

# Chapter 2:

## Changing the culture of native title

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### 2.1 The challenge: decolonising the native title framework

It is clear that the native title system has not fulfilled the promise of *Mabo v Queensland (No 2)*.<sup>1</sup>

Despite the High Court's landmark decision, Australian courts, governments and non-Indigenous people have struggled to accept fully the rights of Indigenous peoples to their lands, waters and territories. In successive court decisions, our cultures have been viewed through a non-Indigenous lens, with our rights separated and eliminated one by one.

The result, as former Federal Court judge Murray Wilcox observed in his response to the 2009 Mabo Oration, is that for many Aboriginal people 'native title has become a mirage'.<sup>2</sup>

The Australian Government has recently laid some of the fundamental building blocks for 'resetting' the relationship between Indigenous peoples and government. These include:

- the apology to the Stolen Generations<sup>3</sup>
- amendments to native title legislation and policy<sup>4</sup>
- a commitment to establishing a new national Indigenous representative body<sup>5</sup>
- appointing an independent committee to conduct the National Human Rights Consultation<sup>6</sup>
- confirming Australia's support for the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration on the Rights of Indigenous Peoples)<sup>7</sup>

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1 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

2 M Wilcox QC, Response to Oration 2009 (Speech delivered in response to the 2009 Mabo Oration, Brisbane, 5 June 2009). At [http://www.adcq.qld.gov.au/ATSI/FromSelfRespect\\_comments.html](http://www.adcq.qld.gov.au/ATSI/FromSelfRespect_comments.html) (viewed 6 July 2009).

3 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, p 167 (Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/hansard/reps/daily/dr130208.pdf> (viewed 4 June 2009).

4 See Chapter 1 of this Report for a discussion of developments during the reporting period.

5 Department of Families, Housing, Community Services, and Indigenous Affairs, *National Indigenous Representative Body, Update August 2009* (2009). At <http://www.fahcsia.gov.au/sa/indigenous/progserv/engagement/NIRB/Pages/default.aspx#1> (viewed 30 October 2009).

6 See National Human Rights Consultation, [www.humanrightsconsultation.gov.au/](http://www.humanrightsconsultation.gov.au/) (viewed 24 September 2009).

7 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007). At [http://www.un.org/esa/socdev/unpfi/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfi/documents/DRIPS_en.pdf) (viewed 29 May 2009).

- confirming Australia's commitment to improving its human rights standing at the international and domestic level<sup>8</sup>
- hosting a visit by the United Nations Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people
- a commitment to establishing a National Healing Foundation led by Indigenous peoples.<sup>9</sup>

The Australian Government has identified reforms to the native title system as a strategic priority<sup>10</sup> and has recognised the potential for the native title system to contribute to closing the gap of disadvantage between Indigenous and non-Indigenous Australians.<sup>11</sup>

I agree that opportunities to effectively engage in the native title system may contribute significantly to closing the gap and promoting economic development. However, that can only occur if Aboriginal and Torres Strait Islander communities have the capacity to engage in these processes. Further, we must have an honest conversation about the roles and responsibilities of government and private industry if we are to generate just and equitable outcomes through native title.

Significant attitudinal shifts will be required to ensure that principle and good process guide the legal framework and generate real change to the system.

Despite the positive developments listed above, unfinished business remains. This includes the social justice package and the Indigenous Economic Development Strategy. In addition, the Government has not developed a plan of action for the full implementation of the Declaration on the Rights of Indigenous Peoples.

In this Chapter, I briefly outline principles that should guide a new approach to native title – one based on collaborative partnerships and genuine commitments to respecting, protecting and fulfilling the rights of Aboriginal and Torres Strait Islander peoples.

I further consider the native title system within the context of the broader laws and policies that impact upon our rights, and argue for a comprehensive program of reform.

## 2.2 We need a level playing field

As a nation, we need to come to a place where we are truly committed to decolonising the legislative framework and removing the barriers to the realisation and recognition of the rights of Aboriginal and Torres Strait Islander peoples. We need to work toward creating a native title system that allows for the full participation and effective engagement of Indigenous peoples.

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8 Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2008, p 12133 (Hon Kevin Rudd MP, Prime Minister). At <http://www.aph.gov.au/Hansard/rep/dailys/dr021208.pdf> (viewed 31 October 2009).

9 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'National Healing Foundation consultations start on National Sorry Day' (Media Release, 26 May 2009). At [http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/jr\\_m\\_healingfoundation\\_26may09.htm](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/jr_m_healingfoundation_26may09.htm)

10 Attorney-General's Department, *Strategic Plan 2009–2010* (2009), p 3. At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(C7C220BBE2D77410637AB17935C2BD2E\)~AGDStrategicPlan1July2009.rtf/\\$file/AGDStrategicPlan1July2009.rtf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(C7C220BBE2D77410637AB17935C2BD2E)~AGDStrategicPlan1July2009.rtf/$file/AGDStrategicPlan1July2009.rtf) (viewed 12 October 2009).

11 Attorney-General, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_Budgets\\_Budget2009\\_FundingForTheNativeTitleSystem\(AdditionalFundingandLapsing\)](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingForTheNativeTitleSystem(AdditionalFundingandLapsing)) (viewed 19 September 2009).

Before we can reach this place, we need to honestly address the way the system operates in practice.

For example, one of the key elements of the Government's reform agenda is to create an environment in which parties are encouraged to negotiate rather than litigate.

It is frequently considered that agreement-making has the potential to deliver substantial benefits to Aboriginal and Torres Strait Islander communities. However, native title agreements have often failed to deliver on this promise.

Marcia Langton and Odette Mazel note that, despite the introduction of state and federal legislation relating to mining and Indigenous rights and the development of standards of corporate social responsibility, many Indigenous communities have experienced little or no improvement in their social and economic status. Indigenous communities often achieve a limited range of direct benefits from engagement and agreements with mining companies.<sup>12</sup>

During the reporting period, the Government has invited stakeholders to consider '[h]ow to ensure that the benefits arising from agreements are used to improve traditional owners and Indigenous communities' economic status and social well being'.<sup>13</sup>

The Government has identified that there are a 'number of assumptions behind this question', including that:

- direct financial contributions resulting from agreements do not necessarily translate into substantive benefits for Indigenous communities
- substantive benefits, such as employment options and community development initiatives often deliver benefits to all members of the community, not just the traditional owners
- an equitable approach to distribution is more likely to generate socio economic benefits for the whole community.<sup>14</sup>

Beneath these assumptions lie even further questions that we must address if we are to create a just and equitable native title system, which delivers substantial benefits to Indigenous communities.

For example, is it enough to simply change legislation or amend policies without building the capacity of communities or native title groups to access and engage with the system positively and proactively?

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12 M Langton & O Mazel, 'Poverty in the Midst of Plenty: Aboriginal People, the "Resource Curse" and Australia's Mining Boom' (2008) 26(1) *Journal of Energy and Natural Resources Law* 31, p 38.

13 Australian Government, *Australian Government Discussion Paper* (undated), p 3 (Discussion Paper). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+--+final+version.DOC/\\$file/Discussion+paper+--+final+version.DOC](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). In order to improve the current framework for negotiating land agreements with Aboriginal and Torres Strait Islander peoples, the Attorney-General and the Minister for Indigenous Affairs convened a Native Title Payments Working Group, made up of experts from the Indigenous community, mining, academia and the legal profession, to provide advice to the Government on 'how to make better use of payments under mining and infrastructure agreements'. The Government released the Discussion Paper based on the report of the Working Group. See Australian Government, Attorney-General's Department, *Native Title Payments Working Group*. At [http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle\\_Native\\_title\\_Native\\_title\\_system\\_coordination\\_and\\_consultation#payments](http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenoulawandnativetitle_Native_title_Native_title_system_coordination_and_consultation#payments) (viewed 25 June 2009); Native Title Payments Working Group, *Native Title Payments Working Group Report* (undated). At [http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native\\_title\\_wg\\_report/Native\\_title\\_working\\_group\\_report.pdf](http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_wg_report/Native_title_working_group_report.pdf) (viewed 10 August 2009).

14 Australian Government, *Australian Government Discussion Paper* (undated), p 3 (Discussion Paper). At [http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Discussion+paper+--+final+version.DOC/\\$file/Discussion+paper+--+final+version.DOC](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).

Can we arrive at beneficial agreements when the playing field is not even?

Undoubtedly, there is a relationship-building element to the negotiation of agreements. The relationship between companies and native title representatives has improved since the introduction of the *Native Title Act 1993* (Cth) (Native Title Act).<sup>15</sup> However, it is important to acknowledge that agreement-making is a formal legal process, which can result in a contractual relationship. It does not necessarily result in positive relationships, particularly where the agreement is weighted in favour of non-Indigenous interests.

Furthermore, not all Indigenous land has the potential for resource development or infrastructure projects sufficient to generate long-term intergenerational benefits. If the community is currently living in abject poverty, an agreement may simply alleviate poverty in the short to medium term.

If the Government is serious about optimising benefits through agreement-making, we need to ensure that the playing field is level. Substantive outcomes that are just and equitable can only be achieved if there are minimum standards in place to recognise and protect our human rights. I discuss implementation of these standards in further detail below.

### 2.3 Principles to underpin cultural change

The Attorney-General has recognised that:

Real change in native title will only come through adjusting the behaviour and attitudes of all parties in the native title system and how they engage with the opportunities native title can present.<sup>16</sup>

The Attorney-General has also emphasised the potential for native title to ‘develop positive and enduring relationships between Indigenous and non-Indigenous Australians’ and to be ‘a vehicle for the reconciliation we all want to achieve’.<sup>17</sup> To secure such outcomes, there needs to be major shifts in the attitudes that have traditionally been displayed by governments and the corporate sector in their engagement with Indigenous communities.

#### (a) Changing the approach of governments

In order to build a new approach to native title, governments must take several important steps. These include:

- developing a full understanding, recognition and respect for the rights of Indigenous peoples to our culture and our country
- ensuring that policy development is based on evidence and deals with Indigenous disadvantage from a holistic perspective
- engaging Aboriginal and Torres Strait Islander peoples as major stakeholders in the development, implementation and monitoring of policies and programs that affect us

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15 National Native Title Council, *Submission – Native Title Payments Working Group* (13 February 2009), p 2.

16 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, undated.

17 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 45. At [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2008\\_FourthQuarter\\_4December2008-NativeTitleConsultativeForum](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultativeForum) (viewed 17 November 2009).

- increasing the cross-cultural competence of bureaucracy to ensure policies and programs support the sustainability and self determination of Indigenous communities.

These steps are very broad and apply to all areas of Indigenous policy including land and resource management, cultural heritage and native title.

I consider that these steps must be underpinned by a genuine commitment to meeting Australia's human rights obligations.

Previous Social Justice Commissioners and I have consistently stated that there is an urgent need for government to apply a rights-based approach to the native title system.

### Text Box 2.1: Decolonising the legislative framework through human rights principles

Major human rights standards that are particularly important to Indigenous peoples include:

- non-discrimination<sup>18</sup>
- equal protection of property interests before the law<sup>19</sup>
- the right to maintain and enjoy a distinct culture<sup>20</sup>
- the right to self-determination, which can include the full, free and effective participation in decision-making that affects them, their lands, territories and resources<sup>21</sup>
- the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.<sup>22</sup>

18 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 2, at <http://www2.ohchr.org/english/law/cerd.htm> (viewed 1 November 2009); *International Covenant on Civil and Political Rights*, 1966, art 26, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 2, at [http://www.un.org/esa/socdev/unpfii/documents/DRIPS\\_en.pdf](http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf) (viewed 1 November 2009).

19 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 5, at <http://www2.ohchr.org/english/law/cerd.htm> (viewed 1 November 2009); *Universal Declaration of Human Rights*, GA Resolution 217A(III), UN Doc A/810 (1948), art 17, at <http://www.un.org/en/documents/udhr/> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 26, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

20 *International Covenant on Civil and Political Rights*, art 27, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 17 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 11, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

21 *International Covenant on Civil and Political Rights*, 1966, art 1, at <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 1 November 2009); *International Covenant on Economic and Social and Cultural Rights*, 1966, art 1, at <http://www2.ohchr.org/english/law/cescr.htm> (viewed 1 November 2009); *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), arts 3–4, at <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

22 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), arts 32. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

I have commented elsewhere on the contents of these rights and the importance of their application in a native title context. In particular, I have provided guidance to the Australian Government about the implementation of the Declaration on the Rights of Indigenous Peoples.<sup>23</sup>

However, I would like to specifically highlight the importance of the principle of free, prior and informed consent (FPIC) to the current discussions about native title reform.

### **Text Box 2.2: How is the principle of free, prior and informed consent relevant to native title?**

Indigenous peoples have the right own, use, develop and control their lands, territories and resources.<sup>24</sup>

The Declaration on the Rights of Indigenous Peoples affirms that States are to 'consult and cooperate in good faith with the Indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them'.<sup>25</sup>

This includes measures that may affect our rights to our lands, territories and resources, such as resource development projects.

In its 2005 Concluding Observations on Australia, the Committee on the Elimination of Racial Discrimination recommended that Australia:

refrain from adopting measures that withdraw existing guarantees of Indigenous rights and that it make every effort to seek the informed consent of Indigenous peoples before adopting decisions relating to their rights to land.<sup>26</sup>

The principle of free, prior and informed consent requires that:

- no coercion or intimidation is used to gain consent
- consent is sought and freely given well in advance of authorisation of development activities
- full information is provided about the scope and impacts of the proposed development activities on their lands, resources and well-being
- that Indigenous people have the choice to give or withhold consent over developments on their lands.<sup>27</sup>

23 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](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 1 November 2009).

24 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 26. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 19. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 17 November 2009).

26 UN Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At [http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/CERD.C.AUS.CO.14.En?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument) (viewed 1 November 2009).

27 DESA Intra-Departmental Task Force on Indigenous Issues, *Provisional Framework DESA technical cooperation programs in countries with Indigenous Peoples*, pp 4–5. At [http://www.un.org/esa/socdev/unpfii/documents/desa\\_prov\\_framework\\_tech\\_coop.pdf](http://www.un.org/esa/socdev/unpfii/documents/desa_prov_framework_tech_coop.pdf) (viewed 29 September 2009).

Governments at all levels need to change their attitudes towards engaging with Aboriginal and Torres Strait Islander peoples. In my view, government departments across all jurisdictions in Australia are not accustomed to regularly consulting with Aboriginal and Torres Strait Islander peoples. Most of them are unsure about what constitutes genuine consultation and effective engagement. We are certainly not at a point where bureaucrats value such engagement or understand its importance in terms of respect and in terms of improving the quality of decision making and policy formulation processes.<sup>28</sup>

The current Government's approach to engaging with Indigenous peoples on reforms to the native title system is a welcome change from the approach of the previous government. However, I note that the capacity of communities to engage in consultative processes has been hindered by the short timeframes for responding to discussion papers and draft legislation regarding native title and associated areas. There was also a lack of consultation in centres most affected by the topics addressed by these reforms. As discussed in Chapter 1, Native Title Representative Bodies/Service Providers and Prescribed Bodies Corporate face considerable resource constraints.

It is essential that the principle of FPIC be reflected throughout the native title system. The principle is a higher standard than that currently provided in the Native Title Act.

The National Native Title Council (NNTC) has argued that one way of achieving a level playing field in native title is to enshrine the principle of FPIC in any process for agreement-making. This principle should be central to all negotiations with mining companies and others in relation to Indigenous peoples.<sup>29</sup>

In Appendix 3 to this Report, I provide clear guidelines for effective engagement and consultation processes that promote FPIC. The guidelines also consider specific issues that require serious consideration when developing processes for engagement with Aboriginal peoples and Torres Strait Islander peoples.<sup>30</sup>

The application of these guidelines would help ensure that policies, legislation and practices concerning native title implement a human rights-based approach to development.

### **(b) Building relationships between Indigenous peoples and governments**

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur), James Anaya, has emphasised the importance of partnerships in implementing the rights of indigenous peoples. Following his visit to Australia in August 2009, he stressed the need to adopt a holistic approach to the development of Indigenous programs that is

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28 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: The Future* (Speech delivered at the University of South Australia, Adelaide, 12 November 2008). At [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2008/20081112\\_future.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081112_future.html) (viewed 1 November 2009).

29 National Native Title Council, *Submission – Native Title Payments Working Group* (13 February 2009), p 3.

30 For examples of how Indigenous peoples are already applying the principle of FPIC in development negotiations, see Chapter 1 of this Report. See also 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](http://www.klc.org.au/media/080910_HUB_shortlist.pdf) (viewed 22 October 2009).

compatible with the objective of the United Nations Declaration of securing for indigenous peoples, not just social and economic wellbeing, but also the integrity of indigenous communities and cultures, and their self-determination.<sup>31</sup>

The Special Rapporteur further stated:

This approach must involve a real partnership between the Government and the indigenous peoples of Australia, to move towards a future, as described by Prime Minister Rudd in his apology to indigenous peoples last year, that is 'based on mutual respect, mutual resolve and mutual responsibility,' and that is also fully respectful of the rights of Aboriginal and Torres Strait Islander peoples to maintain their distinct cultural identities, languages, and connections with traditional lands, and to be in control of their own destinies under conditions of equality.<sup>32</sup>

I agree. To fully protect the rights of Aboriginal and Torres Strait Islander peoples, governments must work with us to build relationships of trust and partnership. In order to do this, governments must ensure:

- the participation of Aboriginal and Torres Strait Islander peoples in decision-making that significantly affects them, including through their representative organisations
- that governments are accountable for their progress in closing the gap in disadvantage experienced by Aboriginal and Torres Strait Islander peoples
- that programs and policies respect Aboriginal and Torres Strait Islander peoples' human rights
- that Aboriginal and Torres Strait Islander peoples' aspirations to economic independence are recognised and their ability to manage their own affairs is supported
- that Aboriginal and Torres Strait Islander peoples' culture and identity are recognised, strengthened and maintained.<sup>33</sup>

This relationship of trust and partnership needs to be developed at all levels of government, including within local, state and territory governments.

State and territory governments are the primary respondents in the majority of native title claims. They are also parties to most of the negotiations under the Native Title Act. Further, the states and territories often work directly with Aboriginal or Torres Strait Islander communities at the local level to deliver essential services and basic human rights, and they are responsible for granting interests in lands, waters and resources to other parties.

States and territories must remember that they not only have responsibilities to protect non-Indigenous interests that may be affected by native title, but to protect the rights and interests of Aboriginal and Torres Strait Islander people.

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31 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

32 United Nations High Commissioner for Human Rights, *Statement of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya, as he concludes his visit to Australia* (27 August 2009). At <http://www.unhchr.ch/hurricane/hurricane.nsf/view01/313713727C084992C125761F00443D60?opendocument> (viewed 23 October 2009).

33 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).



It is for these reasons that positive partnerships between native title holders and state and territory governments are integral to developing new approaches to the settlement of claims and the negotiation of agreements. It is in the best interests of states and territories to ensure that the native title system is working effectively.

However, the relationship between Indigenous peoples and the states and territories should be much broader than just sitting across the negotiation table. A partnership is required that considers native title holistically, and incorporates innovative approaches to the settlement of claims through negotiated outcomes and optimising those outcomes through co-ordinated efforts.

For example, closer strategic partnerships between the state and territory agencies and Indigenous communities are necessary to assess and facilitate the community development, skills and training required to effectively implement agreements. Initiative, support and forward planning to assess and meet the capacity needs of communities would help prepare communities to effectively engage in the agreement-making process and receive the full benefit of negotiated outcomes.

### (c) Corporate social responsibility

To build a just and equitable native title system, a change in attitudes will also be required in the corporate sector.

The concept of corporate social responsibility (CSR) is generally understood to mean that corporations have a degree of responsibility not only for the economic consequences of their activities, but also for the social and environmental implications.<sup>34</sup>

In 2001, Rhonda Kelly and Ciaran O’Faircheallaigh analysed the policies of eight major mining companies in relation to the rights and interests of Indigenous peoples. Kelly and O’Faircheallaigh found that, while most companies accept the idea of CSR in principle, they vary greatly in what they mean by that idea and in the extent to which they actually live up to their policies in practice. Some companies have, or are in the process of developing, policies, practices and resource allocations in relation to Indigenous peoples which are consistent with human rights. However, some companies publicly oppose, and/or work covertly to undermine, legislation and policy designed to protect or promote Indigenous rights and interests.<sup>35</sup>

In March 2009, an International Expert Group Meeting on Extractive Industries, Indigenous Peoples’ Rights and Corporate Social Responsibility considered that while entities participating in extractive industries<sup>36</sup> have become more willing to consult with indigenous communities, efforts continue to fall short of true free, prior, and informed consent. Further, while companies were now more flexible in terms of benefit-sharing, there was no increased interest in acknowledging the sovereignty or traditional decision-making of Indigenous peoples and their rights to their territories

34 Australian Human Rights Commission, *Corporate Social Responsibility & Human Rights*, Fact Sheet (2008). At [http://www.humanrights.gov.au/human\\_rights/corporate\\_social\\_responsibility/corporate\\_social\\_responsibility.html#1](http://www.humanrights.gov.au/human_rights/corporate_social_responsibility/corporate_social_responsibility.html#1) (viewed 1 October 2009).

35 Australian Human Rights Commission, *Frameworks for Negotiation of Mining Agreements – Corporate Social Responsibility*, [http://www.humanrights.gov.au/social\\_Justice/publications/corporate\\_responsibility/frameworks.html](http://www.humanrights.gov.au/social_Justice/publications/corporate_responsibility/frameworks.html) (viewed 4 September 2009).

36 The report of the Expert Meeting recognises that the term ‘extractive industries’ includes transnational corporations, States, public and privately held corporations, companies and other entities participating in the exploration and extraction of natural resources. UN Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples’ rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), para 11. At [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2009\\_CRP\\_8.doc](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc) (viewed 30 October 2009).

or redressing past human rights violations. Some companies consider benefit-sharing or social programs as charity, rather a human rights issue.<sup>37</sup>

The Expert Group recommended that extractive industries corporations:

- adopt the Declaration on the Rights of Indigenous Peoples as a minimum standard and respect the rights that it enshrines, regardless of a host government's acknowledgement of the human rights of indigenous peoples or failure to protect these through national law.
- fully integrate considerations of human rights and environmental standards in all areas of their work.
- recognise the rights of indigenous peoples over their lands as the basis for negotiations over proposed extractive industries, as well as the organisation of engagement, partnership and sharing of financial benefits. In instances where indigenous peoples consent to extractive activities on indigenous land, payments or benefit sharing arrangements should be based on annual reviews throughout the life of the activity. Incomes from any extractive activity must cover all costs associated with closure and restoration and include sufficient funds to provide for potential future liabilities.
- where benefit sharing arrangements are channelled through a foundation or other entity, corporations must ensure that these entitlements remain under the control of the indigenous people.
- develop and enforce policies on human rights.
- set insurance levels and establish insurance funds in agreement with indigenous peoples and at a level appropriate for the risks involved. The duration of the insurance program must match the duration of any impact of the extractive industry activity beyond the term of the project itself.
- be accountable to indigenous peoples for damages resulting from past extractive activities that affected indigenous lands and livelihoods and provide compensation and restitution for damages inflicted upon the lands, territories and resources of indigenous peoples, and the rehabilitation of degraded environments caused by extractive industry projects that did not obtain FPIC.
- submit themselves to the jurisdiction of indigenous courts and judicial systems in whose territories they operate.
- ensure respect for FPIC including full transparency in all aspects of their operations and stop dividing communities to obtain FPIC.
- always regard indigenous communities as having control and ownership of the land and territory, regardless of whether these rights are recognised by the relevant governments or not.<sup>38</sup>

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37 Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), paras 14, 17. At [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2009\\_CRP\\_8.doc](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc) (viewed 30 October 2009).

38 Permanent Forum on Indigenous Issues, *Report of the international expert group meeting on extractive industries, Indigenous Peoples' rights and corporate social responsibility*, UN Doc E/C.19/2009/CRP. 8 (2009), paras 57–67. At [http://www.un.org/esa/socdev/unpfii/documents/E\\_C19\\_2009\\_CRP\\_8.doc](http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc) (viewed 30 October 2009).

I consider that these recommendations provide a good foundation for new relationships between the corporate sector and Indigenous communities. The Australian Government should also adopt and promote the recommendations through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.

#### (d) Encouraging an interest-based approach to negotiation

To facilitate collaborative partnerships between Indigenous communities, government and industry, there is a clear need to move away from an adversarial approach to native title.

The Government has expressed a clear preference for an interest-based approach to negotiating broader land settlement agreements.<sup>39</sup>

An interest-based process is a problem-solving process, with the goal of finding mutually satisfactory outcomes for all parties.<sup>40</sup>

In relation to native title agreement-making, an interest-based approach to negotiations would focus on the interests of the parties in order to reach agreement. Interest-based processes must develop outcomes that meet the substantive, procedural and emotional needs of all parties. Tangible interests such as financial compensation or employment and training are most common, while less tangible interests such as recognition or respect for cultural protocols are harder to quantify and articulate.<sup>41</sup>

In a practical sense, this will require parties to:

- come together as early as possible to understand what each party wants to achieve
- look beyond native title issues – for example, by considering opportunities for economic development, such as employment, training, and developing skills, businesses and infrastructure in the community
- consider the non-tangible interests of parties – for example, increasing the corporate profile of industry parties, or exploring opportunities to strengthen the transfer of knowledge to younger generations through the claims and agreement-making process
- develop strategies to incorporate and implement those interests.<sup>42</sup>

I consider that the adoption of an interest-based approach to negotiation is crucial to fulfilling the promise of the native title system. We can no longer adopt adversarial, win / lose positions. Rather, we should seek opportunities to understand each others' interests and to forge sustainable, mutually beneficial relationships.

39 R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009). At [http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches\\_2009\\_20February2009-3rdNegotiatingNativeTitleForum](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum) (viewed 4 September 2009).

40 C Moore, *The Mediation Process* (2003), cited in the Australian Institute of Aboriginal and Torres Strait Islander Studies, *Indigenous Facilitation and Mediation Project*, [http://ntru.aiatsis.gov.au/ifamp/terms/terms\\_content.html](http://ntru.aiatsis.gov.au/ifamp/terms/terms_content.html) (viewed 4 September 2009).

41 D Everard, *Scoping Process Issues in Negotiating Native Title Agreements*, Australian Institute of Aboriginal and Torres Strait Islander Studies, Research Discussion Paper No 23 (2009), pp 16–17. At <http://aiatsis.gov.au/research/docs/dp/DP23.pdf> (viewed 1 November 2009).

42 R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009). At [http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches\\_2009\\_20February2009-3rdNegotiatingNativeTitleForum](http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum) (viewed 4 September 2009).

## 2.4 Transforming the policy landscape

In Chapter 3, I consider specific aspects of native title law and policy that are in need of reform, with the aim of generating further discussion on how we move towards a just and equitable native title system.

However, native title is part of the wider constitutional, legislative and policy framework that impacts upon the rights of Aboriginal and Torres Strait Islander peoples in Australia. We cannot view native title as being distinct from broader debates about the enjoyment of our human rights. In order to create a just and equitable native title system, we need to ensure that a firm platform is in place across Australia to respect, protect and fulfil the human rights of Aboriginal and Torres Strait Islander peoples.

Our rights to our country are at the core of our physical and mental wellbeing. And because of this, the protection of our native title and other land and water rights is essential to other aspects of our lives, such as health. As discussed in Text Box 2.3, this has been supported by recent research.

### Text Box 2.3: Closing the gap through land rights

Recent research has confirmed what Aboriginal and Torres Strait Islander peoples have known for millennia – that there is a link between their physical, mental and cultural health and their role in caring for their country.<sup>43</sup>

I have said in the past that the land is our mother. It is steeped in our culture. We have a responsibility to care for it now and for generations to come. This care, in turn, sustains our lives – spiritually, physically, socially and culturally – much like the farmer who lives off the land. However, there is a lack of understanding within government of the importance of Indigenous peoples' relationship to country to the broader social and economic improvement in the lives of Indigenous people.<sup>44</sup>

The *Healthy Country, Health People* project, which was requested by traditional owners of central Arnhem Land, researched various aspects of the relationship between caring for country and health and wellbeing.

The study found evidence 'sufficient to support the proof of concept that investment in ICNRM [Indigenous Natural and Cultural Resource Management] appears to be an important strategy for the prevention of chronic diseases and their complications'.<sup>45</sup>

43 S T Garnett et al, 'Healthy country, healthy people: policy implications of the link between Indigenous human health and environment condition in tropical Australia' (2009) 68 *Australian Journal of Public Administration* 53.

44 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: Land and Culture – Economic Development* (Speech delivered at the Department of Environment, Water, Heritage and the Arts NAIDOC Week Celebrations, Parkes, 7 July 2008). At [http://www.humanrights.gov.au/about/media/speeches/social\\_justice/2008/20080707\\_essentials\\_land\\_and\\_culture.html](http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080707_essentials_land_and_culture.html) (viewed 31 October 2009).

45 S Garnett & B Sithole, *Sustainable Northern Landscapes and the Nexus with Indigenous Health: Healthy Country, Healthy People* (2007), p 25. At <http://lwa.gov.au/files/products/social-and-institutional-research-program/pn20681/pn20681.pdf> (viewed 30 October 2009).

The researchers found that greater participation in caring for country activities was 'associated with more frequent exercise and bush food consumption and with better health on most clinical outcomes', for example, a lower Body Mass Index, less abdominal obesity, less diabetes and lower blood pressure.<sup>46</sup>

The researchers concluded that their results 'suggest careful reconsideration of conflicting Indigenous affairs policies that are simultaneously discouraging connections with country and promoting Indigenous natural resource management'.<sup>47</sup>

An earlier government-initiated evaluation of the Indigenous Protected Area (IPA) program also found strong correlations between managing IPAs and broader social and cultural benefits for communities. This study found:

- 60% of IPA communities report positive outcomes for early childhood development from their IPA activities
- 85% of IPA communities report that IPA activities improve early school engagement
- 74% of IPA communities report that their IPA management activities make a positive contribution to the reduction of substance abuse
- 74% of IPA communities report that their participation in IPA work contributes to more functional families by restoring relationships and reinforcing family and community structures.<sup>48</sup>

Further research conducted in the Northern Territory community of Utopia found that outstation living resulted in positive health outcomes including benefits associated with physical activity, diet and limited access to alcohol, as well as social factors, including connectedness to culture, family and land, and opportunities for self-determination.<sup>49</sup>

These studies provide the evidence base for governments to make policies that enable and support the ability of Indigenous peoples to manage and undertake activities on country.<sup>50</sup> These studies also counter the arguments that homelands communities are cultural museums that prevent health and social gains for Aboriginal peoples.<sup>51</sup>

It also supports the common cultural belief that land is central to our wellbeing. Consequently, policy affecting Indigenous peoples cannot be made in a vacuum.

The phrase 'caring for country' can now be based on a better understanding of what this means to Indigenous peoples. 'Caring for country' is not just the title of a policy, it is our law.

The crucial link of the connection between land and water and our wellbeing is something that policy makers are only just starting to grasp.

46 C P Burgess et al, 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"' (2009) 190(10) *Medical Journal of Australia* 567, pp 570–571.

47 C P Burgess et al, 'Healthy country, healthy people: the relationship between Indigenous health status and "caring for country"' (2009) 190(10) *Medical Journal of Australia* 567, p 572.

48 B Gilligan, *The Indigenous Protected Areas Programme; 2006 Evaluation* (2006), p 4. At <http://www.environment.gov.au/indigenous/publications/ipa-evaluation.html> (viewed 24 July 2009).

49 K Rowley et al, 'Lower than expected morbidity and mortality for an Australian Aboriginal population: 10 year follow-up in a decentralised community' (2008) 188(5) *Medical Journal of Australia* 283.

50 J Davies, M LaFlamme & D Campbell, *Health of people and land through sustainable Aboriginal livelihoods in rangeland Australia* (Presentation delivered at the XXI International Grassland Congress, Hohhot, Inner Mongolia, China, 29 June – 5 July 2008).

51 K Rowley et al, 'Lower than expected morbidity and mortality for an Australian Aboriginal population: 10 year follow-up in a decentralised community' (2008) 188(5) *Medical Journal of Australia* 283.

Current policies that impact upon Aboriginal and Torres Strait Islander peoples are isolated, disconnected and disjointed. If there is to be real change in the lives of Aboriginal and Torres Strait Islander people, governments must work collaboratively and develop policies that deal with Indigenous disadvantage from a holistic perspective.

This means that in addition to the key areas for reform discussed in Chapter 3, consideration will also need to be given to associated policies. There is a need for policy-makers to understand the intersections between native title and other policy areas.

**(a) Improving the governance framework**

With regard to maximising the mechanisms available at the domestic level to develop effective policy and law, the Office of the High Commissioner for Human Rights highlights four key governance themes:

- strengthening democratic institutions
- improving service delivery
- the rule of law
- combating corruption.<sup>52</sup>

**Text Box 2.4: Good governance and human rights<sup>53</sup>**

**Strengthening democratic institutions**

When led by human rights values, good governance reforms of democratic institutions create avenues for the public to participate in policy-making either through formal institutions or informal consultations. They also establish mechanisms for the inclusion of multiple social groups in decision-making processes, especially locally. Finally, they may encourage civil society and local communities to formulate and express their positions on issues of importance to them.

**Improving service delivery**

In the realm of delivering State services to the public, good governance reforms advance human rights when they improve the State's capacity to fulfil its responsibility to provide public goods which are essential for the protection of a number of human rights, such as the right to education, health and food. Reform initiatives may include mechanisms of accountability and transparency, culturally sensitive policy tools to ensure that services are accessible and acceptable to all, and paths for public participation in decision-making.

52 Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (2007), pp 2–3. At <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (viewed 19 August 2009).

53 Office of the United Nations High Commissioner for Human Rights, *Good Governance Practices for the Protection of Human Rights* (2007), pp 2–3. At <http://www.ohchr.org/Documents/Publications/GoodGovernance.pdf> (viewed 19 August 2009).

**The rule of law**

When it comes to the rule of law, human rights-sensitive good governance initiatives reform legislation and assist institutions ranging from penal systems to courts and parliaments to better implement that legislation. Good governance initiatives may include advocacy for legal reform, public awareness-raising on the national and international legal framework and capacity-building or reform of institutions.

**Combating corruption**

In fighting corruption, good governance efforts rely on principles such as accountability, transparency and participation to shape anti-corruption measures. Initiatives may include establishing institutions such as ethics and review committees, creating mechanisms of information sharing, and monitoring governments' use of public funds and implementation of policies.

Transparency and accountability in government decision-making is required to truly 'close the gap' on socio-economic outcomes between Indigenous and non-Indigenous Australians and to successfully reform the native title system.

In my *Social Justice Report 2008*, I considered areas where reform is needed to improve governance and the protection of human rights in Australia, including:

- government support for, and implementation of, the Declaration on the Rights of Indigenous Peoples
- constitutional reform to recognise Indigenous peoples in the preamble of the Australian Constitution, remove discriminatory constitutional provisions and to guarantee equal treatment and non-discrimination
- the enactment of a national Human Rights Act that includes the protection of Indigenous rights
- the establishment of a national Indigenous representative body and processes to ensure the full participation of Indigenous peoples in decision-making that affects our interests.
- the establishment of a framework for negotiations / agreements with Indigenous peoples to address the unfinished business of reconciliation.<sup>54</sup>

The Australian Government confirmed its support for the Declaration on the Rights of Indigenous Peoples during the reporting period.<sup>55</sup> The next step will be to work with Aboriginal and Torres Strait Islander people to ensure its implementation.

Advocacy for constitutional reform, a Human Rights Act and the establishment of a national Indigenous representative body continued throughout the reporting period. I consider these three proposals, and further proposals to address the unfinished business of reconciliation, below.<sup>56</sup>

54 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2008*, Australian Human Rights Commission (2009), p 26. At [http://www.humanrights.gov.au/social\\_justice/sj\\_report/sjreport08/index.html](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 19 August 2009).

55 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](http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/un_declaration_03apr09.htm) (viewed 2 November 2009).

56 For further information, 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](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 19 August 2009).

(i) *Constitutional recognition of the first peoples*

In his famous Redfern Speech, Paul Keating (then the Prime Minister of Australia) highlighted the importance of recognising the history of Australia and, in particular, the impact of that history on our country's first peoples. He understood that

the starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossession. We took the traditional lands and smashed the traditional way of life.<sup>57</sup>

The Australian Constitution does not acknowledge Aboriginal and Torres Strait Islander peoples as the first peoples and traditional owners of the land now known as Australia. In fact, the Constitution makes no reference to Aboriginal and Torres Strait Islander peoples at all.

On 10 December 2008, the Australian Government launched a national consultation on human rights protections in Australia. The Government appointed an independent committee, chaired by Father Frank Brennan, to conduct the National Human Rights Consultation (the Consultation).<sup>58</sup>

As identified by the Australian Human Rights Commission (the Commission) in its submission to the Consultation:

There is enormous symbolic importance in recognising the rights and unique status of Indigenous peoples in the preamble to the Constitution. It would go some way towards redressing the historical exclusion of Indigenous peoples from Australia's foundational documents and national identity.<sup>59</sup>

The Commission recommended that Aboriginal and Torres Strait Islander peoples should be recognised in the preamble to Australia's Constitution.<sup>60</sup>

If we as a nation are serious about real engagement with Aboriginal and Torres Strait Islander peoples, constitutional recognition is essential.

The Commission further recommended that the Australian Government should begin a process of constitutional reform to protect the principle of equality for all people in Australia, including:

- removing section 25 of the Constitution
- amending the Constitution to guarantee racial equality and proscribe discrimination on the basis of race
- a comprehensive national inquiry to consider:
  - the exact wording of a constitutional clause to protect the right to equality

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57 P Keating, *Redfern Speech* (Speech delivered at Redfern Park, 10 December 1992). At <http://www.keating.org.au/main.cfm> (viewed 1 November 2009).

58 For further information, see National Human Rights Consultation, [www.humanrightsconsultation.gov.au/](http://www.humanrightsconsultation.gov.au/) (viewed 24 September 2009).

59 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), para 670. At [http://www.humanrights.gov.au/legal/submissions/2009/200906\\_NHRC.html](http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC.html) (viewed 17 November 2009).

60 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), para 696 (recommendation 34). At [http://www.humanrights.gov.au/legal/submissions/2009/200906\\_NHRC.html](http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC.html) (viewed 17 November 2009).



- the extent to which specific grounds of protection should be included
- whether the clause should include any possible limitation.<sup>61</sup>

Constitutional protection of racial equality would prevent legislative protections against racial discrimination from being overridden or suspended by Parliament. This could have an important impact on the native title system – we have seen before how easily the *Racial Discrimination Act 1975* (Cth) can be suspended and the Native Title Act amended to our detriment.<sup>62</sup>

(ii) *A Human Rights Act for Australia*

In its submission to the Consultation, the Commission recommended that the Australian Parliament should introduce a Human Rights Act.<sup>63</sup>

A Human Rights Act would be Parliament's commitment to a democratic system that provides transparency and accountability in all public decision-making which might impact on human rights. It could help ensure that human rights standards, such as those discussed above, are given due consideration when the Australian Government and federal public authorities make decisions that affect our rights to our lands, territories and resources.

The model of a Human Rights Act supported by the Commission would:

- require the Australian Government to consider human rights from the earliest stages of the development of law and policy
- require parliamentary scrutiny of new legislation to ensure that it is compatible with human rights
- require legislation to be interpreted consistently with human rights
- require Parliament to be notified, and to publicly respond, if a law is found to be inconsistent with human rights
- require public authorities to act in a way that is compatible with human rights and to give proper consideration to human rights in decision-making
- provide for an effective remedy when a public authority breaches human rights.<sup>64</sup>

As discussed in the *Social Justice Report 2008*,<sup>65</sup> a Human Rights Act would also be an important way of formally recognising the rights of Aboriginal and Torres Strait Islander peoples. In particular, the Commission believes that a Human Rights Act should include a preamble that specifically recognises the human rights of Aboriginal and Torres Strait Islander peoples.

61 Australian Human Rights Commission, *Submission to the National Human Rights Consultation*, (June 2009), para 696 (recommendation 35). At [http://humanrights.gov.au/legal/submissions/2009/200906\\_NHRC.html](http://humanrights.gov.au/legal/submissions/2009/200906_NHRC.html) (viewed 17 November 2009).

62 See Chapter 1 of this Report for a discussion on the *Native Title Amendment Act 1998* (Cth). See further Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998* (1998). At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/index.html#1998](http://www.humanrights.gov.au/social_justice/nt_report/index.html#1998) (viewed 1 October 2009).

63 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009), pt 20. At [http://humanrights.gov.au/legal/submissions/2009/200906\\_NHRC.html](http://humanrights.gov.au/legal/submissions/2009/200906_NHRC.html) (viewed 17 November 2009).

64 Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (2009), pt 20. At [www.humanrights.gov.au/legal/submissions/2009/200906\\_NHRC\\_complete.pdf](http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC_complete.pdf) (viewed 24 September 2009).

65 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](http://www.humanrights.gov.au/social_justice/sj_report/sjreport08/index.html) (viewed 1 November 2009).

The Commission also recommended that special effort should be made to ensure that Aboriginal and Torres Strait Islander peoples are full and effective participants in the development of a Human Rights Act. This would provide an opportunity for us to articulate how our rights should be recognised in a Human Rights Act.

*(iii) A national Indigenous representative body*

Since October 2007, I have worked with the Australian Government and an Indigenous Steering Committee to advance the establishment of a national Indigenous representative body. I provided a report to the Minister for Indigenous Affairs on the preferred model for the proposed representative body in August 2009.<sup>66</sup> The Government is expected to provide a response to this report in October 2009.

The absence of an effective, credible body in recent years has resulted in fragmented and uncoordinated policy-making at the national level. Policy has been developed without genuine engagement with Aboriginal and Torres Strait Islander peoples.

The creation of a national Indigenous representative body will provide governments with a national focal point from which they can source expert advice on a holistic, whole-of-government basis. The proposed model will provide the 'meeting space' where Aboriginal and Torres Strait Islander peoples and communities, peak bodies and interest groups will be able to focus on the bigger picture and set a longer term agenda for policy making and program delivery. It will provide the starting point for discussions and set the broad directions for policy.<sup>67</sup> The proposed model anticipates that the national Indigenous representative body will have the ability to access expert advice across a range of issues, including native title.<sup>68</sup>

### **(b) Further unfinished business**

In addition to reforms to the broader governance structure, governments must attend to significant unfinished business. They include the social justice package and the Indigenous Economic Development Strategy.

Reform to these areas will complement the native title system and contribute to levelling the playing field.

*(i) The social justice package*

As I have highlighted in a number of my reports, the Native Title Act was intended to be just one of three mechanisms to recognise, and provide some reparation for, the dispossession of Indigenous peoples' from their lands and waters. The Act was to be complemented by:

- a social justice package to address broader issues in the relationship between Indigenous and non-Indigenous Australians

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66 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At [http://www.humanrights.gov.au/social\\_justice/repbody/report2009/index.html](http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html) (viewed 1 November 2009).

67 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At [http://www.humanrights.gov.au/social\\_justice/repbody/report2009/index.html](http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html) (viewed 1 November 2009).

68 Australian Human Rights Commission, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009). At [http://www.humanrights.gov.au/social\\_justice/repbody/report2009/index.html](http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html) (viewed 1 November 2009).

- an Indigenous land fund, which would ensure that those Indigenous peoples who could not access native title would still be able to attain some form of justice for loss of their lands.

While the Indigenous Land Fund was established, the social justice package has never been developed.

In preparation for the 2007 federal election, the Australian Labor Party promised to honour its commitment to implement a package of social justice measures in response to *Mabo (No 2)*.<sup>69</sup> The Labor Party removed reference to the social justice package in its 2009 National Platform.<sup>70</sup> In my view, a social justice package is integral to the effective operation of the native title system and must remain a priority for the Government.

The Aboriginal and Torres Strait Islander Commission<sup>71</sup> as well as my predecessors undertook significant amounts of work to compile detailed recommendations and proposals for a social justice package.<sup>72</sup> Some of the recommendations support proposals discussed in this Chapter, including constitutional recognition of Aboriginal and Torres Strait Islanders peoples, the protection of cultural integrity and heritage, and increasing the participation of Aboriginal and Torres Strait Islander people in the Australian economy.

Unfortunately, these recommendations have yet to be implemented.

I consider that it is time to revisit these recommendations and to consider the implementation of a comprehensive social justice package to complete the native title system.

#### (ii) *Indigenous Economic Development Strategy*

Economic development is an important tool in which to gain self determination and independence, but it should not come at the expense of the collective identity and responsibilities to your traditions, nor the decline in the health of your country.<sup>73</sup>

As discussed in Chapter 1 of this Report, the Australian Government has committed to the development of an Indigenous Economic Development Strategy. However, the Government has not released a discussion paper or draft strategy.<sup>74</sup>

I consider that an Indigenous Economic Development Strategy must be based upon Indigenous ownership and control of their lands and waters.

Rights to land and water are critical to Indigenous communities being able to leverage economic outcomes.

69 Australian Labor Party, *National Platform and Constitution* (2007), ch 13.

70 Australian Labor Party, *National Platform* (2009). At [http://www.alp.org.au/download/how/national\\_platform\\_constitution\\_2009.pdf](http://www.alp.org.au/download/how/national_platform_constitution_2009.pdf) (viewed 29 September 2009).

71 Aboriginal and Torres Strait Islander Commission, *Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures* (1995). Extracts reproduced in (1996) 1 *Australian Indigenous Law Reporter* 76. At <http://www.austlii.edu.au/au/journals/AILR/1996/27.html> (viewed 1 November 2009).

72 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2005*, Human Rights and Equal Opportunity Commission (1995), pp 96–135. See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), app 3, at [http://www.humanrights.gov.au/social\\_justice/repbody/report2009/index.html](http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html) (viewed 1 November 2009).

73 Traditional owner from the Yorta Yorta Nation Aboriginal Corporation, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 22. At [http://www.humanrights.gov.au/social\\_justice/nt\\_report/ntreport06/chp\\_1.html](http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html) (viewed 12 August 2009).

74 See discussion in Chapter 1 of this Report.

The recent amendments to the Native Title Act to allow for broader settlement packages, discussed in Chapter 1, should help facilitate economic development on Indigenous lands and assist communities to take advantage of new opportunities, such as climate change mitigation activities.

However, as I consider in Chapter 3, further reforms to the native title system are necessary to facilitate economic development. This includes providing for the recognition of commercial native title rights. Without the option of the commercial use of native title rights and interests, the ability to leverage economic development from the Indigenous estate and native title and to close the gap between Indigenous and non-Indigenous peoples is severely restricted.

I am also concerned that the development approach adopted by governments is premised on gaining control over Indigenous communities, rather than building governance, capacity and promoting self-sustaining and self-governing communities.<sup>75</sup>

The success of an Indigenous Economic Development Strategy will be maximised by linking it to other areas of Indigenous policy including land rights regimes, and emerging climate change and water policy. However, proactive policy developments must not be compromised by forcing Indigenous peoples to surrender their native title rights or their access to, or ownership of, their lands, waters and territories.

## 2.5 Conclusion

Changing the culture of the native title system will not be an easy task. The potential for reform will depend on the attitudes and commitment of all involved.

This Chapter has highlighted the need to ensure that the native title system is supported by a strong institutional foundation, which is based on human rights principles and incorporates processes that protect and promote the rights and interests of Aboriginal and Torres Strait Islanders peoples.

Reform to the native title system requires political will. It will also require a commitment on the part of governments and the corporate sector to enter into genuine partnerships with Aboriginal and Torres Strait Islander communities based on respect for our rights and the principle of FPIC.

We need to encourage collaborative partnerships where Indigenous people, governments and other stakeholders work together as equal partners to achieve sustainable outcomes that realise the development aspirations of Indigenous peoples.

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<sup>75</sup> For example, see Chapter 4 of this Report concerning reforms to land tenure.

## Recommendations

- 2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.
- 2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.
- 2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.

