* (23 July 2009). At http://www.abc.net.au/am/content/2009/s2633912.htm (viewed 23 July 2009).

39 See later in this Chapter for the discussion of the High Court's decision in *Wurridjal v Commonwealth* (2009) 237 CLR 309, and Chapter 4 of this Report for further information on land tenure reform.

40 The intervention legislation provides for this explicitly. 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.

Nonetheless, since the Government delivered the National Apology to the Stolen Generations,[41] it has introduced a number of reforms that will contribute to creating a new partnership between Indigenous and non-Indigenous Australians. This includes reviewing aspects of native title. As the Prime Minister has acknowledged, '[t]o speak fine words and then forget them, would be worse than doing nothing at all'.[42]

Eighteen months after becoming the Attorney-General, Robert McClelland stated native title reform is among his top priorities.[43] In December 2008, he admitted that he was 'hoping to have made more progress in the first year' to streamline native title processes.[44] In furtherance of the commitment to a more flexible and speedier native title system, he has stated that 'Governments – including the Commonwealth – need to take a less technical and more collaborative and innovative approach to issues like connection'.[45]

To kick-start this process, the Attorney-General released two discussion papers throughout the year.[46] The Native Title Amendment Bill 2009 was introduced into Parliament, and inquired into by a Senate Committee.[47]

It is also apparent that further reform of the system is being contemplated.

For the first time in my five years as Aboriginal and Torres Strait Islander Social Justice Commissioner, the Attorney-General has stated that his 'mind is open' to some more significant changes to the Native Title Act, such as shifting the burden of proof and providing for a presumption in favour of native title.[48] He has said that he is interested in 'any constructive suggestions, especially those aimed at further encouraging agreement making'.[49]

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41 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, p 167 (The Hon Kevin Rudd MP, Prime Minister). At http://www.aph.gov.au/hansard/reps/dailys/dr130208.pdf_(viewed 12 October 2009).

42 Commonwealth, *Parliamentary Debates,* House of Representatives, 26 February 2009, p 2026 (The Hon Kevin Rudd, Prime Minister). At http://www.aph.gov.au/hansard/reps/dailys/dr260209.pdf (viewed 12 October 2009).

43 A Boswell, 'Mixed half-term reform report card', *The Australian Financial Review*, 5 June 2009, p 42.

44 C Merritt, 'McClelland promises clean state for national regulation', *The Australian*, 5 December 2008. At http://www.theaustralian.com.au/business/legal-affairs/mcclelland-promises-clean-slate/story-e6frg97x-1111118227370 (viewed 16 November 2009).

45 R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 12 October 2009).

46 Australian Government, *Australian Government Discussion Paper* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC (viewed 12 October 2009). Attorney-General, *Discussion Paper: Proposed minor native title amendments* (2008). At http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC/$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.DOC (viewed 13 October 2009).

47 The *Native Title Amendment Act 2009* (Cth) commenced on 18 September 2009.

48 R McClelland (Attorney-General), *ABC Radio National* (9 April 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Transcripts_2009_SecondQuarter_9April2009-ABCRadioNationalBreakfastwithFranKelly (viewed 17 November 2009).

49 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum (viewed 16 November 2009).

In June 2009, he stated:

> I believe there is real merit in exploring ways to build on reforms implemented to date to further simplify the native title system, to make resolving claims more efficient and timely, and to reinforce the principle that negotiation rather than litigation should be the primary mechanism for resolving native title claims. While legislative change is not a panacea, I am willing to explore ideas proposed... However, the Government will not rush into such changes without first consulting stakeholders... I am determined to ensure that the way we consult, and the relationships we forge along the way, distinguish this Government's approach to native title.[50]

(a) The native title system in numbers

(i) Determinations between 1 July 2008 – 30 June 2009

Despite developments at a federal and state level, the native title system continued to operate at its usual pace: slowly. The NNTT confirmed that the timeframe within which matters are being finalised is not reducing,[51] and it expects that only 50 out of 473 native title matters will be determined within the next two years.[52]

During the 2008–09 reporting period, 12 determinations of native title were made by the Federal Court, bringing the total number of determinations since the Native Title Act began to 121. The determinations made in 2008–09 are detailed at Appendix 1.

This year's determinations included the largest native title determination in South Australia, granting native title rights and interests over 41 000km^2 of land in the Flinders and Gammon Ranges. The Adnyamathanha Aboriginal people lodged their claim in 1994. In 2009, they reached a consent determination with the state which recognises their rights to hunt, use natural resources, camp and conduct traditional ceremonies recognised over the majority of the area.[53]

The Nyangumarta People from Western Australia's Pilbara region also had their native title rights and interests recognised over more than 33 843 km^2 through two consent determinations. The claim was lodged in 1998. The mediation of this claim was considered by the NNTT to be 'conflict-free', during which '[n]o single issue turned into a tug-of-war'. Nonetheless, 'the mediation still took two-and-half years

50 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

51 National Native Title Tribunal, *National Report: Native Title* (March 2009), p 2. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf (viewed 12 October 2009).

52 Evidence to the Senate Legal and Constitutional Affairs Committee, Canberra, 23 February 2009, p 61 (Stephanie Fryer-Smith, Registrar of the National Native Title Tribunal). At http://www.aph.gov.au/hansard/senate/commttee/S11639.pdf (viewed 12 October 2009). The Registrar said that there were 50 native title matters on the substantive list. The substantive list is the NNTT's case management scheme in which it identifies applications that it thinks will be resolved through determination, dismissal or discontinuance within the next two years.

53 M Rann (Premier of South Australia), R McClelland (Attorney-General) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Historic native title determination today' (Media Release, 30 March 2009). At http://www.ministers.sa.gov.au/news.php?id=4566 (viewed 12 October 2009).

to conclude after parties reached an in-principle agreement on the existence of the Nyangumarta native title rights and interests'.[54]

The NNTT member noted:

> This relatively straightforward claim over unallocated crown land and pastoral leases has taken 11 years to reach an outcome, with some of the claim group no longer alive to see a result. The clear message is that more effort is needed to speed up the native title claims process.[55]

Another significant determination which was made was the Lardil, Yangkaal, Gangal-idda and Kaiadilt Peoples who reached a consent determination, recognising their native title rights over 23 islands in Queensland's Gulf of Carpentaria. The determination, which was made over the land, followed on from the 2004 determination that recognised the peoples' native title rights to the sea.[56]

(ii) Resourcing the native title system

In previous native title reports I have raised serious concerns about the sufficiency and distribution of resources to bodies operating in the native title system. I have been particularly concerned about the impact that poor resourcing has had on the ability of NTRBs to adequately represent the interests of the Indigenous groups who are claiming native title. The Government has also acknowledged that NTRBs are significantly under-resourced.

On 12 May 2009, the Australian Government released its 2009–10 Budget. It committed an additional $50.1 million over four years to the native title system. This will be broken down to $45.8 million for NTRBs, and $4.3 million for the Government to look at ways to improve the system. This additional funding is welcome, and should go some way to lessen the pressure on NTRBs.

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54 See National Native Title Tribunal, 'Nyangumarta native title resolved at 80 mile beach' (Media Release, 11 June 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Nyangumarta_native_title_resolved_at_80_Mile_Beach.aspx (viewed 17 June 2009). See also R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 16 November 2009).

55 National Native Title Tribunal, 'Nyangumarta native title resolved at 80 mile beach' (Media Release, 11 June 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Nyangumarta_native_title_resolved_at_80_Mile_Beach.aspx (viewed 17 June 2009). See also R McClelland (Attorney-General), *Remarks at the Nyangumarta native title on-country consent determination hearing* (Remarks delivered at Federal Court consent determination, Nyiyamarri Purkurl, Western Australia, 11 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_11June2009-RemarksattheNyangumartaNativeTitleOn-CountryConsentDeterminationHearing (viewed 16 November 2009).

56 National Native Title Tribunal, 'Native title recognized on 23 islands in Gulf of Carpentaria' (Media Release, 9 December 2008). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Lardil_determination.aspx (viewed 12 October 2009).

I was pleased to see $4.3 million set aside for examining ways to improve and streamline the operation of the system. As part of this, the Government has said it will look at:[57]

- more flexible connection evidence
- streamlining participation of non-government respondents
- improving access to land tenure information
- promoting broader and more flexible native title settlement packages
- initiatives to increase the quality and quantity of anthropologists and other experts working in the system
- partnerships with state and territory governments to develop new approaches to the settlement of claims through negotiated agreements.

Recognising that there are many lessons to be learnt from the first 16 years of native title, it is positive that the Government has allocated a pool of money to look at ways to address these serious shortcomings.

However, I have concerns with the adequacy of the allocation for NTRBs and PBCs.

Although the funding increase was given in response to a 2008 Native Title Coordination Committee's review of funding of the native title system, the results of that review have not been made public. The Government has stated that the review 'found that NTRBs were substantially under-resourced for the task they were expected to perform in the system',[58] but the extent of that dearth in resourcing is not known. The Attorney-General has informed me that:

> As the Native Title Coordination Committee's 2008 review of funding of the native title system is confidential to Government, it is not possible to publicly release the recommendations. However, I can assure you that the Government did consider the recommendations in the context of the 2009-10 Budget process. The recommendations informed the decision to continue non-ongoing funding otherwise due to lapse in 2008-09, and to provide an additional $50.1 million over four years to improve the operation of the native title system.[59]

Having made submissions into the under-resourcing of NTRBs in the past, and knowing the results of previous reviews of NTRB resourcing, I would speculate that the 2008 review would have recommended a much greater funding increase than was provided in the 2009–10 Budget. I do not agree with the Attorney-General that this funding is sufficient to ensure that NTRBs are adequately resourced to participate in negotiations on behalf of Indigenous people.[60] This is particularly so given that the additional $50.1 million which has been allocated for a four year period, to be divided

57 Attorney-General's Department, *Closing the Gap – Funding for the Native Title System (additional funding and lapsing),* Budget 2009–10 Fact Sheet. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing) (viewed 12 October 2009).

58 Attorney-General's Department, *Closing the Gap – Funding for the Native Title System (additional funding and lapsing)*, Budget 2009-10 Fact Sheet. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing) (viewed 12 October 2009).

59 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 July 2009.

60 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

between all NTRBs across the country,[61] includes money for PBCs, and comes after a reduction of NTRB funding in the previous year's 2008–09 Budget.

In fact, the provisional funding allocation for NTRBs for 2009–10 was over $5 million *less* than the funding provided to NTRBs for the 2008–09 financial year.[62]

In addition, despite my recommendation and calls for secured funding from across the country, the Budget did not provide a specific allocation for PBCs. Once again, PBC funding will come from the allocation for NTRBs, or from specific project funding from other agencies. I have been informed that in 2009–10, $1 million of the money allocated for NTRBs has been tentatively put aside for 'crisis funding support for PBCs … in recognition of the critical unmet needs that can arise in this area'.[63]

There are some sources of PBC project funding from other agencies. One such source is the Working on Country program run by the Department of Environment, Water, Heritage and the Arts. The 2009–10 Budget allocated $69 million to the Working on Country program to create 210 new Indigenous ranger jobs in remote and regional Australia over the next five years.[64]

There are various economic, cultural, social and environmental benefits that flow from enabling Aboriginal people and Torres Strait Islanders to manage and care for their country. The new commitment of funds is welcomed.

Unfortunately project funds such as these rarely cover the operational costs of running a PBC or are inaccessible by PBCs due to an initial lack of funding and capacity. And so, despite running very successful programs, PBCs can struggle to find resources for telephones, offices and internet connections, seriously inhibiting their success. I comment further on the precarious positions of PBCs across the country later in this Chapter.

(b) Changes to native title over the year – the direction of the Australian Government

The Australian Government's main message on native title this year is that it is dedicated to creating a native title system which encourages the parties to negotiate rather than litigate their claims. This policy would primarily be pursued through encouraging all parties to have a flexible and open minded attitude to settling native title claims.

I am supportive of this approach, and I am hopeful that it will lead to improved outcomes for Indigenous claimants. However, there are some serious barriers to change.[65]

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61 The Attorney-General estimates that the native title system cost approximately $120 million in the 2007–08 financial year. See R McClelland (Attorney-General), *Launch of the Australian Law Reform Commission's Reform journal on Native Title and the Reconciliation Action Plan* (Speech delivered at the launch of the Australian Law Reform Commission's journal and its Reconciliation Action Plan, Sydney, 8 April 2009). At http://www.alrc.gov.au/about/rap/AGspeech.html (viewed 12 October 2009).

62 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

63 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

64 P Garrett (Minister for the Environment, Heritage and the Arts), 'Over $69 million for new Indigenous rangers working on country' (Media Release, 12 May 2009). At http://www.environment.gov.au/minister/garrett/2009/budmr20090512e.html (viewed 12 October 2009).

65 See further T Calma, 'Native title in Australia: Good intentions, a failing framework?' (2009) 93 *Reform* 6.

Firstly, there are considerable constraints in the Native Title Act that will prevent parties making progress in improving native title outcomes. In Chapter 3 of this Report I consider some of these restrictions and possible amendments. Many of the restrictions originate from the initial scope of the Act. However the 1998 amendments made the situation significantly worse.

Secondly, 'attitudes' to policy are discretionary and depend on the elected government of each jurisdiction, creating uncertainty, unpredictability and inequity in native title outcomes across Australia. If a government changes, there is no guarantee that the flexible approach will be maintained. The different outcomes that result after a change in government or a change in a government's approach have been seen many times.

Finally, I am concerned about the breadth of change that can be achieved when nearly all of the state and territory governments have indicated to me that they consider that they have already been acting in a flexible manner for years.[66] Subsequently, they all naturally support the Australian Government's approach, but it begs the question, how much more flexible will these governments feel they can be within the existing framework?

The NNTT considers that while the Australian Government's call for behavioural change is positive, it warns that even when parties support mediated rather than litigated outcomes, the support 'has not always resulted in outcomes at a broadly acceptable rate'.[67] Nor has it always resulted in good outcomes.

These limitations are evident in the Torres Strait Regional Sea Claim, Part A of which was heard by the Federal Court throughout the year.[68] In that claim, the federal Attorney-General's stated preference for flexible and less technical approaches to native title was not reflected in the Australian Government Solicitor's approach to the claim, nor did the Queensland Government Solicitor act in a way that reflects the Queensland Government's support for the federal Attorney-General's flexible approach to native title.

In the view of the Torres Strait Regional Authority (TSRA), the Queensland and Commonwealth Governments' attitudes in the claim were inconsistent with their policies and their commitments to act as model litigants.

> …the Government lawyers continue to oppose the claim putting the Applicant to proof of its case. In the case of the Sea Claim the government parties' position is captured by, among other things:
>
> - A failure to make any significant concessions;

66 Information received in correspondence to me, in response to requests for information for the preparation of the Native Title Report 2008, including: M Scrymgour, Minister for Indigenous Policy, Northern Territory Government, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; Queensland Government Department of Natural Resources and Water, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; M Atkinson, Attorney-General, Government of South Australia, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 September 2008; T Kelly, Minister for Lands, New South Wales Government, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 1 September 2008; R Hulls, Attorney-General, Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

67 National Native Title Tribunal, *National Report: Native Title* (March 2009), p 3. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf (viewed 12 October 2009).

68 At the time of writing, the parties were waiting for Justice Finn to hand down his decision on the case.

- Technical arguments regarding the nature and content of the native title rights and interests;
- Challenging the exercise, existence and extent of native title rights and interests in the whole of the claim area; and
- Pressing technical legal arguments that relate to questions of society and authorisation of the claim.

The position taken by the Queensland and Commonwealth Governments' are disappointingly inconsistent with a commitment to 'improve the operation of the native title system by encouraging more negotiated settlements of native title claims'. The position has caused TSRA to commit significant financial resources, time and other resources to prosecute the claim.[69]

This is a pertinent example of why relying on a change in attitude will not alone be sufficient to address the difficulties of the native title system. I recommend that the Australian Government pursue its policy through a combination of legislative and non-legislative options which together provide unambiguous and enforceable measures that all parties to native title must adhere to. Many of my ideas for change are identified in Chapter 3 of this Report.

Some measures initiated or completed by the Australian Government in 2008–09 are considered below.

(i) Native Title Amendment Bill 2009 (Cth)

After consulting on a discussion paper on minor native title amendments, the Attorney-General introduced the Native Title Amendment Bill 2009 (Cth) (the Bill) on 19 March 2009. The *Native Title Amendment Act 2009* (Cth) (the Native Title Amendment Act) commenced on 18 September 2009.

The Amendment Act amends the Native Title Act to allow for, and encourage, broader negotiated agreements between native title claimants and other parties. The key changes include:

- giving the Federal Court full control over the management of native title claims
- giving the Federal Court the power to make consent orders about matters beyond native title. It is expected that this will assist with the negotiation of broader agreements
- giving the Federal Court the power to rely on an agreed statement of facts between the parties
- applying recent amendments to the Evidence Act broadly to native title proceedings[70]
- changing the provisions for recognition of NTRBs; and extension, variation and reduction of NTRB areas.[71]

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69 Torres Strait Regional Authority, *Supplementary submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2009* (24 April 2009), p 2.

70 See below for a summary of these amendments.

71 See Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3250 (The Hon Robert McClelland MP, Attorney-General). For a summary of the amendments, see Attorney-General's Department, *Native Title Amendment Act 2009: Information Sheet* (2009). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC/$file/Native+Title+Amendment+Act+2009+-+Information+Sheet.DOC (viewed 12 October 2009).

I made submissions to the discussion paper and the Senate Inquiry, generally supporting the passage of the Bill.[72] I also recommended a number of improvements that could be made to the Bill and identified areas where further clarification of the law could be beneficial. In addition, I responded to the Attorney-General's calls to provide additional concrete recommendations for reform of the native title system, and outlined in my submissions a number of other matters that require consideration in future reforms.

(ii) The Evidence Amendment Act 2008 *(Cth)*

In December 2008, the *Evidence Amendment Act 2008* (Cth) was passed. The Act amends the *Evidence Act 1995* (Cth) (the Evidence Act), allowing for evidence of the existence or content of traditional law and custom to be exempt from the hearsay and opinion evidence rules. The amendments also changed the rules for narrative evidence, giving the court the power to direct a witness to give evidence wholly or partly in narrative form, rather than the standard question and answer format. This form of giving evidence is relevant for native title hearings where Aboriginal and Torres Strait Islander people might be more comfortable giving evidence through narrative or in the traditional practice of 'storytelling'. These amendments commenced on 1 January 2009.

I summarised these changes in my *Native Title Report 2008*.[73] I am pleased that changes introduced in the Native Title Amendment Act mean that the new evidence rules can apply to native title cases that began before 1 January 2009, if the parties consent or the Court orders that it is in the interests of justice to do so.[74]

However, I would like to reiterate the comments that I made in my *Native Title Report 2008*; that although the amendments to the rules of evidence may go some way to addressing the difficulties of evidence in native title proceedings, they will not provide a complete or adequate solution. For this reason I continue to advocate that the Evidence Act 1995 should not apply to native title proceedings.[75]

(iii) The Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth)

The Attorney-General introduced the Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth) into Parliament in December 2008. If passed, the Bill will allow the Federal Court to refer a proceeding, or one or more questions arising in a proceeding, to a referee for report.[76]

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72 For a copy of my submissions see http://www.humanrights.gov.au/legal/submissions/sj_submissions/submissions.html (viewed 30 November 2009).

73 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), pp 19–20. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009).

74 *Native Title Act 1993* (Cth), s 214.

75 See Australian Human Rights Commission, *Submission to the Senate Committee on Legal and Constitutional Affairs inquiry into the Native Title Amendment Bill 2009* (24 April 2009); Australian Human Rights Commission, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (19 February 2009). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/submissions.html#nt (viewed 12 October 2009).

76 Explanatory Memorandum, Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth). At http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/framelodgmentattachments/46A1A36C581ECB47CA2575140020744B (viewed 12 October 2009). At the time of writing, the Bill was still before the Senate. It had been referred to the Senate Committee on Legal and Constitutional Affairs in December 2008. The Committee reported in February 2009.

The Explanatory Memorandum to the Bill states that this power could be useful where technical expertise is required, but it is not efficient for the judge to gain the necessary expertise in that area. Therefore, the Bill gives the Court the power to refer a matter out to a referee, which is intended to provide the Court with greater flexibility, and save on resources and time.

The Attorney-General considers that the Federal Court could use this power in native title cases, contributing to the Court's ability to manage claims in such as way that the parties avoid protracted litigation and can negotiate outcomes. The new referral powers contained in the Bill may go some way to reducing the negative impacts that the adversarial setting has on native title claimants and the outcomes reached.

(iv) Optimising Benefits from Native Title Agreement-Making – Discussion Paper

The Attorney-General and the Minister of Families, Housing, Community Services and Indigenous Affairs convened the Native Title Payments Working Group in July 2008 to 'advise on how to promote better use of native title payments to improve economic development outcomes for Indigenous Australians'.[77] The Working Group on Native Title Payments reported to the Australian Government in late 2008.[78] The Attorney-General and the Minister for Indigenous Affairs then released a Discussion Paper that built on the working group's report. The Discussion Paper considered legislative and non-legislative options that would 'make better use of payments to Aboriginal communities under mining and infrastructure agreements'.[79] The proposals covered a range of topics, including transparency, taxation, minimum benefits, and other ways to promote good practice.

I agreed with aspects of the Discussion Paper, including the need to improve the application of the tax law to Indigenous corporations holding native title rights, or who receive benefits by virtue of a native title agreement.[80] However, I also recommended that the government focus on providing the Indigenous party to the negotiation with sufficient resources and access to the skills necessary to negotiate on an even playing field with the resource company. I would also like to see the underlying procedural rights on which negotiations are based, that is, the right to negotiate, expanded and strengthened to guarantee that even playing field.

Indigenous parties are on an unequal footing in negotiations with resource companies and governments. I have suggested changes to shift that power to create a more equal bargaining position for the Indigenous party. In turn, this will create better agreements. Communities know their own priorities. Once they have more power, they will be in a better position to pursue the outcomes they want to see achieved.

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77 Australian Government, *Australian Government Discussion Paper* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC (viewed 12 October 2009). The working group comprised of Professor Marcia Langton, Gina Castelain, Chris Cottier, James Fitzgerald, David Ross, Philip Hunter, Bill Hart, Glen Kelly, Melanie Stutsel and Brian Wyatt.

78 Native Title Payments Working Group, *Report* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC (viewed 12 October 2009).

79 R McClelland (Attorney-General) and J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Native title discussion paper released' (Media Release, 8 December 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_FourthQuarter_8December2008-NativeTitleDiscussionPaparReleased (viewed 16 November 2009).

80 See Australian Human Rights Commission, *Submission to the Government's native title payments discussion paper – Optimising benefits from native title agreements* (4 March 2009). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/20090304_ntpayments.html (viewed 12 October 2009).

(v) Where momentum is waning

So far, I have considered areas where the Australian Government has made or considered changes to native title. However, there are areas of native title policy in which there has been a distinct lack of action and momentum. I consider examples of few such areas below.

Financial assistance to the states and territories for compensation

At the Native Title Ministers' Meeting in 2008, state and territory Ministers agreed to negotiate in good faith on the content of an agreement between the Australian Government and themselves for financial assistance to deal with native title compensation.

The agreement was intended to be drafted by 30 June 2009.[81] At the date of writing, a copy of the agreement was not publicly available, nor had there been any comment by governments on its status.

In last year's *Native Title Report*, I suggested that the Australian Government tie this funding to the behaviour of the state and territory governments in negotiating native title agreements, giving them incentive to act in the flexible manner that the Australian Government is advocating.

Joint Working Group on Indigenous Land Settlements – an alternative land settlement scheme

Another outcome of the Native Title Ministers' Meeting in 2008 was the establishment of a Joint Working Group on Indigenous Land Settlements. The group is to:

- develop innovative policy options for progressing broader regional land settlements
- seek to complement, not override existing processes in place for the negotiation of flexible native title settlements.

The Government is pursuing these broader land settlements on the understanding that:

> Broader settlement packages provide land and social justice outcomes beyond answering the question of whether native title exists. Examples of benefits under such settlements include training and employment opportunities, land transfers and co-management of land.[82]

Over the last year, the Joint Working Group has not produced any publicly available material. However, it is expected that the Working Group will report back to the next Native Title Ministers' meeting in August 2009.

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81 Native Title Ministers' Meeting, *Communiqué* (18 July 2008). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 16 November 2009).

82 UN Human Rights Committee, *Replies to the list of issues (CCPR/C/AUS/Q/5) to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009), para 41.

Indigenous Economic Development Strategy

Since it was elected, the Australian Government has talked about its impending Indigenous Economic Development Strategy. The Labor Party committed to developing an Indigenous Economic Development Strategy (IEDS) in their 2007 election campaign, highlighting economic development as a key feature of improving the lives of Indigenous Australians.[83] The Labor Party referred to the need for government to work in partnership with Indigenous people to achieve economic self-reliance for individuals and communities, and promoted links between Indigenous people and the private sector. Part of the IEDS would focus on housing, land and sea management and carbon trading.

When the Government was elected, the Minister for Indigenous Affairs, Jenny Macklin, regularly promoted the IEDS as the Government's key policy platform for Indigenous affairs. In May 2008, Minister Macklin stated that the IEDS would be developed within six months.[84]

Again, in May 2009, Minister Macklin announced that the Government would soon release a public discussion paper outlining an approach to Indigenous economic development with an aim to incorporate that feedback into the IEDS, which would be launched later this year.[85] At the date of writing this Report, the Government had not released a discussion paper or a draft IEDS.

Prescribed Bodies Corporate – funding

All levels of government have failed to confront the problems concerning the viability of PBCs.

There are now over 60 registered PBCs in Australia.[86] The areas covered by PBCs are set out in Map 1.1. Under the Native Title Act, PBCs are established to hold native title once a determination has been made. However, they perform a wide range of ever-expanding functions. Given that the native title rights and interests held by PBCs are not able to be used for commercial gain, PBCs often struggle to fund their basic administrative and organisational costs. This undermines their capacity to comply with complex regulatory and project reporting requirements. This, in turn, threatens their ability to protect the native title rights they were established to maintain.[87]

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83 Australian Labor Party, *Indigenous economic development – election 2007* (2007). At http://www.alp.org.au/download/now/indig_econ_dev_statement.pdf (viewed 1 October 2009).

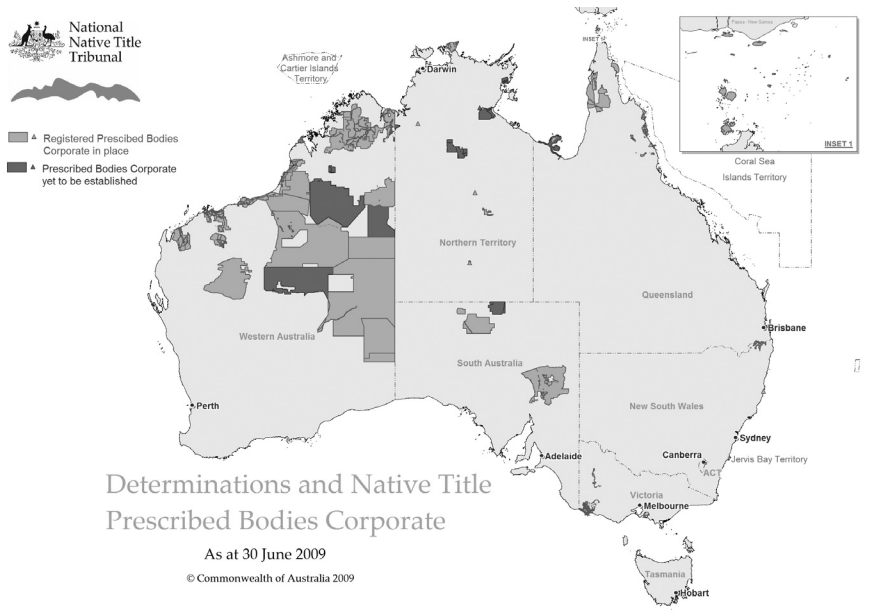
84 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Beyond Mabo: Native title and closing the gap* (Speech delivered as the 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008). At http://www.nswbar.asn.au/circulars/macklin.pdf (viewed 12 October 2009).

85 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Budget: Closing the gap between Indigenous and non-indigenous Australians* (12 May 2009). At http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget09_10/indigenous/Documents/ClosingTheGap/closingthegap.pdf (viewed 13 October 2009).

86 As at 14 July 2009, there were 63 registered Prescribed Bodies Corporate: L Bunyan, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to Tom Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 6 August 2009.

87 These concerns were outlined in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), pp 36–42. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 12 October 2009).

Map 1.1: Determinations and Native Title Prescribed Bodies Corporate



The chair of a PBC in Western Australia describes the difficult position that PBCs are placed in:

> The PBC is the foundation to look after our land, our culture, socially and economically... In the last couple of years our committee has been struggling a little. Our [Annual General Meeting] has been failing a bit. I have got to look at every little avenue to manage our country. How can we manage our country without government funding? We set up lots of Karajarri projects with project funding... The government says 'we will give you money for the project, but we won't give you money for the PBC'. ... The downfall of our PBC is trying to administrate and manage our country. We have no fax, no phone, and no place where people can come.[88]

Yet, as I mentioned earlier in this Chapter, no federal funding has been allocated specifically for PBCs. The 2007 changes to the native title system did provide that NTRBs could use some of their limited funding to assist PBCs with their day-to-day operations. Through this mechanism, approximately $1 million of NTRB funding has been set aside for PBCs across the country in 2009–10.[89] The 2007 changes also allowed for the Department of Families, Housing, Community Services and

88 M Mulardy, interviewed by J Weir, 'Traditional Owner Comment' (September/October 2008) No 5/2008 *Native Title Newsletter* 2, p 3.

89 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

Indigenous Affairs (FaHCSIA) to consider direct funding requests from PBCs. To date, FaHCSIA has not directly funded a single PBC.[90]

The 2007 amendments to the Native Title Act also provided for another potential funding source for PBCs. PBCs are now able to charge fees for the costs that they incur in respect of a number of matters that are specifically listed in subsection 60AB(1) of the Native Title Act. These include costs incurred when negotiating agreements under s 31(1)(b) of the Native Title Act and negotiating Indigenous Land Use Agreements.[91]

Regulations can be made to allow PBCs to charge a fee for costs they incur when performing other functions.[92] However, two years after these amendments were finalised, these regulations are yet to be drafted.

Overall, the Australian Government has acted contrary to the Australian Labor Party's National Platform and Constitution 2007, which commits to ensuring adequate resourcing for the *core responsibilities* of PBCs.[93]

In the meantime, pressure is building on PBCs to perform a myriad of tasks on behalf of every level of government. This takes advantage of the traditional owners' sense of responsibility to their country.

For example, amendments were made in 2008 to the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld). Previously, lands granted by the Queensland Government to Indigenous communities were administered by a trustee for the benefit of Aboriginal people or Torres Strait Islanders particularly concerned with the land.

The 2008 amendments made a number of significant changes to the Queensland land rights Acts, including allowing Registered PBCs to hold the land for the native title holders of that land. The Acts now allow the Minister to appoint a PBC as the grantee of the land if there is a determination over all or part of the land, and the PBC approves. These amendments were intended to assist the Queensland Government to include Indigenous land as part of native title negotiations and to help align the Queensland Acts with the Native Title Act.[94]

Despite this significant additional responsibility, the Queensland Government has not committed to providing additional resources to enable PBCs to undertake this responsibility. The Government has only committed to providing guidance to new grantees as to how to enter into leases. I have been told that the Queensland Government considers that PBCs are the funding responsibility of the Australian Government, as a federal law (the Native Title Act) requires PBCs to be established.

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90 Department of Families, Housing, Community Services and Indigenous Affairs, Email to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 24 August 2009. I have been informed that whether PBC funding applications are received directly by the Department or not, they are routed through the relevant NTRB, which is then requested to provide comments on each application. Any PBC that wishes to apply for funding direct from the Department must first seek the Department's agreement to make an application for direct funding, explaining why they consider support through their NTRB is not acceptable. For more information on funding of PBCs and the 2007 changes, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008), pp 97–99. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 13 October 2009).

91 However, PBCs cannot charge fees for their costs of being a party to an inquiry about whether a future act can occur or not under s 35 of the Native Title Act, nor for their costs as a party to any court proceeding.

92 *Native Title Act 1993* (Cth), s 60AB(2).

93 Australian Labor Party, *Australian Labor Party National Platform and Constitution* (2007), ch 13, para 104 (emphasis added).

94 Explanatory Note, Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld), p 6. For further discussion, see Chapter 4 of this Report.

I do not agree with this approach. PBCs are established to hold and protect native title rights and interests under the Native Title Act. However, that does not mean that they should be asked to shoulder additional responsibilities, programs and costs by other governments, without appropriate resources to undertake those additional responsibilities.

As I have stated, many PBC members would be loathe to not accept the responsibilities to deal and manage their land. This is exactly what they have worked toward in pursuing their native title claim. Yet they must be funded to undertake this role. Otherwise, they are being set up to fail yet again.

Given these pressures, PBC members are banding together and demanding practical recognition of their status as the traditional owners of an area.

One aspect of this is that they would like to form a national peak body in order to form a direct line of communication with governments about land and sea matters and the management of their native title rights and interests. At a meeting of over 50 PBC representatives, PBCs called for a peak body which would be the voice for PBCs, coordinate information, mentor new PBCs, lobby and influence policy and sit with other national bodies.[95]

I support this call. I recommend that such a body should be supported by existing bodies and projects that play a similar role. This could include the Aurora Project, the PBC project at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), the Office of the Registrar of Indigenous Corporations (ORIC) and the National Native Title Council (NNTC).

I also consider that further attention needs to be paid to the development of sources of funding support for PBCs. Funding models already exist whereby a percentage of income derived from state land tax or mining activity has funded the statutory land rights regime. Some land rights regimes across the country are now self-funding due to state government investment. The examples featured in Text Box 1.1 should be further reviewed to determine what aspects may be appropriate for the native title system to create financial sustainability for land holding and management organisations once a determination has been made.

Text Box 1.1: Examples of funding arrangements for land rights regimes

New South Wales Land Rights Regime[96]

Under the *Aboriginal Land Rights Act 1983* (NSW), an account was established, whereby for fifteen years, the state paid an amount equivalent to 7.5% of NSW Land Tax (on non-residential land) into statutory accounts administered by the New South Wales Aboriginal Land Council (NSWALC), as compensation for land lost by the Aboriginal people of NSW.

That annual payment ceased in 1998 when a clause in the Act, known as the Sunset Clause, took effect. Since then, the NSW Aboriginal Land Council has been self-sufficient, funding its activities and supporting Local Aboriginal Land Councils with the money made from its investments.

95 Native Title Services Victoria and the Australian Institute of Aboriginal and Torres Strait Islander Studies, 'Native Title holders call for national peak body' (Media Release, 2 June 2009).

96 New South Wales Aboriginal Land Council, *NSWALC Funding.* At http://www.alc.org.au/about/Funding/funding.htm (viewed 19 September 2009).

The capital, or compensation, accumulated over the first 15 years of the Council's existence remains in trust for the Aboriginal people of NSW and cannot be touched. Interest from NSWALC's investments fund the organisation's head office in Parramatta, which oversees and funds the network of Local Aboriginal Land Councils.

NSWALC also funds land claims, related test-case litigation and supports the establishment of commercial enterprises which create an economic base for Aboriginal communities.

Aboriginals Benefit Account – Northern Territory[97]

The Aboriginals Benefit Account (ABA) is a Special Account (for the purposes of the *Financial Management and Accountability Act 1997* (Cth)) established for the receipt of statutory royalty equivalent monies generated from mining on Aboriginal land in the Northern Territory (NT), and the distribution of these monies.

The ABA is administered by the Department of Families, Housing, Community Services and Indigenous Affairs in accordance with the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).

The ABA funds are used to meet the operational costs of the Land Councils in the NT and to pay compensation to traditional owners and other Aboriginals living in the NT that have been affected by mining. The ABA can also make grants for the benefit of Aboriginal people in the NT and in exercising this function, the Commonwealth Minister receives advice from an Account Advisory Committee with Aboriginal majority membership.

Government support at all levels is crucial to the success of the system overall and to meeting the goal of closing the gap.

Prescribed Bodies Corporate – regulation

Since its commencement in 2007, I have raised concerns about the application of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (the CATSI Act).[98] I have previously:

- called for a review of the impact of the CATSI Act on Indigenous corporations, in particular on the ability of Registered Native Title Bodies Corporate (also known as PBCs)[99] to protect and utilise their native title rights and interests
- recommended that the Government ensure that funding provided to registered PBCs is consistent with the aim of building the capacity of PBCs to operate.

Those recommendations have not been addressed.

97 Department of Families, Housing, Community Services and Indigenous Affairs, *Aboriginals Benefit Account (NT only).* At http://www.fahcsia.gov.au/sa/indigenous/progserv/money/Pages/aboriginals_benefit_account.aspx (viewed 19 September 2009).

98 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 6; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), ch 2.

99 Under the CATSI Act, Prescribed Bodies Corporate are referred to as Registered Native Title Bodies Corporate. I will continue to refer to them as PBCs in this Report.

FaHCSIA has advised that $545 750 was provided to NTRBs during the 2008–09 financial year for allocation to specific PBCs. In addition, FaHCSIA advised that the ORIC also expended $1.5 million in training to Indigenous corporations, some of which was provided to PBCs. ORIC organised and funded five workshops for PBCs, which were attended by 15 groups during the 2008–09 financial year.[100]

While I acknowledge and support the critical work of the ORIC in developing the governance capacity of Indigenous organisations (including PBCs), I am concerned that at least two registered PBCs have been placed under administration during this reporting period.[101] This emphasises the need for a review of the impact of the CATSI Act on Indigenous corporations.

1.4 Significant cases affecting native title and land rights

(a) The constitutional validity of compulsory acquisitions under the Northern Territory intervention: *Wurridjal v Commonwealth*

(i) Background

In February 2009, the High Court handed down its decision in *Wurridjal*.[102] In the case, the Court considered the constitutional validity of certain provisions of the legislation which supported the Northern Territory intervention.[103]

Two senior members of the Dhukurrdji people (traditional owners of an area including the town of Maningrida) and a business in Maningrida (the Bawinanga Aboriginal Corporation) argued that three aspects of the intervention were acquisitions of property under the Constitution:

- the compulsory acquisition of five-year leases over township land in Aboriginal communities across the Northern Territory[104]

100 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2009.

101 Office of the Registrar of Aboriginal Corporations, 'Two QLD native title corporations placed under special administration' (Media Release, 24 September 2008). At http://www.oric.gov.au/Content.aspx?content=publications/mediaReleases/ORICMR0809-09_Two-QLD-native-title.htm&menu=publications&class=publications&selected=Media%20releases (viewed 17 November 2009).

102 *Wurridjal v Commonwealth* (2009) 237 CLR 309.

103 See *Wurridjal v Commonwealth* (2009) 237 CLR 309, 335 (French CJ). The challenged provisions appeared in the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER) and the *Families, Community Services and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth). I discussed the Northern Territory intervention, the compulsory acquisition of five-year leases and changes to the permit system in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 9. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 4 October 2009). Other aspects of the intervention were discussed in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 4 October 2009). Developments in land tenure reform are further discussed in Chapter 4 of this Report.

104 Five-year leases over township land in 64 communities were compulsorily acquired, that is, involuntarily created by force of law. Freehold title to the land had earlier been granted to the traditional owners under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). The compulsory leases give the Commonwealth exclusive possession and quiet enjoyment of the land and allow the Commonwealth to grant subleases and licences over the land.

- changes to the permit system, which stated that permits were no longer required to enter common areas of community land nor the roads connecting them[105]
- the alleged subordination of Aboriginal people's rights to enter upon and use or occupy the land in accordance with Aboriginal tradition.[106]

More than a year after the intervention began no rent or compensation for the changes had been discussed with traditional owners or the Land Councils.[107]

(ii) Arguments of the parties

In the High Court, the plaintiffs claimed that the Commonwealth had acquired Aboriginal property rights on other than just terms, in breach of the guarantee offered to property-holders in s 51(xxxi) of the Constitution.[108] They sought a declaration that, to this extent, the intervention legislation was invalid.

The Commonwealth claimed that because the intervention legislation was made under the Territories power of the Constitution (s 122),[109] the safeguard of just terms for the acquisition of property in s 51(xxxi) of the Constitution did not apply.

In the alternative, the Commonwealth claimed that no property was acquired because the Land Trust's fee simple interest in the land was a mere statutory entitlement (created under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (the ALRA)) and therefore it was defeasible and could be changed by another Commonwealth law. They argued that the changes that were made for the intervention were less than an 'acquisition', because under the ALRA the Commonwealth continued to have a significant level of control over Aboriginal land.

Finally, in the event that the Court held that there was an 'acquisition of property' in the constitutional sense, the Commonwealth argued that the provisions in the intervention legislation which allowed court action to recover reasonable compensation, satisfied the requirement for 'just terms'.

(iii) Decision of the High Court

Therefore, the High Court considered three issues:

1. Whether the requirement for just terms compensation in s 51(xxxi) of the Constitution applies to laws made for the territories under s 122 of the Constitution.
2. Whether there had been an acquisition of property.
3. Whether the relevant laws provided just terms.

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105 A law of the Northern Territory, the *Aboriginal Land Act* (NT) (ALA), establishes the 'permit system' which provides that people are not allowed on Aboriginal land without permission from the traditional owners or the Land Council.

106 Section 71 of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) affirms that Aboriginal people have the right to enter and occupy or use the land in accordance with Aboriginal tradition.

107 As I mentioned in the *Native Title Report 2007*, the legislation under which the Australian Government acquired the land did not explicitly provide that rent would be paid in all circumstances. The legislation simply provided for the payment of 'reasonable' compensation if the Minister had requested a valuation of the land from the Valuer-General. See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 9. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

108 Section 51(xxxi) of the Constitution provides that 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: ...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'.

109 The relevant part of section 122 of the Constitution states that the 'Parliament may make laws for the government of any territory'.

A majority of the Court answered 'yes' to all three.[110] The majority overruled *Teori Tau v Commonwealth (Teori Tau),*[111] in which the Court had held that s 122 is not limited or qualified by s 51(xxxi). They found that there had been an acquisition of property to which s 51(xxxi) of the Constitution applied.

However, the majority also found that the intervention legislation provided just terms, by allowing recovery of 'reasonable compensation', if necessary by court action. Although the plaintiffs 'won' on two of the three questions argued before the Court, the Court required them to pay the Commonwealth's legal costs.

(iv) Justice Kirby's dissent

Justice Kirby dissented on the overall result in *Wurridjal*. He found that the applicants should not be knocked out in a preliminary hearing of the kind adopted by the High Court (a 'demurrer'), which addressed legal questions divorced from a full trial involving witnesses and other evidence. He was satisfied that the plaintiffs had an arguable case (particularly with a majority over-ruling *Teori Tau*) and should have the opportunity, after amending and clarifying their claim if necessary, to pursue the matter in a full hearing. As Kirby J stated:

> My purpose in these reasons is to demonstrate that the claims for relief before this Court are far from unarguable. To the contrary, the major constitutional obstacle urged by the Commonwealth is expressly rejected by a majority, with whom on this point I concur. The proper response is to overrule the demurrer. We should commit the proceedings to trial to facilitate the normal curial process and to permit a transparent, public examination of the plaintiffs' evidence and legal argument… The law of Australia owes the Aboriginal claimants nothing less. …
>
> If any other Australians, selected by reference to their race, suffered the imposition on their pre-existing property interests of non-consensual five-year statutory leases, designed to authorise intensive intrusions into their lives and legal interests, it is difficult to believe that a challenge to such a law would fail as legally unarguable on the ground that no "property" had been "acquired". Or that "just terms" had been afforded, although those affected were not consulted about the process and although rights cherished by them might be adversely affected. The Aboriginal parties are entitled to have their trial and day in court. We should not slam the doors of the courts in their face. This is a case in which a transparent, public trial of the proceedings has its own justification.[112]

Justice Kirby attributed legal significance to the indigeneity of the traditional owners. By contrast Justices Hayne and Gummow stated:

> No different or special principle is to be applied to the determination of the demurrer to the plaintiffs' pleading of invalidity of provisions of the Emergency Response Act and the FCSIA Act because the plaintiffs are Aboriginals. No party to this litigation sought to rely upon any such principle, whether the suggested principle be described as a rule of 'heightened' or 'strict' scrutiny or in some other way. There was therefore no examination of the content of any such principle. But we would agree that such a principle 'seems artificial when describing a common interpretative function'. In any event, to adopt such a principle would have departed from the fundamental principle of 'the equality of all Australian citizens before the law'…[113]

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110 Regarding question 1, French CJ, Gummow & Hayne JJ and Kirby J all answered in the affirmative. In doing so, they overruled *Teori Tau v Commonwealth* (1969) 119 CLR 564, applying the safeguard of 'just terms' compensation for the acquisition of property across Australia, to territories as well as states. Justice Kiefel arrived at the same result but on narrower constitutional grounds. Regarding question 2, French CJ, Gummow & Hayne JJ, Kiefel J and Kirby J all answered in the affirmative. Regarding question 3, French CJ, Gummow & Hayne JJ, Heydon J and Kiefel J all answered in the affirmative.

111 (1969) 119 CLR 564.

112 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 391, 394 (Kirby J).

113 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 369 (Gummow and Hayne JJ).

Recognising another consequence of the special status of traditional owners compared to other land owners in Australia, Justice Kirby reiterated his comments in the *Griffiths*[114] case in which he emphasised that Indigenous peoples' rights deserve special protection and that any law purporting to extinguish or diminish Indigenous peoples' land rights can only do so by 'specific legislation' which expressly states this intention.[115]

He supported this principle with a discussion of relevant international law which 'recognises the entitlement of indigenous peoples, living as a minority in hitherto hostile legal environments, to enjoy respect for, and protection of, their particular property rights'.[116]

Justice Kirby concluded:

> In these proceedings a growing body of international law concerning indigenous peoples exists that confirms the rules that are already now emerging in Australian domestic law. Laws that appear to deprive or diminish the pre-existing property rights of indigenous peoples must be strictly interpreted. This is especially so where such laws were not made with the effective participation of indigenous peoples themselves. Moreover, where (as in Australia) there is a constitutional guarantee providing protection against 'acquisition of property' unless 'just terms' are accorded, development of international law will encourage the national judge to give that guarantee the fullest possible protective operation.[117]

The plaintiffs' status as traditional owners also influenced Justice Kirby's consideration of what actually constitutes just terms. He referred to case law and the differences between the Australian Constitution and the drafting of the Constitution of the United States of America to support his view that '[a]t least arguably, "just terms" imports a wider inquiry into fairness than the provision of "just compensation" alone'.[118]

Justice Kirby considered the implications of this view for the acquisition of traditional owners' land. He stated that:

> This might oblige a much more careful consultation and participation procedure, far beyond what appears to have occurred here. …
>
> Given the background of sustained governmental intrusion into the lives of Aboriginal people intended and envisaged by the National Emergency Response legislation, 'just terms' in this context could well require consultation before action; special care in the execution of the laws; and active participation in performance in order to satisfy the constitutional obligation in these special factual circumstances …[119]

(v) Significance of the decision

The decision of the High Court in *Wurridjal* is significant for several reasons. A majority of judges over-ruled *Teori Tau* and said effectively that the just terms guarantee applies in the territories in the same way that it does in the states. This is important for everyone who lives in a territory and is therefore subject to Commonwealth laws passed under s 122 of the Constitution. I am particularly pleased that a majority

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114 *Griffiths v Minister for Lands, Planning and Environment (Northern Territory)* [2008] HCA 20.

115 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 406 (Kirby J).

116 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 411 (Kirby J).

117 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 413 (Kirby J).

118 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425 (Kirby J). Justice Kirby also said that s 51(xxxi) of the Australian Constitution was inspired by the United States Constitution, which provides for 'just compensation'. However, the drafters of the Australian Constitution deliberately inserted the words 'just terms' rather than 'just compensation', suggesting the Australian phrase should be given a distinct interpretation that transcended compensation. See *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425 (Kirby J).

119 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 425, 426 (Kirby J).

recognised the unfairness of the rule in *Teori Tau*, because Aboriginal people make up almost 30% of the population in the Northern Territory and they hold fee simple (or freehold) title to almost 50% of the land there. These property rights were vulnerable to second-class treatment by the Commonwealth under the old law.

As I noted earlier, in *Wurridjal* the Commonwealth argued that it retained such a strong controlling interest over Aboriginal land in the Northern Territory that it could impose a five-year lease against the wishes of traditional owners (with apparently no obligation to pay rent) and yet not trigger the obligation to provide just terms. Another welcome feature of the case is that a majority of the Court rejected this argument. The decision reaffirmed the legal strength of Aboriginal property rights under the ALRA and the independent degree of control over land enjoyed by traditional owners.

On the other hand, the case has left some important questions unanswered about the 'valuation' of Aboriginal property rights and the legitimacy or otherwise of applying normal 'real estate' principles regarding compulsory acquisition and compensation to these unique property interests. Because of the way the case was dealt with, the plaintiffs' arguments that special procedures for acquisition and non-monetary compensation might be required to meet the constitutional standard of just terms remain unresolved.

It is also unclear from the Court's decision whether the changes to the permit scheme, on their own, effect an acquisition of property. This remains important for the future, particularly if further unilateral changes are made by Parliament to the rules for entering on Aboriginal land or the permit changes remain in place after expiry of the five-year leases.[120]

The Government is accountable for the arguments that its legal representatives put before courts. The Commonwealth's arguments in this case raise a number of concerns about the Government's approach to Indigenous peoples' land rights.[121]

The Government disputed whether any compensation needed to be paid simply because the acquisitions were in the Northern Territory.

Perhaps even more concerning was the Government's alternative argument that five-year leases were a statutory readjustment and not an acquisition of property. This can be seen as an attempt by the Commonwealth to treat Aboriginal land as an inferior form of title.

A further concern remains about the Commonwealth Government's conduct – the failure to pay rent and compensation for the leases in a timely manner.

In October 2008, well after proceedings in this case had commenced, the Government requested the Northern Territory Valuer-General to determine the rents that should be paid for the compulsory five-year leases.

On 27 February 2009, about a month after the *Wurridjal* decision was handed down, the Government announced that it had finalised boundaries for all 64 five-year leases that were acquired by the Government as part of the Northern Territory Emergency Response. The review of the lease boundaries resulted in changes to the leases to reduce the area leased and allowed for the Government to accurately determine the

120 For discussion of this and other aspects of the case, see S Brennan, 'The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*' (*Melbourne University Law Review*, forthcoming).

121 See S Brennan, 'The Northern Territory Intervention and Just Terms for the Acquisition of Property: *Wurridjal v Commonwealth*' (*Melbourne University Law Review*, forthcoming).

area for which they would pay rent. The Minister for Indigenous Affairs, stated that the Government recognised 'that reasonable rent must be paid to landowners'.[122]

In August 2009, the Minister advised me that:

> In October 2008, in response to the recommendation of the Northern Territory Emergency Response Review Board, I wrote to the Northern Territory Valuer-General requesting that he determine reasonable amounts of rent to be paid to owners of land subject to five-year leases under the NTER. In March of this year, I made an additional request of the Valuer-General to also determine rent to be paid under the reduced lease boundaries that came into effect on 1 April 2009. The Valuer-General was asked to give these requests his prompt attention. I am advised that the Valuer-General is currently finalising his draft report, a copy of which will be provided to FaHCSIA as well as the relevant land councils for comment. I expect to receive the Valuer-General's final report containing both sets of determinations in late August 2009. The payment of rent will commence shortly after.[123]

At the time of writing this Report, the Government had still not paid rent or compensation for the leases.

I further consider the Government's approach regarding the payment of rent and the assessment of compensation in Chapter 4 of this Report.

I am also concerned that the Commonwealth drafted compensation provisions which required a full-scale constitutional case to establish entitlements and yet, when the Aboriginal parties defeated the Commonwealth on two out of three constitutional arguments, they were nonetheless ordered to pay the Commonwealth's legal costs.

Only Kirby J considered that the costs order was unjust:

> They brought proceedings which, in the result, have established an important constitutional principle affecting the relationship between ss 51(xxxi) and 122 of the Constitution for which the plaintiffs have consistently argued. It was in the interests of the Commonwealth, the Territories and the nation to settle that point. This the Court has now done. In my respectful opinion, to require the plaintiffs to pay the entire costs simply adds needless injustice to the Aboriginal claimants and compounds the legal error of the majority's conclusion in this case.[124]

The end result is inequitable. Between the calculated drafting strategy of the Commonwealth and the costs order of the Court, the law seems to have operated unfairly.

(b) The requirement to negotiate in good faith: *FMG Pilbara Pty Ltd v Cox*

(i) The future act regime

The future act regime deals with proposed development on native title country. Particular forms of development likely to have a substantial native title impact attract additional procedural protections for native title parties. These protections are known as the 'right to negotiate' and they apply to the grant of some mining tenements (leases and licences) and certain compulsory acquisitions. The Act places emphasis on negotiation as the means for addressing the native title issues at stake in such future acts, by preventing resort to an arbitral body (usually the NNTT) for a period

122 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Government finalises five-year lease boundaries in NT Indigenous communities' (Media Release, 27 February 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/lease_boundaries_27feb09.htm (viewed 19 October 2009).

123 J Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 12 August 2009.

124 *Wurridjal v Commonwealth* (2009) 237 CLR 309, 426 (Kirby J).

of six months. Time runs from the issue of a notice that the government intends to grant a mining tenement (s 29 notice). During this negotiation window, s 31 of the Native Title Act obliges the parties involved to negotiate in good faith. The main negotiating parties are the mining company (grantee) and a registered native title claimant group or the recognised native title holders for the area, with the state or territory government playing a passive or sometimes more active role as well.

In *FMG Pilbara*[125] (decided in April 2009), the Full Federal Court considered what is required for parties to fulfil the obligation in s 31 to 'negotiate in good faith with a view to obtaining the agreement of each of the native title parties to the doing of the act or the doing of the act subject to conditions'.[126]

(ii) Background to the appeal

The Western Australian Government gave notice of its intention to grant Fortescue Metal Group (FMG) a lease to mine an area in the Pilbara region. The proposed lease overlapped a registered native title claim and an area where native title had been determined.

As required by the Native Title Act, FMG negotiated with both native title parties – the Puutu Kunti Kurrama and Pinikura People (PKKP), a registered native title claimant group for part of the area, and the Wintiwari Guruma Aboriginal Corporation (WGAC), the registered native title body corporate for the balance of the area.[127] Six months after the notice, none of the parties had reached an agreement. FMG applied to the NNTT for a determination whether the future act could proceed, with or without conditions. Both the native title parties alleged that FMG had not fulfilled its obligation to negotiate in good faith.

FMG had approached the negotiations on a 'whole of claim' basis. That is, the miner sought a comprehensive Land Access Agreement (LAA) that bundled together not only the specific grant of the mining lease in question, but all the other future activities it might wish to undertake on the native title land in question, in pursuit of exploration and mining projects. This included obtaining tenure for mining as well as for railway and port infrastructure, and the authority to extract water.

Most of the discussions between PKKP and FMG had concerned the finalisation of a negotiation protocol, an agreed process for dealing with these comprehensive negotiations. PKKP claimed there had only been one meeting following the conclusion of the negotiation protocol about the substance of FMG's proposed activities.

The native title parties drew attention to a number of aspects of FMG's behaviour, raising two questions in particular about the obligation to negotiate in good faith:

- If negotiations have reached only a preliminary stage at the expiry of six months, does it show an absence of good faith for a miner to 'bail out' of those negotiations and seek an arbitral determination? One set of negotiations were said to have involved only one meeting about the substance of FMG's proposed activities.

125 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49. It has also been reported at (2009) 175 FCR 141. For a case note, see National Native Title Tribunal, *Native Title Hot Spots* (2009) (Issue 30), pp 17–23.

126 The High Court refused special leave to appeal the decision of the Full Federal Court on 14 October 2009. See *Cox v FMG Pilbara Pty Ltd* [2009] HCATrans 277 (14 October 2009). At http://www.austlii.edu.au/au/other/HCATrans/2009/277.html (viewed 23 October 2009).

127 WGAC was established following the approved determination of native title made in *Hughes v Western Australia* [2007] FCA 365.

- If discussions over a particular mining grant are incorporated into a broader negotiation over future activities on the land, what happens if those broader negotiations falter? Did the good faith requirement oblige FMG to return to the table and seek agreement to the particular grant, once the wider LAA talks stalled? Or was the company free to seek arbitration at that point?

The NNTT found in favour of the native title party on both issues. The NNTT said that 'although FMG had approached negotiations with PKKP in relation to the LAA in a manner which was reasonable and honest, it had not advanced those negotiations to a stage where it could be said that it had discharged its duty to negotiate in good faith'.[128] Also, FMG should have reverted to more specific negotiations when broader talks stalled. The absence of good faith negotiation meant that the NNTT had 'no jurisdiction' to determine whether the future act could be done or not.[129]

(iii) Decision of the Federal Court

FMG appealed the NNTT's decision to the Federal Court and was successful on both issues. The Court found that, regardless of the stage reached in negotiations, all that the Act requires is that the parties negotiate in good faith about the doing of the future act during the six month period. Once that time expires, a future act determination can be sought. The Court also considered that in this case, the broader negotiations the parties had embarked on were sufficient to discharge the obligation to negotiate in good faith in relation to the particular future act in question.[130] There was no need to revert to negotiations about the specific mining grant itself before seeking arbitration.

The Court found that, as FMG had acted in good faith during the six month period, the NNTT had the power to make a determination as to whether the act could be done.[131]

In its decision, the Court made a number of observations:

- The expression in s 31 of the Native Title Act that the parties must 'negotiate in good faith' should be given its natural and ordinary meaning.[132] The provision is intended to be beneficial to native title parties and should not be given a narrow interpretation.
- The Act does not compel parties to negotiate over specified matters or in a particular way and, here, neither native title party had objected to negotiations being conducted on a whole of claim or project wide basis.[133]
- 'Good faith' requires consideration of the party's conduct – what it has done, and what it has not done – as an indication of the party's state of mind during the negotiations.[134]
- Merely to 'go through the motions', with a rigid and pre-determined position may show a lack of good faith. But in this case, the NNTT had found that FMG had a genuine desire to reach agreement in its negotiations and there was no evidence that FMG had engaged in deliberately misleading

128 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 15.
129 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 1.
130 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 38.
131 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 28.
132 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 19.
133 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, paras 36, 38.
134 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.

behaviour. These and other factual findings showed 'there had been conscientious and bona fide negotiation for a six-month period'.[135]

- The requirement to negotiate in good faith in s 31 does not mean that the parties have to reach a certain stage in their negotiations by the end of the six month period.[136] Instead, the Court stated that:

> [T]here could only be a conclusion of lack of good faith within the meaning of [s 31]...where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.[137]

(iv) Policy implications of the decision

One of the main virtues of agreement-making is that it provides much greater flexibility for the parties. There are limits to what the Act can prescribe, particularly in substantive terms, when it comes to mining negotiations. Similar constraints apply to courts and tribunals.

However, the obligation on miners to negotiate in good faith, before any other option arises to proceed with their development, is one of the few legal safeguards that native title parties have under the future act regime. The Full Federal Court decision in *FMG Pilbara* shows that the Act provides insufficient legal protections and that, even under the existing law, the Courts could legitimately enforce the good faith requirement more vigorously.

I am concerned that in *FMG Pilbara* the Act was interpreted in ways which unnecessarily strengthened the position of mining companies over native title interests. For example, s 31(1)(b) requires good faith negotiation towards agreement about 'the doing of the act' and the act here was the grant of the specific tenement. The Court would have been well justified in finding that negotiations addressing a much broader range of issues lacked the specificity required by the precisely chosen language in the Act.

The Court also applied only a loose form of judicial scrutiny to the decision by FMG to 'bail out' of substantive negotiations at a very early stage. Whereas the NNTT in the *FMG Pilbara* litigation had emphasised the 'reasonable person' test employed in earlier future act decisions to assess the behaviour of the mining company,[138] the Full Federal Court seemed to rely on a much looser standard of behaviour. The embryonic stage of negotiations had to be attributable to 'sharp practice' or 'unconscionable conduct' or the like,[139] before the withdrawal from negotiations at that early stage could justify a conclusion of lack of good faith. This narrow interpretation 'raises the bar even further for native title parties who seek to oppose applications [for arbitration] under s 35'.[140] Native title lawyer Sarah Burnside has suggested that 'only an unusually careless proponent risks being found to have failed to meet the threshold'.[141]

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135 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 29.

136 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 23.

137 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 27.

138 *Cox v Western Australia* [2008] NNTTA 90, also reported at (2008) 219 FLR 72, paras 40, 70.

139 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 27.

140 S Burnside, *'Take it or leave it': how not to negotiate in good faith* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 3 June 2009). At http://ntru.aiatsis.gov.au/conf2009/papers/SarahBurnside.pdf (viewed 24 June 2009).

141 S Burnside, *'Take it or leave it': how not to negotiate in good faith* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 3 June 2009). At http://ntru.aiatsis.gov.au/conf2009/papers/SarahBurnside.pdf (viewed 24 June 2009).

This is supported by research conducted by Tony Corbett and Ciaran O'Faircheallaigh in 2006:

> We identified 13 cases where the Tribunal made determinations about 'good faith' in negotiations related to the grant of mining leases, and 17 determinations … over whether the grant of a mining lease might proceed. In only one case was a decision made that 'good faith' negotiation had not occurred, and this involved a situation where the grantee had made little attempt to engage with the native title party and had made clear that it was participating in the RTN process only so that it could proceed to arbitration by the Tribunal … these findings strongly suggest that grantee parties have little to fear from the arbitration process…Unless they engage in behaviour that patently demonstrates the absence of an intention to engage in negotiation, they appear unlikely to be required to re-commence the RTN process with a consequent delay in project development.[142]

In short, courts and tribunals should employ appropriate rigour and standards of reasonableness when applying the good faith requirement.

I also consider the right to negotiate provisions need to be amended so that they provide much stronger incentives for the negotiation of agreements that are fair to native title parties and their legitimate concerns when mining is proposed on their land. I consider potential options for reform in Chapter 3 of this Report.

(c) The first decision that a mining lease must not be granted: *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd*

In May 2009, the NNTT handed down its first decision that a mining lease must not be granted because of its impact on the native title holders.[143] It was a landmark decision, although its broader significance beyond this case will remain unclear for some time.

(i) Decision of the NNTT

In *Holocene*,[144] the NNTT considered whether the Western Australian Government could grant a mining lease to a company (the grantee party, Holocene Ltd)[145] on land over which native title has already been determined to exist.

The proposed lease was for 3144 hectares in the Gibson Desert in Western Australia, from which the grantee wanted to extract and process potash for sale as fertiliser. Brine from a very large body of salty water, Lake Disappointment, would be channelled by a trench many kilometres long and pumped into evaporation ponds. The potassium

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142 T Corbett & C O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review* 153, p 161.

143 Subdivision P of the Native Title Act provides for a 'right to negotiate' which applies where a government proposes to do particular acts which could affect native title rights. For the government's act to be valid, it must give notice of its intention to do the act, and allow any relevant native title group and the grantee party (the party which has requested or applied to the government for the act to be done) to negotiate in good faith with a view to coming to an agreement about the proposed act. If no agreement is reached, the proponent can ask the arbitral body (the NNTT) to make a decision on whether the proposed act can go ahead, or if it can only go ahead on certain conditions. For further information, see National Native Title Tribunal, *Procedures under the right to negotiate scheme* (2005). At http://www.nntt.gov.au/Future-Acts/Procedures-and-Guidelines/Documents/Procedures%20under%20the%20right%20to%20negotiate.pdf (viewed 22 June 2009).

144 [2009] NNTTA 49 (27 May 2009). For a case note, see National Native Title Tribunal, *Native Title Hot Spots* (2009) (Issue 30), pp 2–16.

145 Holocene Ltd was converted to a proprietary company in 2007 and is a wholly owned subsidiary of Reward Minerals Ltd.

salts (potash) would be harvested by trucks and other machinery and processed at an adjacent diesel-powered plant before being transported by road to market.

The relevant part of the Lake (which was 87% of the proposed mining lease area) was within the Martu People's traditional lands, over which they hold exclusive possession native title.[146]

After the Western Australian Government gave notice of their intention to undertake the future act and grant the mining lease, the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) (which is the PBC for the Martu People as the native title holders) negotiated with the grantee company. The parties were unable to reach agreement and the grantee party applied under s 35 of the Native Title Act to have the NNTT determine whether the lease could be granted.

The grantee company and the Western Australian Government both asked the NNTT to rule that the lease could be granted; the Martu People asked the NNTT to rule that the lease must not be granted.

Section 39 of the Native Title Act provides a list of criteria that the NNTT must take into account when determining whether the act can occur. It must consider how the act impacts on:

- The enjoyment by the native title parties of their registered native title rights and interests. For this factor, the NNTT will assess the evidence relating to the actual exercise or enjoyment of the registered native title rights in the area.[147]
- The way of life, culture and traditions of any of those parties.[148]
- The development of the social, cultural and economic structures of any of those parties.[149]
- The freedom of access by any of those parties to the land or waters concerned and their freedom to carry out rites, ceremonies or other activities of cultural significance on the land or waters in accordance with their traditions.[150]
- Any area or site, on the land or waters concerned, of particular significance to the native title parties in accordance with their traditions.[151] For this factor, the NNTT will consider the operation and effectiveness of any protection afforded under a state or territory heritage protection regime and the length of time the project will last.

146 The Martu People were determined to hold native title in the area on 27 September 2002. See *James on behalf of the Martu People v State of Western Australia* [2002] FCA 1208.

147 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 64–81. The NNTT considered that there would not be a substantial impact on the ability of the Martu People to physically enjoy their native title rights if the lease was granted: para 81.

148 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 82–88. The NNTT considered that the grant of the mining lease would not detrimentally impact on the way of life, culture and traditions of the native title party in any substantial way, subject to its findings relating to Lake Disappointment itself (discussed later): para 88.

149 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 89–94.

150 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 95–98.

151 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 99–152. In the NNTT's view, the disturbance to the Lake would not be minimal, and the Lake has a high level of importance to the Martu People.

In addition, under s 39, the NNTT must consider:

- The interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act.[152]
- The economic or other significance of the act to Australia, the state or territory concerned, the area in which the land or waters concerned are located and Aboriginal peoples and Torres Strait Islanders who live in that area. For this factor, the NNTT must consider the significance of the future act itself, not its contribution to the maintenance of a viable mining industry overall. The native title party's legal entitlement to compensation is not considered an economic benefit.[153]
- Any public interest in the doing of the act. The NNTT considers that there is a public interest in having a successful mining industry but it also considers that it may be in the public interest to refuse the grant of a mining tenement.[154]
- Any other matter that the arbitral body considers relevant. The NNTT may consider a range of factors, including any environmental protection regime and the impact this will have on the restoration of the area and the native title party's rights and interests. The NNTT may also consider the native title party's initial readiness to contemplate mining and its opposition to the granting of the lease when there was a failure to agree on acceptable terms.[155]

In this decision, the NNTT considered each of these elements and weighed up the evidence before it. In considering the evidence, the NNTT referred to the difficulty it has in giving weight to the various criteria it is required to consider:

> We accept that our task involves weighing the various criteria by giving proper consideration to them on the basis of evidence before us. The weighing process gives effect to the purpose of the Act in achieving an accommodation between the desire of the community to pursue mining and the interest of the Aboriginal people concerned.
>
> The criteria involve not just a consideration of native title but other matters relevant to Aboriginal people and to the broader community. There is no common thread running through them, and it is apparent that we are required to take into account quite diverse and what may sometimes be conflicting interests in coming to our determination. Our consideration is not limited only to the specified criteria. We are enabled by virtue of s 39(1)(f) to take into account any other matter we consider relevant.
>
> The Act does not direct that greater weight be given to some criteria over others. The weight to be given to them will depend on the evidence.[156]

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152 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 154–163.

153 The NNTT confirmed that 'compensation cannot be seen as an economic benefit. Rather, it is a legal entitlement to be recompensed for the loss or damage suffered': *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 164–178.

154 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 179–183.

155 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 184–188.

156 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 37. The entire quote comes from *Western Australia v Thomas* [1996] NNTTA 30; (1996) 133 FLR 124, 165–166.

Consequently, the NNTT considered each factor, and referred to the preamble of the Native Title Act and the principle that a beneficial construction should be given to the provisions of the Act which are designed to protect native title rights and interests or which otherwise reflect other interests and concerns of native title parties and Aboriginal people so as to give the fullest relief which the fair meaning of the language will allow.[157]

It recognised that 'the Martu Elders' affidavit evidence clearly supports the agreed concession that the native title party has made that they are not opposed to mining over parts of the Lake but only wishes mining to proceed on terms acceptable to it'.[158] The NNTT considered:

> [The Martu People] were willing to make serious sacrifices in relation to the integrity of their culture and traditions with prospects of gaining benefits from the Project that assist them to achieve their long term goals of employment, business opportunities and economic advancement…But the tenor of their evidence is that they want this to happen in a way that pays respect to their culture and traditions as far as possible.[159]

While recognising that the Native Title Act does not give native title parties a right of veto, the NNTT reiterated that it does have the power to determine that the act must not be done based on the evidence.[160]

> It is accepted that a native title party under the Act does not have a veto in the sense that they can say 'no' to a development proposal and have the [NNTT] automatically accept that view no matter what the circumstances. However, they are entitled to say 'no' and to have the [NNTT] give considerable weight to their view about the use of the land in the context of all the circumstances. In my view this is such a case.[161]

The NNTT found that the site in question was of particular significance to the Martu People. In addition, the NNTT referred to the fact that the Martu People's native title was the subject of a finalised court determination and of a 'substantial kind' (that is, exclusive possession). These facts increased the weight that could be given to the native title holders' interests, proposals, opinions or wishes in relation to the management, use or control of the area:

> As a general proposition, there is a difference between making a future act determination over an area of exclusive possession and making a determination over an area where the right to exclusive possession has been extinguished and the capacity to exercise or enjoy other native title rights is seriously attenuated because of the exercise of non native title rights, such as pastoral interests which may have existed since the early days of European settlement.[162]

157 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), paras 40–42.

158 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 156.

159 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 212.

160 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 162.

161 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 215.

162 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 163.

Finally, the NNTT also considered whether it could determine that the future act should be allowed to occur subject to a condition that a monetary payment be made or equity granted in Reward Ltd. Considering precedents, the NNTT confirmed that it is not within its power to impose conditions of the kind sought by the native title party for the awarding of compensation or payments in the nature of compensation:

> It can be accepted that the Tribunal has power to direct the payment of monies to the native title party for matters which it must attend to under conditions such as the conduct of heritage surveys or attendance at liaison committee meetings. However once a payment or benefit is properly identified as compensation the Tribunal has no power to impose provision of it by way of condition…[163]

Here the Martu People would be entitled to compensation as 'owners' under the *Mining Act 1978* (WA), although the suggestion in the case is that this would not be a large sum. The benefit to the Martu People from the project was 'not likely to be very great'.[164]

Overall the NNTT said that the project was of general economic significance and would not have a substantial effect on the Martu and their interests, except for the effect on Lake Disappointment, a place of special significance. But this last factor was critical, when combined with the opposition to the mine expressed by the Martu People once acceptable terms (beyond the legal entitlement to compensation and other modest benefits) could not be agreed.

Holocene applied to the Commonwealth Attorney-General under s 42 of the Native Title Act to have him overturn the decision on the basis that it was in the national interest, or in the interests of Western Australia, to do so. I am pleased to see that the Attorney-General refused to disturb the NNTT's finding in favour of the Martu People.

(ii) Policy implications of the decision

There are glaring deficiencies in the right to negotiate provisions. Developers can be close to certain that their projects will be approved by the NNTT if they do not reach agreement:

> The Act creates a strong incentive for native title parties to negotiate agreements. If they fail to do so and the Acts arbitration provisions are applied by the National Native Title Tribunal, the native title parties lose an opportunity to obtain compensation related to the profits or income derived from a mining operation. In principle, the Act also creates incentives for grantees to reach agreement because if they fail to do so and enter arbitration the Tribunal may decline to grant the interests they seek or impose onerous conditions on any grant it makes. However, in practice, the Tribunal has applied the arbitration provisions of the NTA in a manner that renders them largely innocuous from the perspective of grantees. The result is fundamental inequality in bargaining positions. This undermines the purposes of the NTA and leads to agreements that favour grantees.[165]

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163 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 196.

164 *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 178.

165 T Corbett & C O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review* 153.

However, this decision may shift that balance of power ever so slightly. It has been recognised that:

> The decision would require miners to pay closer attention to sites of cultural significance for native title holders, and would encourage them to settle lease negotiations before any investment in projects.
>
> … in this case the interests of the native title holders outweighed the potential economic benefit, and thus the public interest in the mining project.[166]

As Tony Wright, CEO of the Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu), the PBC for the area said:

> It's not about money. It's about a whole range of things that the traditional owners would like to have taken into account … the significance of the lake cannot be understated.[167]

There are important factual features in this case which have often been absent in future act arbitrations to date and which appeared to exert a significant influence on the NNTT's decision. The Martu People held exclusive possession native title rights and interests already the subject of a court determination and there was strong evidence from a range of sources establishing Lake Disappointment as a site of great significance. Due mainly to a stock exchange announcement by the company, there was clear evidence that during negotiations, in recognition of the project's impact, the company had offered cash payments, royalties and equity in Reward Ltd, benefits not available from an arbitral decision by the NNTT – such evidence would not normally be disclosed and available to inform the NNTT's decision.

The rarity, so far, of the decision in *Holocene* to refuse a mining grant reinforces the need to revisit the statutory balance of interests struck in this part of the future act regime. I return to this issue in Chapter 3 of this Report.

Text Box 1.2: Affidavit evidence of the Martu Elders

The affidavit evidence provided by the Martu Elders is an example of the kind of concerns that many traditional owners have when non-Indigenous people want to use their lands:

> As a community everyone has a right to be involved in decisions affecting our community and our lands, but especially those people connected to the Lake Disappointment country. There are many other Martu people who have to be consulted about things affecting Lake Disappointment and all of Martu have to be consulted about things affecting our land and our communities. …
>
> But the Martu also know that we have to live in a world with white men and white men's law. We know that to protect our land, sometimes we have to give up a little bit even if it affects our culture and law. But the white man cannot have all our land. We give them a little bit but no more. We let go of a fingernail, and it hurts us, but we do this so we do not have to lose an arm. So we agreed to let Holocene to come onto parts of our land, but no more, so we could protect and save all the other parts of our land. This is the price we must pay to protect our culture and our Law for the future of the Martu.

166 A Boswell, 'Native title halts mining lease', *The Australian Financial Review,* 2 June 2009, p 7, quoting R Edel, DLA Philips Fox.

167 A Boswell, 'Native title halts mining lease', *The Australian Financial Review,* 2 June 2009, p 7.

But we are only willing to give up land if we are satisfied that we know where and how the miner is working and we are able to control those activities under Martu Law. We must also be given what we think is fair compensation for giving up our land and for the effect on our culture. Otherwise we will not agree to give up the land. ...

We are angry that Holocene's lawyers have said that under the white man's law any compensation for the loss of part of our land "will be small".

The Martu fought long and hard to have the white man recognise what the Martu have always known – that the land is Martu land. The native title determination was the white man's law finally recognising this fact.

From what Holocene's lawyers are saying, the land can be taken away again against our will and for small compensation. They don't seem to respect Martu law and the effect of the Project on Martu and their culture. ...

The Martu believe that if there is trust and respect between the Martu and miners, shown by the involvement of the Martu in all decisions about the land by negotiated heritage and access protocols, the use of Martu monitors to oversee land disturbance and the like, and fair compensation is paid to the Martu for the use of Martu land, then agreements can be reached. But this is a complex process and goodwill is needed to agree all the details so that Martu can finally decide if they are willing to agree to a Project.

Holocene and Reward thought that the payment to the Martu of the money and royalties and other compensation and shares set out in the Term Sheet was fair compensation when they agreed to the Term Sheet. It was very important that we would get royalty payments and shares in Reward as we would own part of the Project and share in its success and we would keep a share of the land. This made it easier to agree to allow Holocene to build the Project on our land and to accept the effect on Martu culture.

Now Holocene and Reward are saying that they will not give us a royalty or shares in Reward and that Holocene and the Government only have to pay very small compensation because they think the land is worth so little. This is a white man's attitude and completely ignores the impact on Martu culture by the mining activities, particularly as this will happen without our approval. The Martu have rights including the right to decide who comes onto the land and who uses the land. We will lose this right and also the right to use the land to hunt and find food around the Project. Everyone but the Martu will be making money from the Martu land.

If there is no trust and respect, if there is no Martu involvement and no fair compensation paid to the Martu, then the Martu will not agree to mining on Martu land. We do not understand why Reward agreed to the compensation in the Term Sheet and now think they can go ahead without paying the compensation and against our wishes. ...

At the time that the 2008 Survey was done, as explained above, the Martu were willing to compromise their position and to allow the potash Project to proceed, but only because we thought fair compensation had been agreed and only in the areas that the Martu said could be used and only with the full involvement of the Martu during construction and operations to ensure that there was no more interference than was acceptable.

To the Martu, this is the only way to protect our culture and Law for the future. The Martu have responsibility for the Lake, we must care for the Lake and by doing so, for all Martu. We do this by practising our Law and with ceremonies and songs. The Martu think long term, for our future generations, not just the next 20 or 30 years. ...

The Martu will work with Holocene and Reward about jobs for the Martu.

The Martu know which parts of the Lake are safe and which are not. We will not work on those areas that are not safe.

> We want jobs for our people, but more than that, we want contracts for our companies, like our trucking company, and we want contracts to build and maintain the roads and track. This will give us independence, experience and a future, so we can develop our communities and offer our young people a future on their country. We want our boys and girls to go to University and learn trades to be able to work for and help their people. We want to use any money that we get from this Project to do these things for our people. We thought all this would be discussed as part of the Stage 2 of our negotiations with Holocene and Reward and be part of our agreement.
>
> The Martu want to do a ceremony at the Lake before any mining starts so that we can make sure the spirits understand who is coming onto the Lake and that they will respect our culture and Law. This will protect the workers on the Lake and all those who go there for the mining and for our people.
>
> We also want Reward to make sure that there are signs near our sites telling white men that they are not to go there. We want our sites to be protected and we want to be consulted about where signs and fences should be put and how the company will carry out its operations.
>
> The Martu need to be consulted about the Lake and the mine because the Martu are responsible for the Lake. It is part of us; it is our culture and our Law. We should be told exactly where Holocene plans to mine, the location of its plant, camp, trenches and ponds. Holocene must respect our sites and those areas that we have told them are not to be disturbed. This is all explained in the 2008 survey. In the end Martu need to be told about all aspects of the Project and operations before we can decide whether we are prepared to agree to it going ahead.[168]

1.5 International human rights developments

The Prime Minister has commented that:

> [Australians] believe in a fair go for everyone, and everywhere, and that belief in a fair go means that as a nation we seek to make a difference and support human rights and fundamental freedoms around the world and at home.[169]

In this section, I consider developments in international human rights law that concern native title. I urge the Australian Government to implement its commitment to supporting human rights and to take heed of these developments.

(a) The Declaration on the Rights of Indigenous Peoples

In last year's *Social Justice Report* I summarised the Declaration on the Rights of Indigenous Peoples, which was adopted by the United Nations General Assembly in September 2007.[170] Australia voted against the Declaration in the General Assembly. I am pleased to report that the Government formally announced its support of the Declaration on 3 April 2009. It was a watershed moment in Australia's modern history.

168 Affidavit evidence of the Martu Elders, quoted in *Western Desert Lands Aboriginal Corporation (Jamukurnu – Yapalikunu) / Western Australia / Holocene Pty Ltd* [2009] NNTTA 49 (27 May 2009), para 155.

169 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2008, p 12132 (The Hon Kevin Rudd MP, Prime Minister). At http://www.aph.gov.au/hansard/reps/dailys/dr021208.pdf (viewed 13 October 2009).

170 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008,* Australian Human Rights Commission (2009), ch 2. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html (viewed 13 October 2009).

In supporting the Declaration, the government has committed to a framework which fully respects Indigenous peoples' rights and creates the opportunity for Indigenous and non-Indigenous Australians to be truly equal.

The Declaration includes a number of articles on the rights of indigenous peoples to our lands, territories and resources.[171]

In supporting the Declaration, the Minister for Indigenous Affairs stated:

> We also respect the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with land and waters.[172]

Improving the effectiveness and operation of the Native Title Act is essential in ensuring that these rights are realised. The Attorney-General considered:

> In supporting the Declaration today, the Government is also respecting the important place land and resources have in the cultural, spiritual, social and economic lives of Indigenous Australians. Recognising and acknowledging the history and connection of our Indigenous people with the land is inextricably linked to respecting their rights and freedoms. We understand that native title is an important property right that should be recognised and protected.[173]

The challenge now is for government to build understanding of the Declaration among government officials and the community and, importantly, to promote and incorporate the Declaration's principles into government policy.

Indigenous peoples around the country have begun to use the principles contained in the Declaration to support the recognition and protection of their rights. For example:

- When the Government announced the compulsory acquisition of town camps in Alice Springs, the Indigenous Peoples' Organisations Network of Australia called on the Government to comply with its international obligations to respect the rights of the Indigenous Peoples of Australia by ensuring that the representatives of the Aboriginal people in the region of Alice Springs are able to make an informed decision about housing and services for the occupants.[174]
- When negotiations were undertaken by the Kimberley Land Council for the location of the gas hub with Woodside and the Western Australian Government under the right to negotiate provisions in the Native Title Act, the land council held the other parties to the standard of free, prior and informed consent. This is a higher standard than required currently by the Native Title Act.[175]

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171 A copy of the Declaration can be found in Appendix 4 to this Report.

172 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm (viewed 2 November 2009).

173 R McClelland (Attorney-General), *Remarks in support of the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_3April2009-RemarksinSupportoftheUnitedNationsDeclarationontheRightsofIndigenousPeoples (17 November 2009).

174 The Australian Government, the Indigenous Peoples' Organisations Network of Australia, and the Australian Human Rights Commission, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission attending the eighth session of the Permanent Forum on Indigenous Issues New York, 18 to 29 May 2009* (21 May 2009).

175 Kimberley Land Council, 'Traditional Owners announce shortlist for gas development hub' (Media Release, 10 September 2008). At http://www.klc.org.au/media/080910_HUB_shortlist.pdf (viewed 22 October 2009).

The true value of the Declaration will lie in using it to hold governments to the standards it affirms and building a consistent pattern of usage over time.

(b) Treaty monitoring bodies

Throughout the reporting period, three independent bodies that monitor compliance with international human rights treaties have commented upon issues relevant to the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources.

In April 2009, the UN Human Rights Committee (which monitors the implementation of the *International Covenant on Civil and Political Rights*[176]) welcomed recent reforms to the native title system. However, the Committee stated that it:

> notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000.[177]

The Human Rights Committee recommended that Australia 'should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples'.[178]

Similarly, in May 2009 the United Nations Committee on Economic, Social and Cultural Rights noted with concern that:

> despite the reforms to the native title system, the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, have a negative impact on the recognition and protection of the right of indigenous peoples to their ancestral lands.[179]

The Committee on Economic, Social and Cultural Rights recommended that Australia 'increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples'.[180]

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176 *International Covenant on Civil and Political Rights*, 1966. At http://www2.ohchr.org/english/law/ccpr.htm (viewed 13 October 2009).

177 UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), para 16. At http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc (viewed 13 October 2009).

178 UN Human Rights Committee, *Consideration of Reports Submitted by States Parties under article 40 of the Covenant: Concluding Observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (7 May 2009), para 16. At http://www2.ohchr.org/english/bodies/hrc/docs/co/CCPR-C-AUS-CO-5.doc (viewed 13 October 2009).

179 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (22 May 2009), para 32. At http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc (viewed 13 October 2009).

180 UN Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties under Articles 16 and 17 of the Covenant: Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (22 May 2009), para 32. At http://www2.ohchr.org/english/bodies/cescr/docs/AdvanceVersions/E-C12-AUS-CO-4.doc (viewed 13 October 2009).

In mid–2009, Australia was due to submit its member report for the period 1 July 2002 to 30 June 2008 to the UN Committee on the Elimination of Racial Discrimination. This report, which would combine Australia's 15th, 16th and 17th reports, would report on Australia's compliance with its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination* (the CERD).[181] At the time of writing, the final version of the report was not available.

The Committee on the Elimination of Racial Discrimination has requested the Australian Government to respond to a Request for Urgent Action submitted by a number of Aboriginal people residing in Prescribed Areas in the Northern Territory who are subject to the measures of the Northern Territory Intervention.[182]
Noting that the Australian Government is in the process of 'redesigning key [Northern Territory Emergency Response] measures in order to guarantee their consistency with the Racial Discrimination Act', the Committee on the Elimination of Racial Discrimination requested details of the Government's progress:

- in redesigning the Northern Territory Emergency Response, in direct consultation with the communities and individuals affected
- on lifting the suspension of the *Racial Discrimination Act 1975* (Cth).[183]

The Committee on the Elimination of Racial Discrimination requested that this information be submitted no later than 31 July 2009.[184]

In relation to the recommendations of the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, discussed above, the Attorney-General has informed me that:

> The Committees' recommendations … will be carefully considered … However, the Government has a clear strategy for improving the native title system and is committed to ensuring that the native title system is flexible and produces broad benefits to Indigenous people … the Government is progressing reforms to improve the rates of claim resolution and to encourage broader settlements that deliver social justice outcomes beyond answering the question of whether native title exists. …
>
> The Government is committed to genuine consultation with Indigenous people and other relevant native title stakeholders in exploring ways to improve the native title system. The Government will not rush into making significant change to the Native Title Act. History has shown that such change requires proper consideration and consultation.[185]

181 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965. At http://www2.ohchr.org/english/law/cerd.htm (viewed 13 October 2009).

182 Request for Urgent Action under the International Convention on the Elimination of All Forms of Racial Discrimination (28 January 2009). At http://www.nit.com.au/downloads/files/Download_192.pdf (viewed 1 October 2009).

183 F Victoire Dah, Chairperson of the Committee for the Elimination of Racial Discrimination, Correspondence to C Millar, Ambassador, Permanent Mission of Australia to the United Nations at Geneva, 13 March 2009. At http://www2.ohchr.org/english/bodies/cerd/docs/early_warning/Australia130309.pdf (viewed 1 October 2009).

184 The Australian Government responded to the Committee on the Elimination of Racial Discrimination's request on 30 July 2009.

185 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 27 July 2009.

(c) United Nations Permanent Forum on Indigenous Issues

Each year, the United Nations Permanent Forum on Indigenous Issues (the Permanent Forum) meets in New York to discuss issues related to economic and social development, culture, the environment, education, health and human rights.

In 2009, a delegation of Aboriginal and Torres Strait Islander people attended the Permanent Forum's eighth session. The delegation made a number of interventions relevant to issues raised in this report. These included an intervention by the NSW Aboriginal Land Council on the Government's policy of linking the provision of housing services to land tenure reforms and a joint intervention by the Australian delegation on the Government's compulsory acquisition of Town Camps in Alice Springs.

For the first time at the Permanent Forum, a joint statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission was presented to the Forum. The three parties to this landmark statement acknowledged that, while there is still a long way to go to significantly improve rights protection for Indigenous Australians at the domestic level, the statement signaled their common intent to:

> reset the relationship between Aboriginal and Torres Strait Islander peoples, Australian Governments and the broader Australian population, premised on good faith, goodwill and mutual respect.[186]

A number of the reports and papers presented to the Permanent Forum should be used to inform the Government's policy on native title law and policy. For example, papers were presented on:

- climate change, human rights and indigenous peoples
- the report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility
- the Anchorage Declaration (from the Indigenous Peoples' Global Summit on Climate Change).[187]

Significantly, the session also included the presentation of a draft guide on the principles in the Declaration on the Rights of Indigenous Peoples, the *International Labour Organisation Convention No 169*[188] and the *International Labour Convention No 107*[189] that relate to indigenous land tenure and management arrangements. The guide considers:

- the right to self-determination
- full and direct consultation and participation
- free, prior and informed consent
- the rights of indigenous peoples to traditional lands, territories and natural resources

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186 The Australian Government, the Indigenous Peoples' Organisations Network of Australia, and the Australian Human Rights Commission, *Joint Statement by the Indigenous Peoples' Organisations Network of Australia, the Australian Government and the Australian Human Rights Commission attending the eighth session of the Permanent Forum on Indigenous Issues New York, 18 to 29 May 2009* (21 May 2009).

187 These reports and papers are available at: United Nations Permanent Forum on Indigenous Issues, *Eighth session of the United Nations Permanent Forum on Indigenous Issues*. At http://www.un.org/esa/socdev/unpfii/en/session_eighth.html#docs (viewed 12 October 2009).

188 *International Labour Organisation Convention No 169,* 1989. At http://www.ilo.org/ilolex/english/convdisp1.htm (viewed 1 October 2009).

189 *International Labour Organisation Convention No 107,* 1957. At http://www.ilo.org/ilolex/english/convdisp1.htm (viewed 1 October 2009)

- respect for indigenous cultural practices, traditions, laws and institutions
- reparation for injury to or loss of indigenous interests
- non-discrimination against indigenous peoples' interests
- respect for the rule of law.[190]

The draft guide elaborates on these principles, discusses developments in interpretation and provides advice on their implementation.

For example, with respect to the principle of free, prior and informed consent, the guide states that:

> implicit in the principle of Indigenous peoples having a right to free, prior and informed consent is the notion of capacity; Indigenous peoples who lack the requisite capacity would be unable to consent in a free and informed manner. This principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.[191]

Further, the Permanent Forum recently released a Draft General Comment related to article 42 of the Declaration. Article 42 provides that States shall promote respect for and full application of the provisions of this Declaration and follow up the effectiveness of this Declaration.[192] The Draft General Comment clarifies that the purpose of the Declaration 'is to constitute the legal basis for all activities in the areas of indigenous issues' and should be read as a source of international law.[193]

1.6 Significant developments at the state and territory level

(a) Victoria – the place to be

Some say that Victoria 'is the State with the worst record on land justice in all of Australia'.[194] However, as I reported last year, this could change drastically. Victoria may become the first state to achieve the sort of true land justice that was intended by the Native Title Act.

On 4 June 2009, Victoria's Attorney-General announced the adoption of a new settlement framework as the Government's preferred method for negotiating native title. It was a significant day for Aboriginal Victorians.

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190 UN Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated). At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 1 September 2009).

191 UN Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No. 169 and International Labour Organisation Convention No. 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), pp 20–21. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 1 September 2009).

192 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 42. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 30 November 2009).

193 C Smith (Member of the United Nations Permanent Forum on Indigenous Issues), *Draft General Comment No 1 (2009) Article 42 of the Declaration on the Rights of Indigenous Peoples,* UN Doc E/C.19/2009/CRP.12 (5 May 2009). At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_12.doc (viewed 12 October 2009).

194 C Marshall (CEO of Native Title Services Victoria), *A cooperative approach for Broad Mediated Outcomes* (Speech delivered at the Negotiating Native Title Forum, Melbourne, 19 February 2009). At http://www.ntsv.com.au/document/Negotiating-Native-Title-Forum-Feb-09.pdf (viewed 12 October 2009).

The objectives of the framework are to:

- establish a streamlined, expedited and cost effective approach to settling native title claims by negotiation, resulting in equitable outcomes consistent with the aspirations of traditional owners and the state
- increase the proportion of Aboriginal people with access to their traditional lands in Victoria
- contribute to reconciliation in Victoria through building stronger partnerships with Aboriginal Victorians, resolving long-standing land grievances, and strengthening communities and cultural identity
- increase economic and social opportunities and deliver on key Victorian Government policies.[195]

When announcing the framework, the Victorian Attorney-General stated:

> Just as the Apology acknowledged the consequences of fracturing families; just as the preamble to the *NTA* acknowledged the 'consequences of past injustices'; so we must make these same acknowledgments in the business with which we are charged – getting back to basics … and making land justice real.
>
> That's why I'm delighted to announce that a partnership between the state and traditional owners has produced an out of court alternative to the conventional process – the *Victorian Native Title Settlement Framework* …
>
> Recognising that land aspirations are primarily about recognition, respect and opportunities that flow from joint management of land, Framework Agreements, under the new arrangements, will facilitate packages of benefits in return for permanent withdrawals of claim.[196]

I consider that the procedure for negotiating the framework to be an example of best practice.

In 2005, Native Title Services Victoria (NTSV), a service delivery body that performs some of the functions of a NTRB for the state of Victoria, supported the establishment of the Victorian Traditional Owner Land Justice Group (LJG) 'to find a better way of doing business and achieving workable native title and land management outcomes in Victoria'.[197]

In November 2006, the Group decided that its main purpose would be to negotiate a new policy framework with the state government so that native title could better meet the aspirations of traditional owners. In 2008, after two years of hard work, the Victorian Attorney-General announced that a Steering Committee would be formed to undertake the negotiations. That Steering Committee was tasked with recommending a new policy framework for native title and land justice.

The Steering Committee consisted of Professor Mick Dodson (as chair, facilitator and mediator), five traditional owner negotiators from the LJG, the CEO of NTSV and senior officers of the Departments of Justice, Sustainability and Environment, Planning and Community Development and Aboriginal Affairs Victoria.

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195 Victorian Department of Justice, *Objectives of the Native Title Settlement Framework*. At http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/Your+Rights/Indigenous+Victorians/Native+Title/JUSTICE+-+Objectives+of+the+Native+Title+Settlement+Framework (viewed 12 June 2009).

196 R Hulls (Attorney-General of Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At http://ntru.aiatsis.gov.au/conf2009/papers/TheHon.RobertHulls.pdf (viewed 12 October 2009).

197 Victorian Traditional Owner Land Justice Group, 'Native Title Settlement Framework will address unfinished business for Victoria's traditional owner groups' (Media Release, 4 June 2009). At http://www.landjustice.com.au/document/LJG-Media-release-040609.pdf (viewed 12 October 2009).

All decisions of the Committee were made by consensus.

The negotiators chosen to represent the LJG were nominated by the full LJG in 2007. The negotiations did not consider specific areas of land or benefits for specific individuals, families or groups, but how native title land justice settlements could work across all of Victoria. Graham Atkinson, LJG Co-Chair said: 'What the individual traditional owner groups do with those principles … is their responsibility'.[198]

He further commented that '[t]he framework has come about because of the commitment by both parties to work together, to achieve greater understanding of each other's positions, and make considerable compromises to reach agreement'.[199] It was a process undertaken in the true spirit of reconciliation. The parties respected each others' positions and kept in mind the underlying reason why they were in the same room together – to come to real outcomes.

> I want to thank the government for creating dialogue with the traditional owners in Victoria. My advice [to Government] is don't be swayed by public opinion, which may be negative a lot of times. But you'll find that most Victorians they are not really racist, they just don't fully understand Aboriginal needs and expectations. It's a shady area to them... So what I'm saying is urging the government not to become deterred, just stay there with us and we'll be marching on the same highway to get some sort of justice at the end of it.[200]

The framework sets the core principles of what agreements between traditional owners and the Victorian Government would cover. It includes recognition, access to land, access to natural resources, strengthening culture and improved native title claims resolution.[201] The key areas include:

- rights and protocols for speaking for country, including how traditional owners can be involved in management of state lands and rights to be consulted on development or future use of land
- recognition of traditional owners and their boundaries through native title determinations and / or alternative settlements:

  > Land Justice is an absolute priority. Aboriginal people need to be recognised for who they are and the country they belong to.[202]

- access to land for traditional owner groups, ranging from management of national parks through to transferring land for economic development or cultural purposes:

  > Aboriginal people they base their future, their future generations, all on land because land is connected with their old existence. Land and people can't be separate, they're all one.[203]

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198 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009).

199 Victorian Traditional Owner Land Justice Group, 'Native Title Settlement Framework will address unfinished business for Victoria's traditional owner groups' (Media Release, 4 June 2009). At http://www.landjustice.com.au/document/LJG-Media-release-040609.pdf (viewed 12 October 2009).

200 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting L Clarke, Co-Chair.

201 The following information on the content of the framework is taken from the Traditional Owner Land Justice Group's website at http://www.landjustice.com.au/?t=3 (viewed 9 June 2009); and the Victorian Government's *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009), at www.justice.vic.gov.au (viewed 10 June 2009).

202 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting S Onus.

203 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting L Clarke, Co-Chair.

- access to natural resources including customary use of resources such as animals, plants and fisheries:

  > What's important is creating job opportunities for our young people's future, certainly for more people; and working in a landscape, in a natural environment, and the opportunity to benefit from that.[204]

- strengthening culture, including signage on country and cultural keeping places:

  > We think it's important for Government to be willing to give recognition and strengthening in lots of areas… signage on roads indicating traditional country, cultural centres and keeping places, protocol at public events, curriculum modules in schools and public monuments to Indigenous people and language preservation and restoration projects. As we are the original owners of this land and that we have been dispossessed from our traditional land.[205]

- claims resolution including reparation, funding and the terms of agreements:

  > We're also mindful of the importance of restorative justice through compensation or reparation because traditional owners will need resources to establish their base and to operate as viable organisations or bodies to represent their traditional owner members.[206]

The Victorian Government is beginning consultation on how to implement the framework. It will also seek financial and policy support from the Australian Government. Some legislative amendments will need to be made and information sessions will be delivered. After all this, the negotiation of Individual Framework Agreements between traditional owner groups and the state government will begin.

It appears that the framework will contribute to the realisation of many of the Australian Government's aims for native title, in that it:

- encourages out of court settlement of native title claims
- is expected to speed up the process of making agreements
- implements the COAG agreement to pursue broader land settlements which are comprehensive and sustainable in to the future.

If the framework is adequately resourced, the Steering Committee predicts that native title would largely be resolved by 2020.[207] At current estimates, this will be nearly 20 years earlier than the rest of the country. As Professor Mick Dodson said '[t]he Commonwealth has everything to gain from supporting Victoria's approach'.[208]

In addition, and most importantly for Aboriginal Victorians, this approach will provide a pathway toward justice in a way that is consistent with Australia's international human rights obligations.

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204 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting A Mullet.

205 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting B Nicholls.

206 Victorian Traditional Owner Land Justice Group, *Settlement Framework,* http://www.landjustice.com.au/?t=3 (viewed 9 June 2009), quoting G Atkinson, Co-Chair.

207 M Dodson, Transmittal letter, in Department of Justice, Victoria, *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009). At www.justice.vic.gov.au (viewed 10 June 2009).

208 M Dodson, Transmittal letter, in Department of Justice, Victoria, *Report of the Steering Committee for the development of a Victorian Native Title Settlement Framework* (2009). At www.justice.vic.gov.au (viewed 10 June 2009).

It is hoped that we will soon see more of this. At the announcement of the framework, the federal Attorney-General considered that it is an 'example of how, by changing behaviours and attitudes, and by resolving native title through settlements...we can make native title work better'.[209]

(b) And the others? The states and territories lingering behind

While Victoria is on the move, the behaviour of other state and territory governments throughout the reporting period has concerned me. I am particularly worried about the capacity of governments to consult and communicate effectively with Aboriginal and Torres Strait Islander communities, and their level of respect for Indigenous peoples' native title and land rights.

(i) Western Australia

Over a year into negotiations with traditional owners over the location of a proposed LNG processing plant in Western Australia, the government of that state changed. Instead of supporting and engaging productively with the negotiations, the new Premier, Colin Barnett, said that if an agreement could not be reached, he would take steps to compulsorily acquire the land:

> The companies will develop their gas one way or the other, the state and federal governments will get their royalties one way or the other, but the Aboriginal people of the Kimberley will miss out, and I think that would be a tragedy.[210]

As threats of compulsory acquisition loomed, the Australian Government stepped in, providing the services of Mr Bill Gray to mediate an outcome. Thanks to the perseverance of all parties and Mr Gray, an outcome was reached. In-principle approval for a site was given on 15 April 2009. Negotiations for an Indigenous Land Use Agreement are continuing and impact assessments are being undertaken.

(ii) Northern Territory

Despite taking action to prevent compulsory acquisition in Western Australia, the Australian Government announced plans to compulsorily acquire town camps in the Northern Territory after negotiations for 40-year leases reached a stalemate. Just days before the Australian Government's compulsory acquisition would have taken effect, Tangentyere Council and 16 town camps in Alice Springs accepted the 40-year lease over their lands.[211]

(iii) Queensland

During the reporting period, the Queensland Government continued to work with traditional owners to negotiate joint management arrangements over national parks in Cape York under the *Cape York Peninsula Heritage Act 2007* (Qld).

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209 R McClelland (Attorney-General), *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 16 November 2009).

210 D Guest, 'Royalties battle threatens Kimberley gas deal', *The Australian*, 14 April 2009. At http://www.theaustralian.news.com.au/business/story/0,,25330918-36418,00.html (viewed 21 April 2009).

211 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *ABC Central Australia*, 30 July 2009. For further information, see Chapter 4 of this Report.

Two new National Parks have been declared that will have Aboriginal land as their underlying tenure: the Lama Lama National Park[212] (Cape York Peninsula Aboriginal Land) (35 560 hectares); and the KULLA (McIlwraith Range) National Park[213] (Cape York Peninsula Aboriginal land) (this covers almost 160 000 hectares). The management of the parks is to be undertaken by the Environmental Protection Agency and the Lama Lama and Kulla Land Trusts under Indigenous Management Agreements.

However, the Queensland Government has continued to pursue further amendments to the *Torres Strait Islander Land Act 1991* (Qld) and the *Aboriginal Land Act 1991* (Qld). This is despite serious concerns and criticism about the 2008 amendments that make it easier for the Queensland Government to compulsorily acquire Indigenous land.[214]

Prior to these amendments, some Indigenous bodies (such as the Torres Strait Regional Authority) asked for the proposed compulsory acquisition provisions to be removed from the Aboriginal and Torres Strait Islander Land Amendment Bill 2008 (Qld) until further consultation with communities could be carried out.[215] Since the amendments were introduced, there have been calls for consultation on the compulsory acquisition provisions while the Government considers further changes. These calls have been largely ignored.

The Queensland Government created further disquiet when it declared river basins in the Cape York region as Wild Rivers despite concerns and requests for further consultation and clarity about the impact of the law.[216]

These developments across the country raise an ongoing concern I have about the capacity of governments to consult and communicate effectively with Aboriginal and Torres Strait Islander communities. Throughout my term as Commissioner, I have given various speeches, submissions and reports that recommend different ways of consulting and communicating with Indigenous communities. Some of those principles have been attached at Appendix 3 to this Report.

212 C Wallace (Minister for Natural Resources and Water and Minister Assisting the Premier in North Queensland), 'Historic Land Agreement means first National Park on Aboriginal Land in Queensland' (Media Release, 10 July 2008). At http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=59121 (viewed 30 October 2009).

213 A Bligh (Premier for Queensland), 'New National Park for Queenslanders' (Media Release, 6 August 2008). At http://statements.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=59590 (viewed 30 October 2009).

214 For further information, see Chapter 4 of this Report.

215 Torres Strait Regional Authority, 'ATSILA Act a Blow to Indigenous Economic Development' (Media Release, 26 June 2008). At http://www.tsra.gov.au/media-centre/press-releases/2008-press-releases/native-title-atsila-act.aspx (viewed 4 August 2009).

216 See Australian Human Rights Commission, *Submission to the Queensland Minister for Natural Resources and Water for the proposed Archer Basin Wild River Declaration, the Lockhart Basin Wild River Declaration and the Stewart Basin Wild River Declaration* (November 2008). At http://www.humanrights.gov.au/legal/submissions/2008/200811_wild_rivers.html (viewed 12 October 2009).

1.7 Conclusion

In this reporting period, we have witnessed some important first steps towards the creation of a just and equitable native title system. I commend the Australian Government and the Victorian Government for their commitment to improving the operation of the native title system.

However, the system remains far from perfect. The following Chapters of this Report are designed to further the dialogue on native title reform.

I encourage all levels of government and all political parties to be flexible and to work with us to implement more far-reaching reforms to improve the native title system. We must not let this opportunity pass. We must not lose the momentum for change. But we must ensure the full and effective engagement of Indigenous peoples in any reform process.