Chapter 2:
'The basis for a strengthened partnership': Reforms related to agreement-making

2.1 Introduction

For Aboriginal and Torres Strait Islander peoples, agreement-making can be an expression of free, prior and informed consent and the beginning of cooperative relationships with governments and other parties.

Good agreements can recognise our rights and facilitate their exercise. In particular, agreements can enable Aboriginal and Torres Strait Islander peoples to 'determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[1]

However, agreement-making does not always result in beneficial outcomes for Aboriginal and Torres Strait Islander peoples. As David Ritter notes, 'some deals seem objectively fair, but others have produced clear winners and losers'.[2]

Indeed, Aboriginal and Torres Strait Islander peoples face significant barriers to reaching just and equitable agreements. These include inadequate financial resources and access to appropriate professional advice. There are also significant barriers embedded within native title law and policy, such as the onerous burden of proof faced by Aboriginal and Torres Strait Islander peoples. To facilitate positive outcomes from agreement-making, governments need to take action to ensure that the playing field is level.[3]

During the Reporting Period (1 July 2009–30 June 2010), the Australian Government advanced a number of initiatives designed to promote broader land settlements and improve the ability of Aboriginal and Torres Strait Islander peoples to enter into beneficial agreements. While it is arguable that these initiatives do not go far enough, in general I welcome the Australian Government's attempts to reform the adversarial culture of the native title system.

In this Chapter, I examine the Australian Government's commitment to reforming the native title system to encourage negotiations and agreement-making. I first review some of the achievements in agreement-

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 32(1). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

2 D Ritter, *The Native Title Market* (2009), p 6.

3 Proposals for reforms to create a 'level playing field' are considered further in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

making that occurred during the Reporting Period. I then review the Government's initiatives to encourage agreement-making and to explore options for broader and more substantial outcomes from native title agreements.

However, not all of the Australian Government's legislative and policy initiatives relating to agreement-making and agreements were positive.

During the Reporting Period, the Australian Government proposed a new future act process to facilitate the construction of public housing and infrastructure on Indigenous-held land. In this Chapter, I express serious concerns that this future act process will detract from agreement-making and that it does not contain sufficient procedural rights.

Finally, I briefly highlight a matter that I will continue to monitor closely – that is, the Government's proposal to introduce a new statutory review function to promote 'sustainable' agreements.

2.2 Achievements in agreement-making

Agreement-making is a significant part of the native title system. For example, a milestone was reached in November 2009 when the National Native Title Tribunal (NNTT) registered the 400th Indigenous Land Use Agreement (ILUA). President Graeme Neate of the NNTT recognised that '[t]he fact that 400 ILUAs have now been registered Australia-wide indicates that this form of agreement is continuing to work well for land users around the nation'.[4]

In addition, the NNTT has reported that all of the determinations that native title exists that were registered during the Reporting Period were made by consent of the parties.[5] President Neate has commented that:

> Those determinations and the ILUAs (some of which were associated with the making of determinations that native title exists), as well as numerous future act agreements and future act consent determinations, illustrate the strong agreement-making context in which native title issues are usually resolved.[6]

Over the Reporting Period, we have witnessed a number of significant agreements. I highlight a few of these in the text boxes below.

4 National Native Title Tribunal, 'Native title reaches another milestone' (Media Release, 27 November 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Nativetitlereachesanothermilestone.aspx (viewed 29 September 2010).

5 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 26. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

6 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 26. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

Text Box 2.1: Yawuru agreements

On 25 February 2010, the Yawuru People signed a body corporate ILUA and an area ILUA with the State of Western Australia and the Shire of Broome. The body corporate ILUA was registered by the NNTT on 24 May 2010 and the area ILUA was registered on 6 August 2010.[7]

The agreements are considered to be the largest native title agreements in Australia, and include a $196 million land and money package.[8]

The agreements provide compensation to the Yawuru People for the loss and impairment of their native title rights and interests. They also commit the Western Australian Government to help create a sustainable social and economic future for the community, including by providing funds for capacity building, economic development and social housing.[9]

Yawuru elder Pat Dodson is reported as saying that the agreements represent 'a serious cutting of the government umbilical cord. We are in the marketplace now and we have to develop commercial skills to run joint ventures'.[10]

He further comments:

> We in fact become probably the largest real estate developer of the future town of Broome. There is an area of the coast (and marine region of Roebuck Bay) area going from the north to the south for about 300km that we will joint manage with the Shire of Broome and the State Department of Environment. What is unique about this agreement is that we have to put in to get value out of development. There are no royalties to be paid out to native titleholders. This is not a mining deal. Dividends by way of community benefits will come from participation and development. We take the risks as well as the benefits from this deal.[11]

The agreements were a good outcome for the Yawuru People. However, the long process that led to the final agreements illustrates that there is still a need to change the adversarial culture of the native title system.

The agreements were reached 16 years after the Yawuru People submitted their first claim. As Justice Merkel of the Federal Court commented, the Yawuru People engaged in an 'epic struggle … to achieve recognition under Australian law of their traditional connection to, and ownership of, their country'.[12]

Pat Dodson described the process as 'pretty awful and very intrusive' and said that '[t]he adversarial approach put a lot of our people through a very rough time'.[13] Similarly, Peter Yu is reported as stating that:

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7 National Native Title Tribunal, 'Tribunal registers Yawuru agreement' (Media Release, 25 May 2010). At http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/YawuruILUAsregistered.aspx (viewed 29 September 2010); National Native Title Tribunal, 'Tribunal registers second Yawuru ILUA' (Media Release, 6 August 2010). At http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/TribunalregisterssecondYawuruILUA.aspx (viewed 29 September 2010); National Native Title Tribunal, *Annual Report 2009–10* (2010), pp 78–80. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

8 Office of Native Title Western Australia, *Yawuru Agreements*, Fact Sheet. At http://www.ont.dotag.wa.gov.au/_files/Yawuru_fact_Sheet.pdf (viewed 29 September 2010).

9 Office of Native Title Western Australia, *Yawuru Agreements*, Fact Sheet. At http://www.ont.dotag.wa.gov.au/_files/Yawuru_fact_Sheet.pdf (viewed 29 September 2010).

10 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

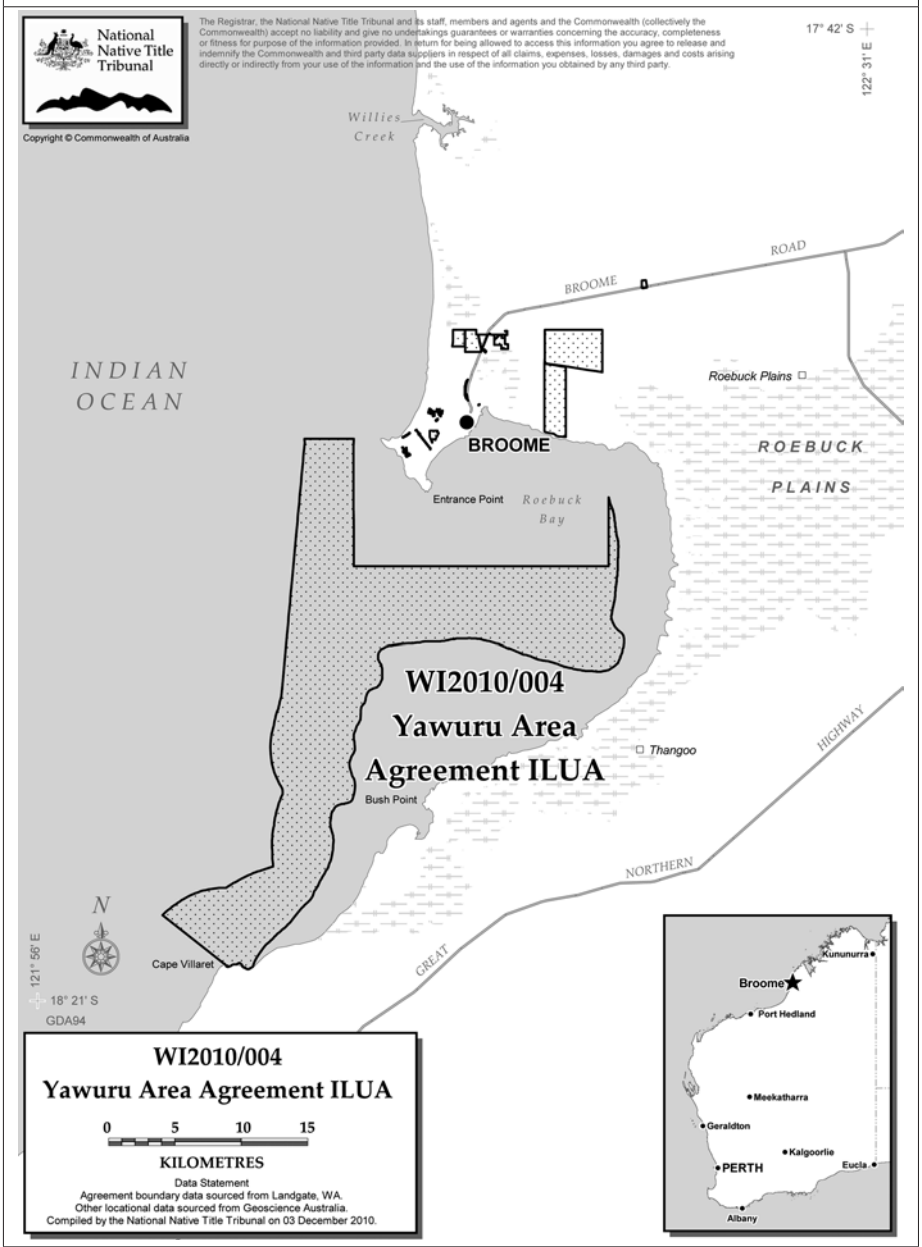
11 P Dodson, Email to K Kiss, Director, Social Justice Unit, Australian Human Rights Commission, 9 November 2010.

12 *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (28 April 2006), para 159.

13 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

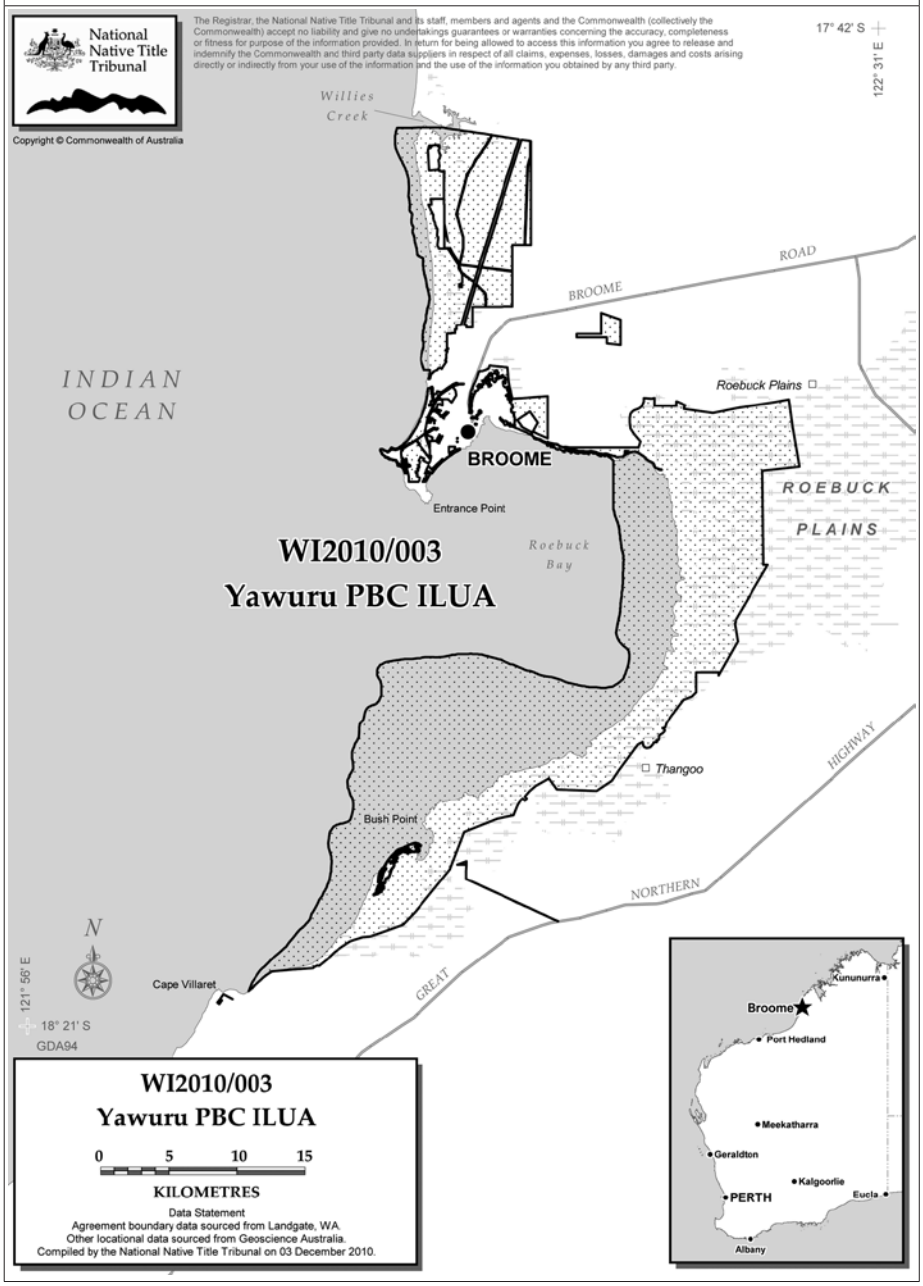
> The underlying principle of native title envisaged by the Keating government was mediation. It is now all highly litigious. No Australian should have their lives exposed and questioned in the way that it happened to us.[14]

Map 2.1: Yawuru Area ILUA



14 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

Map 2.2: Yawuru PBC ILUA



Text Box 2.2: Kowanyama consent determination

On 22 October 2009, the Federal Court made a consent determination which finalised Part A of the Kowanyama People's claim.[15] The determination area covers over 2730 square kilometres. It includes part of the land subject to the Kowanyama Deed of Grant in Trust (DOGIT) and a coastal strip. The Kowanyama People had exclusive native title rights recognised over the former area (excluding the Kowanyama township within the DOGIT) and non-exclusive rights recognised over the latter.[16]

The total native title claim area covers 19 800 square kilometres of land and sea and is divided into three parts. Part B includes pastoral leases and Part C covers the Kowanyama township area.[17] At the time of writing, native title over these parts had yet to be determined.

The consent determination regarding Part A followed successful negotiations between a number of stakeholders, including the Kowanyama People, the Queensland and Australian governments, Kowanyama Aboriginal Shire Council, Telstra, and commercial fishers.[18]

The Cape York Land Council (CYLC), as the native title representative body for Aboriginal peoples in Cape York, and the Queensland and Australian governments have agreed on a framework for progressing native title claims in the Cape York region. Noting that the Kowanyama area was the first to be progressed under that framework, the Attorney-General commented that this

> process is about adopting a regional focus, and looking beyond recognition of native title, to see whether traditional owners have other aspirations that can be met through negotiations with governments.[19]

NNTT Member Graham Fletcher, who mediated between the parties, said that negotiations could be fast-tracked due to the parties' willingness to put time and resources into the claim and focus on settling native title through agreement. Mr Fletcher further stated that the successful outcome puts the Kowanyama People and other parties in a good position to resolve the other two sections of the claim area (Parts B and C).[20]

The CYLC says that despite the existence of the framework agreement, and the commitment of the parties, the native title process remains slow, with complex issues still to be resolved. There remains uncertainty about whether native title holders can build on their native title rights to achieve economic and other development.[21]

15 *Kowanyama People v Queensland* [2009] FCA 1192 (22 October 2009).

16 *Kowanyama People v Queensland* [2009] FCA 1192 (22 October 2009), paras 2, 3.

17 See National Native Title Tribunal, *Kowanyama People's native title determination* (2009). At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Multimedia%20and%20determination%20brochures/Determination%20brochure%20Kowanyama%20October%202009.pdf (viewed 29 September 2010).

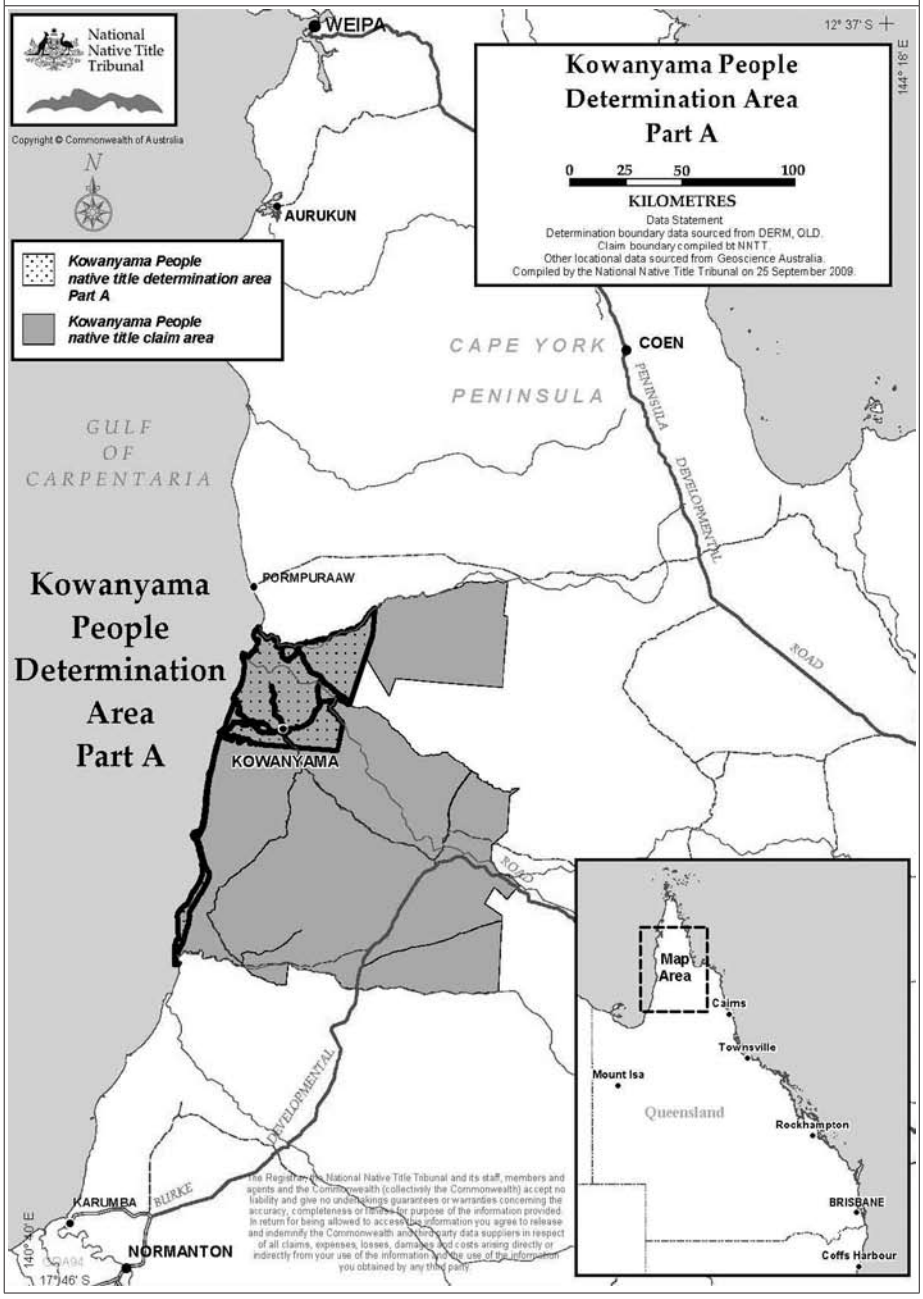
18 National Native Title Tribunal, 'Kowanyama native title determination' (Backgrounder, 22 October 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Documents/2009%20media%20release%20attachments/Kowanyama_background_Oct_2009.pdf (viewed 13 October 2010).

19 The Hon R McClelland MP, Attorney-General, *Remarks at the Kowanyama Native Title Determination* (Speech delivered at the Kowanyama Native Title Determination, Kowanyama, 22 October 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_22October2009-RemarksattheKowanyamaNativeTitleDetermination (viewed 29 September 2010). See also The Hon R McClelland MP, Attorney-General, and The Hon Craig Wallace MP, Minister for Natural Resources and Water (Qld), 'Joint Communiqué on Native Title' (Media Release, 20 August 2008). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_20August2008-JointCommuniqueonNativeTitle (viewed 29 September 2010).

20 National Native Title Tribunal, 'Kowanyama native title recognised for first time' (Media Release, 22 October 2010). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Kowanyama_native_title_recognised_for_first_time.aspx (viewed 29 September 2010).

21 M Stinton, Senior Legal Officer, Cape York Land Council, Email to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 14 October 2010 (Attachment).

Map 2.3: Kowanyama consent determination area (Part A)



Text Box 2.3: Noongar Heads of Agreement

On 17 December 2009, the South West Aboriginal Land and Sea Council (SWALSC) and the Western Australian Government signed a Heads of Agreement (HoA) outlining a framework for the resolution of the Noongar People's active native claims.[22]

The HoA was arrived at after a long history of litigation. In September 2006, Justice Wilcox of the Federal Court found in favour of the Noongar People with respect to key issues in their claim over an area in and around Perth.[23] In April 2008, the Full Federal Court allowed appeals by Western Australia, the Commonwealth and the Western Australian Fishing Industry Council against the decision of Justice Wilcox.[24]

The HoA is an important first step towards a final agreement. Importantly, the HoA includes a timetable that proposes that an agreement be signed off by February 2012.

The SWALSC has stated that this 'is an historic opportunity to finally come to terms with the State and to build a new future'.[25] Similarly, Professor Simon Young of the University of Western Australia's Faculty of Law said that:

> This is a chance for Western Australia to step ahead and become something of a model. A successful result in relation to this very important Western Australian claim may well draw other regions into more comprehensive negotiations.[26]

In congratulating the parties on the HoA, the then Social Justice Commissioner Tom Calma stated:

> This commitment by the government to partner with the SWALSC to resolve native title for the Noongar people shows us yet again how crucial partnership, engagement and participation with Aboriginal and Torres Strait Islander peoples is in achieving native title for Australia's First Peoples.[27]

2.3 Reforms to encourage agreement-making

The examples of agreement-making highlighted in section 2.2, above, are encouraging. However, they also illustrate that we are a long way from truly breaking down the adversarial culture within the native title system. For instance, the Noongar Heads of Agreement and the Yawuru agreements came about only after many years of litigation.

I am pleased that the Australian Government has begun to take action to address this problem. Indeed, the Special Rapportuer on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur) has acknowledged the Australian Government's efforts to

22 See generally National Native Title Tribunal, *Agreement begins negotiations*, http://www.nntt.gov.au/Native-Title-In-Australia/Western-Australia/Pages/South-west.aspx (viewed 29 September 2010); South West Aboriginal Land and Sea Council, *Negotiations with the West Australia Government*, http://www.noongar.org.au/talks-government.php (viewed 29 September 2010).

23 *Bennell v Western Australia* (2006) 153 FCR 120.

24 *Bodney v Bennell* (2008) 167 FCR 84.

25 South West Aboriginal Land and Sea Council, 'What's in the package and why should we pursue a settlement?', *Noongar Wangkinyiny*, July 2010, p 4. At http://www.noongar.org.au/images/pdf/newsletters/June2010Newsletterforweb.pdf (viewed 29 September 2010).

26 J McHale, 'A new way forward', *ABC South West WA*, 22 February 2010. At http://www.abc.net.au/news/stories/2010/02/22/2826765.htm?site=southwestwa (viewed 29 September 2010).

27 Australian Human Rights Commission, 'Commissioner welcomes Native Title negotiations for the Noongar people' (Media Release, 18 December 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/131_09.html (viewed 29 September 2010).

> streamline the existing native title procedure and pursue related reforms, such as minimizing the adversarial approach of the native title system to allow for native title negotiations to be carried out in a more flexible manner...[28]

During the Reporting Period, the Attorney-General reiterated the Australian Government's commitment to ensuring 'a more flexible, less legalistic native title approach that delivers practical outcomes'.[29] The Government supported this commitment by providing an additional $50 million in the 2009–2010 Budget 'to build a more efficient native title system that focuses on achieving resolution through agreement-making rather than costly and protracted litigation'.[30]

In general, I welcome government initiatives to remove the obstacles to agreement-making. I believe that the Australian Government took several positive steps in the right direction during the Reporting Period. However, these steps need to be supported by more significant change to the framework of the native title system.

In this section, I analyse a selection of initiatives that have the potential to improve agreement-making in the native title system. These include:

- the *Native Title Amendment Act 2009* (Cth) (Native Title Amendment Act)
- financial support for settlements at a state and territory level
- the adoption of the *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (Best Practice Guidelines) by the Joint Working Group on Indigenous Land Settlements (JWILS)[31]
- proposed amendments to the *Native Title Act 1993* (Cth) (Native Title Act) to enable historical extinguishment to be disregarded in certain circumstances
- grants to support anthropologists working in the native title system
- potential reforms to clarify the requirement to negotiate 'in good faith'.

I am pleased that many of the Australian Government's initiatives to encourage agreement-making are broadly consistent with the recommendations in the *Native Title Report 2009*. I encourage the Australian Government to continue to pursue this reform agenda in 2010–2011.

(a) The *Native Title Amendment Act 2009* (Cth)

The Native Title Amendment Act commenced on 18 September 2009. Among other things, the Native Title Amendment Act amended the Native Title Act to:

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28 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 28. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 29 September 2010).

29 The Hon R McClelland MP, Attorney-General, 'Native Title Reforms Pass Parliament' (Media Release, 14 September 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_14September2009-NativeTitleReformsPassParliament (viewed 29 September 2010).

30 The Hon R McClelland MP, Attorney-General, 'Kowanyama Native Title Determination' (Media Release, 22 October 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_22October2009-KowanyamaNativeTitleDetermination (viewed 29 September 2010).

31 JWILS consists of representatives of the Attorney-General's Department, the Department of Families, Housing, Community Services and Indigenous Affairs, and state and territory governments. The objective of JWILS is 'to develop innovative policy options for progressing broader and/or regional land settlements that complement the *Native Title Act 1993 (Cth)* and the work of the Federal Court of Australia': Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

- allow the Federal Court to determine whether it, the NNTT or another individual or body, should mediate a claim,[32] which gives the Federal Court 'the central role in managing native title claims'[33]
- enable the Federal Court to rely on an agreed statement of facts between the parties in consent determinations[34]
- provide for the application of recent amendments to the *Evidence Act 1995* (Cth) to native title proceedings that began before 1 January 2009 and where evidence has been heard, if the parties consent or the Federal Court orders that it is in the interests of justice to do so[35]
- empower the Federal Court to make orders to give effect to the terms of an agreement that involve matters other than native title.[36]

In general, I welcome the Government's efforts to foster more timely and flexible negotiated settlements. However, a common perception is that these amendments simply 'tinker at the edges' and that greater reform is needed. For example, Queensland South Native Title Services (QSNTS) submitted that there is

> enormous practical benefits in adopting the agreed statement of facts model … as well as broadening the jurisdiction for determinations to include a … power over non-native title matters, but these changes are very much at the back-end of any process and will not of themselves kindle a native title environment conducive to achieving negotiated outcomes.[37]

I have been informed that the Federal Court, the NNTT and the Attorney-General's Department are monitoring the impact of the amendments. However, it is too soon to assess whether the amendments have promoted the resolution of native title claims and agreement-making.[38]

I encourage the Federal Court, the NNTT and the Attorney-General's Department to continue to monitor and to report on the impact of these amendments. In particular, these monitoring processes should include an examination of whether the amendments:

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32 *Native Title Act 1993* (Cth), s 86B(1).

33 Attorney-General's Department, *Native Title Amendment Act 2009: Information Sheet* (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 29 September 2010).

34 *Native Title Act 1993* (Cth), ss 87(8)–(11), 87A(9)–(12).

35 *Native Title Act 1993* (Cth), s 214. For example, the *Evidence Act 1995* (Cth) (as amended by the *Evidence Amendment Act 2008* (Cth)) now includes exceptions to the hearsay rule regarding evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group: *Evidence Act 1995* (Cth), s 72. These amendments are reviewed in 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 29 September 2010).

36 *Native Title Act 1993* (Cth), ss 87(4)–(7), 87A(5)–(7). Regulations may specify the kinds of matters other than native title that an order of the Federal Court under these provisions may give effect to: ss 87(7), 87A(7). Such regulations had not been made by the end of the Reporting Period.

37 Queensland South Native Title Services, *Submission to the Attorney-General's Department on proposed minor native title amendments* (17 February 2009), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform# (viewed 29 September 2010). See also National Native Title Council, *Submission to the Attorney-General's Department on proposed minor native title amendments* (20 February 2009), pp 1, 2–3. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform# (viewed 29 September 2010); J Creamer, 'We Will Mediate the Gap Closed: 2009 Native Title Amendments' (2010) 7(16) *Indigenous Law Bulletin* 21, p 22.

38 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010; R Hanf, Manager – Strategic Projects and Planning, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

- have led to the negotiation of broader land settlements
- have affected the resources of native title representative bodies (NTRBs) and native title service providers (NTSPs).

I consider these issues below.

(i) Have the amendments encouraged broader land settlements?

As described above, the Federal Court now has the power to make orders to give effect to the terms of an agreement that involve matters other than native title.

The Attorney-General has stated that the amendments 'will assist with the negotiation of broader native title agreements and provide greater certainty for all stakeholders'.[39] The Australian Government has explained 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.[40]

However, it is unclear if the amendments will be sufficient to facilitate the negotiation of broader settlement agreements. Minor amendments, such as those introduced by the Native Title Amendment Act, may not promote agreement-making unless they are accompanied by further reforms to laws, policies, attitudes and behaviours.

For example, the Yamatji Marlpa Aboriginal Corporation (YMAC) has informed me that the amendments have had little impact to date in its region. YMAC reports that, due to the policies of the Western Australian Government, there have been few opportunities to take advantage of the amendments.

For instance, state consent determination guidelines are 'highly onerous' and require Traditional Owners to meet 'a significant evidentiary threshold'.[41] As discussed in the *Native Title Report 2009*, there is a need for governments to encourage more flexible approaches to connection evidence requirements.[42]

(ii) The impact of recent amendments on the disposition of claims

Aboriginal and Torres Strait Islander peoples understand all too well that justice delayed is justice denied. We know that our Elders may not be with us to witness the final outcomes of the native title claims and negotiations that are tangled in bureaucratic and adversarial webs.

I am pleased that the Attorney-General has recognised that:

> On current estimates, it may take another 30 years to resolve all current native title claims. It is a tragedy to see people dying before their peoples' claims are resolved.

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39 The Hon R McClelland MP, Attorney-General, 'Rudd Government Introduces Legislation to Improve the Native Title System' (Media Release, 19 March 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FirstQuarter_19March2009-RuddGovernmentintroducesLegislationtoimprovetheNativeTitlesystem (viewed 7 October 2010).

40 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 (2009), para 41. At http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm (viewed 7 October 2010).

41 S Hawkins, CEO, Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

42 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 88–93, 123 (recommendation 3.9). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

> Australia's Indigenous people deserve better, and all participants in the system should strive to achieve that.[43]

As noted above, to support the Australian Government's aim of 'achieving more negotiated native title outcomes in a more timely, effective and efficient fashion', the Native Title Amendment Act gave the Federal Court 'a central role in managing all native title claims, including deciding who mediates a claim'.[44]

During the Reporting Period, the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) was also amended to provide:

> The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.[45]

Justice Reeves of the Federal Court suggests that the amendments to the Native Title Act and the Federal Court Act have together 'created an entirely new environment for native title litigation'.[46]

For example, the Federal Court's National Native Title Registrar has informed me that the Court has 'reviewed its approach to the management of the jurisdiction in order to ensure, to the extent possible, the efficient, effective and just resolution of claims'.[47] Indeed, Kevin Smith, CEO of QSNTS, observes that the Federal Court has adopted a 'very proactive' approach towards the disposition of claims.[48]

This development could be beneficial, particularly if state governments are encouraged to improve their processes and make more concerted efforts to progress negotiations. While noting that it is too early to express an opinion on all the recent reforms, the Goldfields Land and Sea Council has commented that having the Federal Court control the direction of each native title case in a proactive and efficient manner will mean that opportunities for resolution can be more easily identified and pursued.[49]

In general, NTRBs and NTSPs are supportive of the drive to speed up the claims process, and are working cooperatively with the Federal Court to achieve this. However, this inevitably places pressure on already stretched resources and the limited pool of legal and anthropological experts. I encourage the Australian Government to monitor the resourcing implications of these reforms closely.

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43 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3249 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf (viewed 7 October 2010).

44 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3249 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf (viewed 7 October 2010).

45 *Federal Court of Australia Act 1976* (Cth), s 37M(1). This amendment was introduced by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), which commenced on 1 January 2010.

46 Justice J Reeves, *Recent Developments in the Federal Court Following the Amendments to the* Native Title Act (Paper presented to the Native Title: Rights, Obligations and Agreements Conference, Brisbane, 28 May 2010), p 18.

47 L Anderson, National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 23 September 2010. For further information, see Justice J Reeves, *Recent Developments in the Federal Court Following the Amendments to the* Native Title Act (Paper presented to the Native Title: Rights, Obligations and Agreements Conference, Brisbane, 28 May 2010).

48 K Smith, *"Our old people are dying"; a cry for broader land settlement and social justice not just native title claim disposition* (Speech delivered to the 2nd Annual National Native Title Law Summit, Brisbane, 16 July 2010), p 3.

49 Goldfields Land and Sea Council, 'Information requested for the Native Title Report 2010' (30 September 2010).

I also question whether simply 'speeding up' claims processes will result in just outcomes. These amendments to the Native Title Act do not alter the features of the native title system that tip the scales so heavily in favour of non-Indigenous interests. These features include the onerous burden placed upon Traditional Owners to prove continuity and the devastating impact of extinguishment.

Under such conditions, there is a risk that the Government's focus on more 'timely' settlements may lead to further injustice. As Kevin Smith has stated, '[i]f the system was made fair then by all means expedite the process. But to push claims through the system as it presently stands is grossly unfair'.[50]

Our desire for justice should not be swept aside in the name of efficiency. I am also aware that the human rights problems plaguing the system cannot be rectified by minor, procedural amendments. As I stated in Chapter 1, I consider that there needs to be a comprehensive, independent review of the Native Title Act with a view to aligning it with international human rights standards.

(b) Financial support for settlements

The Australian Government's willingness and ability to support settlements at a state and territory level was a matter of contention during the Reporting Period.

The Australian Government is currently exploring options for the creation of settlement packages, and I am pleased to report that it has committed to provide funding towards the first two settlements under the Victorian Native Title Settlement Framework (Victorian Settlement Framework). However, the Australian, state and territory governments are yet to negotiate a Native Title National Partnership Agreement (NTNPA).

(i) Potential for a Native Title National Partnership Agreement

In 2008, Native Title Ministers agreed to negotiate in good faith on an offer of financial assistance from the Australian Government that could better facilitate the settlement of native title issues by state and territory governments. In its 2008–2009 report, JWILS noted that significant progress had been made towards a draft NTNPA that would provide

> for Commonwealth financial assistance to State and Territory governments to negotiate settlements that result in the full and final resolution of a claim or potential claim, and provide practical benefits to Native Title Claim Groups, for example land acquisition, the buy back of licences and opportunities to co-manage and access land.[51]

At the 2009 Native Title Ministers' Meeting (NTMM),[52] the Australian Government committed to continue to 'explore funding options to underpin a draft native title National Partnership Agreement in the future'.[53]

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50 K Smith, *"Our old people are dying"; a cry for broader land settlement and social justice not just native title claim disposition* (Speech delivered to the 2nd Annual National Native Title Law Summit, Brisbane, 16 July 2010), p 3.

51 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

52 The Native Title Ministers' Meeting comprises of federal, state and territory ministers with native title responsibilities. The meeting is convened by the federal Attorney-General. Meetings were held in 2005, 2006, 2008 and, most recently, on 28 August 2009. See Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

53 Native Title Ministers' Meeting, *Communiqué* (28 August 2009). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Communique_NTMM-28.08.09.pdf/$file/Communique_NTMM-28.08.09.pdf (viewed 7 October 2010).

In April 2010, the Attorney-General's Department also advised the Native Title Consultative Forum (NTCF)[54] that 'the Commonwealth's ability to conclude the draft NTNPA in the short to medium term will be dependent upon the outcomes of the current Federal budget process'.[55] I encourage the Australian Government to make every endeavour to finalise the NTNPA as soon as possible.

(ii) Native Title Settlements Project

The Attorney-General's Department advised the NTCF that, in the absence of an NTNPA, it was 'making significant efforts to identify and improve access to existing programs and resources that could be used to promote flexible and constructive native title outcomes'.[56]

In late 2009, the Attorney-General's Department established the Native Title Settlements Project and appointed a Director of Native Title Settlements to explore opportunities for the Australian Government to encourage broader native title settlement outcomes.[57] The Director met with federal departments to identify and negotiate access to specific resources and programs that may be usefully applied towards settlements.[58]

The Attorney-General's Department reported to the NTCF that it had 'identified a number of potential opportunities as well as areas where there are challenges concerning program access and available resources'.[59] The Department recognises that 'any packaging of Commonwealth resources in settlements will need to be managed on a case-by-case basis'.[60] It has begun to trial this new approach with a small number of specific cases.[61]

I support efforts to create better settlement packages to assist with the resolution of claims. However, I would be concerned if these settlement packages only represent a repackaging of existing services. I also consider that such services should not be provided in lieu of compensation for the use or development of our lands.

(iii) Australian Government support for the Victorian Settlement Framework

A significant question emerged during the Reporting Period as to whether the Australian Government would financially support the Victorian Settlement Framework.

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54 The NTCF consists of representatives from the Attorney-General's Department, FaHCSIA, the Federal Court of Australia, the NNTT, state, territory and local governments, NTRBs and NTSPs, pastoral, fishing, mining and petroleum industries and the Australian Human Rights Commission. For further information, see Attorney-General's Department, *Native title system coordination and consultation*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlesystemcoordinationandconsultation (viewed 7 October 2010).

55 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

56 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

57 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010; The Hon R McClelland MP, Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 20 April 2010.

58 The Hon R McClelland MP, Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 20 April 2010.

59 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

60 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

61 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

The former Attorney-General of Victoria announced the adoption of the Victorian Settlement Framework on 4 June 2009.[62] The Victorian Settlement Framework 'provides for out of court settlement packages that allow Traditional Owners to settle their land claim directly with the State outside the Federal Court process'.[63]

Following the announcement, the federal Attorney-General described the Victorian Settlement Framework as 'an example of how, by changing behaviours and attitudes, and by resolving native title through settlements that include the provision of practical benefits that we can make native title work better'.[64]

However, in November 2009 the Victorian Traditional Owner Land Justice Group expressed concerned that the Victorian Settlement Framework was 'in jeopardy as a result of disagreement over funding between the State and Commonwealth Governments'.[65]

I am pleased that the Australian Government has now agreed to contribute towards settlement costs for specific settlements under the Victorian Settlement Framework. The federal Attorney-General's Department has informed me that the Commonwealth has committed funding towards the first two settlements under the Victorian Settlement Framework.[66]

The former Attorney-General of Victoria informed me that Victorian Government agencies worked over the Reporting Period to develop the policy and legislative detail required to bring the Victorian Settlement Framework into operation.[67]

I congratulate the State of Victoria and the Traditional Owners of Victoria on this significant achievement. I encourage the Australian Government and the incoming Victorian Government to work together to ensure that the Victorian Settlement Framework is sufficiently funded and successfully implemented. I also encourage

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62 The Hon R Hulls MP, Attorney-General (Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/RobertHulls.pdf (viewed 7 October 2010).

63 Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework*, Department of Justice (Victoria) (2008), p 10. At http://www.justice.vic.gov.au/wps/wcm/connect/1d97d700404a43e5ae77fff5f2791d4a/FINAL+SC+Report+13May09.pdf?MOD=AJPERES (viewed 7 October 2010). See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 47–51. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

64 The Hon R McClelland MP, 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 7 October 2010).

65 Victorian Traditional Owner Land Justice Group, 'Traditional Owner Concern Over Native Title Funding' (Media Release, 5 November 2009). At http://www.landjustice.com.au/document/LJG-TRADITIONAL-OWNER-CONCERN-OVER-NATIVE-TITLE-FUNDING.pdf (viewed 7 October 2010). See also The Hon R Hulls MP, Attorney-General (Victoria), 'Commonwealth Abrogating Native Title Responsibility' (Media Release, 5 November 2009). At http://www.premier.vic.gov.au/component/content/article/8637.html (viewed 7 October 2010).

66 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010. Since this correspondence, the first settlement under the Victorian Settlement Framework has been reached. The native title rights of the Gunaikurnai peoples were recognised by the Federal Court in a consent determination on 22 October 2010. The Victorian and Australian governments each contributed $6 million towards the $12 million settlement package. See The Hon R McClelland MP, Attorney-General, and The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Gunaikurnai native title recognition' (Media Release, 22 October 2010). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FourthQuarter_22October2010-GunaikurnainativetitlerecognitionGunaikurnainativetitlerecognition (viewed 22 November 2010).

67 The Hon R Hulls MP, Attorney-General, Victoria, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 September 2010. The Traditional Owner Settlement Act 2010 (Vic) commenced on 23 September 2010.

the Australian Government to work with other states and territories to achieve similar reforms across the country.

(c) Adoption of the *Guidelines for Best Practice Flexible and Sustainable Agreement Making*

In August 2009, the NTMM endorsed the Best Practice Guidelines.[68] These guidelines were developed by JWILS.

(i) What do the Best Practice Guidelines cover?

In a *Communiqué* from their August 2009 meeting, the Native Title Ministers stated:

> The Guidelines provide practical guidance for governments on the behaviours, attitudes and practices that can achieve the efficient resolution of native title, from the early stages of negotiations through to implementation.
>
> The Guidelines emphasise the desirability for government parties to provide broader practical and sustainable benefits attuned to the interests of Indigenous native title claimants.[69]

Among other things, the Best Practice Guidelines encourage government parties to:

- adopt an interest-based approach to negotiations
- negotiate in good faith
- be proactive in providing connection and tenure information early
- consider engaging in regional settlements
- consult effectively to achieve a sustainable agreements
- exercise cultural awareness and sensitivity
- use interpreters and draft agreements in plain English
- consider whether capacity-building is required for Aboriginal and Torres Strait Islander parties to realise fully the potential of sustainable benefits
- recognise the importance of committing to ongoing implementation and review of agreements.

Aspects of the Best Practice Guidelines are broadly consistent with the recommendations for improving the native title system contained in the *Native Title Report 2009*. These include the need for governments to adopt an interest-based approach to negotiations, provide access to tenure information as early as possible, promote regional approaches to agreement-making, and build the capacity of Aboriginal and Torres Strait Islander communities to effectively engage in agreement-making.[70]

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68 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

69 Native Title Ministers' Meeting, *Communiqué* (28 August 2009). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Communique_NTMM-28.08.09.pdf/$file/Communique_NTMM-28.08.09.pdf (viewed 7 October 2010).

70 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 65, 94–96, 112–117. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

(ii) Will the Best Practice Guidelines be effective?

Now that they have adopted the Best Practice Guidelines, governments need to implement them. Otherwise, the Best Practice Guidelines will be little more than empty words.

This sentiment was reflected during the consultations on the draft guidelines that were conducted by JWILS in mid-2009. Many stakeholders noted that guidelines 'would only add value if effectively implemented by governments'.[71] For instance, QSNTS generally supported the draft guidelines as a 'positive step towards a more flexible and less technical approach to agreement making' but stated that 'unless governments are prepared to take certain steps to ensure that the Guidelines are adhered to, then they will be of little or no use'.[72]

YMAC has further commented that the Best Practice Guidelines 'will only have effect if genuine efforts are made by government parties to implement them in everyday practice', and that it had yet to see any tangible outcomes from the commitments made at the NTMM and JWILS.[73]

Indeed, these guidelines may not be sufficient to alter government practices. I share the view of former Social Justice Commissioner, Tom Calma, that the Australian Government should play a leadership role in encouraging states and territories to change their behaviour, including by using its financial position.[74]

This could be achieved through the development of a NTNPA. According to JWILS, a 'key requirement' for federal financial assistance under the draft NTNPA would be that a settlement 'is sustainable over the longer term and contributes to the Council of Australian Governments' (COAG) "Closing the Gap" targets'.[75] In a similar way, the Australian Government could explore options for making the provision of funding to states and territories under the NTNPA conditional on best practice standards in agreement-making – such as those set out in the Best Practice Guidelines – being met.

(d) Proposed amendments to disregard historical extinguishment

On 14 January 2010, the Attorney-General released an exposure draft of proposed amendments to the Native Title Act.[76] These amendments would allow parties to agree to disregard the historical extinguishment of native title in 'areas set aside or vested by a Government law for the purpose of preserving the natural environment

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71 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 1. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

72 Queensland South Native Title Services, *Submission to the Joint Working Group on Indigenous Land Settlements on the Draft Guidelines for Best Practice Flexible and Sustainable Agreement Making* (July 2009), pp 1, 7. At http://www.qsnts.com.au/publications/SubmissiononDraftGuidelinesforBestPracticeFlexibleandSustainableAgreementMaking.pdf (viewed 7 October 2010).

73 S Hawkins, CEO, Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

74 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 88. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

75 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

76 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 3 (Exposure Draft). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 7 October 2010).

of the area, such as a State or Territory park or reserve'.[77] This amendment is inspired by the reforms proposed by Chief Justice Robert French of the High Court of Australia.[78]

(i) What would be the benefits of this reform?

As stated in the *Native Title Report 2002*, native title can be 'an archaeological site of extinguishment'.[79] The breadth and permanency of extinguishment across Australia entrenches dispossession and disadvantage. It is also contrary to Australia's human rights obligations. Following his visit to Australia in August 2009, the Special Rapporteur observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration)[80] and other international instruments.[81]

Sections 47–47B of the Native Title Act already provide for prior extinguishment in respect of pastoral leases held by native title claimants; reserves; and vacant Crown land to be disregarded in certain circumstances. In the *Native Title Report 2009*, the then Social Justice Commissioner recommended that the Australian Government explore options for extinguishment to be disregarded in a greater number of circumstances.[82]

It is therefore encouraging that the Australian Government has proposed amendments to enable historical extinguishment to be disregarded over an area such as a national, state or territory park.

(ii) Are there any limitations to this reform proposal?

The Attorney-General suggests that this amendment 'could provide opportunities for more claims to be settled by negotiation rather than litigation'.[83]

Under the proposed amendment, extinguishment would be disregarded only if the relevant parties agree to it in writing.[84] The proposed amendment would therefore

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77 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 2 August 2010).

78 Chief Justice R S French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, p 13. At http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/ (viewed 7 October 2010).

79 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2003), p 68. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/index.html (viewed 7 October 2010).

80 GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 19 October 2010).

81 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 29 September 2010).

82 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 110–111, 124 (recommendation 3.18). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

83 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 2 August 2010).

84 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 3 (Exposure Draft, proposed s 47C(1)(c)). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 7 October 2010).

have the most impact where government parties are truly prepared to be flexible and approach claims processes in good faith.

Yet, as the Australian Institute of Aboriginal and Torres Strait Islander Studies observed, it is in the interests of a state to argue for extinguishment so that the land remains under its control, free from encumbrances.[85] This suggests that, unless accompanied by a cultural change within governments, this particular reform may not promote agreement-making. In the absence of such a change, the proposed amendment could be strengthened by removing the requirement that there be an agreement before extinguishment can be disregarded.

(iii) What else could the Australian Government do?

I hope that the Australian Government's proposal is a precursor to further reforms to the Native Title Act. I encourage the Government to work with NTRBs and NTSPs to develop proposals to expand the range of circumstances in which extinguishment can be disregarded.

The proposed reform will not alone be sufficient to address the injustices of extinguishment. I consider that the impact and operation of the law concerning extinguishment should be a significant part of the terms of reference of a comprehensive, independent review of the Native Title Act.

(e) Grants to support anthropologists

To ensure that they receive sustainable outcomes from agreements, Traditional Owners need to be able to access necessary expert advice.

On 28 May 2010, the Attorney-General announced that the Australian Government will invest $1.4 million over three years in a Native Title Anthropologists Grants Program to attract and retain anthropologists within the native title system.[86] On 3 June 2010, the Minister for Indigenous Affairs announced the establishment of a Native Title Research Scholarship Program. The scholarships will support postgraduate study in a field relating to native title, with a focus on anthropology and history.[87] I support these initiatives. They are consistent with the recommendation in the *Native Title Report 2009* that the Australian Government should provide further support for the training and development of experts in native title.[88] I encourage the Australian Government to explore further initiatives in this regard.

(f) Potential reforms to clarify the requirement to negotiate 'in good faith'

Towards the end of the Reporting Period, the Minister for Families, Housing, Community Services and Indigenous Affairs (Minister for Indigenous Affairs) and the Attorney-General announced that the Australian Government would 'progress work

85 Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), *Submission to the Attorney-General's Department on the Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (undated), p 2. At http://www.aiatsis.gov.au/ntru/docs/publications/submissions/s47.pdf (viewed 7 October 2010).

86 The Hon R McClelland MP, Attorney-General, '$1.4 Million for native title anthropologists' (Media Release, 28 May 2010). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_28May2010-$1.4MillionforNativeTitleAnthropologists (viewed 7 October 2010).

87 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 11 January 2010); The Aurora Project, *NTRB Scholarships*, http://www.auroraproject.com.au/NTRB_scholarships.htm (viewed 11 January 2010).

88 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 121–122, 124 (recommendation 3.24). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

to clarify the meaning of "in good faith" under the right to negotiate provisions' of the Native Title Act.[89]

Such reforms could potentially address some of the disparities in bargaining power that exist under the right to negotiate regime, and place Aboriginal and Torres Strait Islander peoples in a better position to negotiate beneficial agreements.

(i) Why is this reform needed?

Under the Native Title Act, the right to negotiate applies to certain future acts, including the grant of certain mining rights and certain compulsory acquisitions.[90] Section 31(1)(b) of the Native Title Act requires parties to

> negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
>
> (i) the doing of the act; or
>
> (ii) the doing of the act subject to conditions to be complied with by any of the parties.

A party may apply to an arbitral body for a determination in relation to the act if at least six months have passed since the 'notification day'[91] and the parties have not made an agreement.[92]

In *FMG Pilbara Pty Ltd v Cox* (*FMG*),[93] the Full Federal Court found that the Native Title Act does not require that parties reach a certain stage in negotiations before a party is able to apply for a determination. A future act determination can be made once the prescribed period expires regardless of the stage negotiations have reached, provided those negotiations were conducted in good faith during that period. Nor are parties compelled to negotiate in a particular way or over specified matters.[94]

In the *FMG* decision, this meant that it was not a breach of the requirement to negotiate in good faith for the proponent to apply for a determination when:

- negotiations had reached only a preliminary stage
- the proponent had negotiated on a 'whole of claim' basis rather than specifically about the future act that was the subject of the application to the NNTT.[95]

The Australian Government has observed that:

> This decision has been criticised on the basis that it could enable parties to approach the NNTT for a determination that a particular future act proceed, even if there have been no substantive negotiations about the doing of that act. It has therefore been

89 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 7 October 2010).

90 *Native Title Act 1993* (Cth), s 25(1).

91 The Government party must give notice of the act to certain parties. In this notice, the Government party must specify a day as the 'notification day' for the act: *Native Title Act 1993* (Cth), ss 29(1), (4)(a).

92 *Native Title Act 1993* (Cth), s 35(1).

93 (2009) 175 FCR 141. This decision was profiled in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

94 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, 146, 148.

95 That is, negotiation on a 'whole of claim' basis is acceptable so long as it is clear to all parties that a particular tenement (the subject of the section 29 notice) is included in the negotiations.

> suggested that the decision could discourage parties to actively engage in negotiations to reach broad and practical agreements.[96]

The previous Social Justice Commissioner expressed concerns that the Full Federal Court had interpreted the Act 'in ways which unnecessarily strengthened the position of mining companies over native title interests'.[97] The High Court of Australia refused special leave to appeal this decision on 14 October 2009.[98]

YMAC has informed me that:

> The High Court's decision [to refuse special leave to appeal] has the potential to create a situation in which mining companies can avoid their obligation to negotiate in good faith. This could undermine the rights of Traditional Owners and will render the relevant provisions of the NTA redundant.
>
> If Traditional Owners lose this mechanism, the ability to secure benefits for Traditional Owner communities will be greatly diminished, which in turn will undermine efforts to close the gap.[99]

(ii) What are the next steps?

On 3 July 2010, just outside of the Reporting Period, the Minister for Indigenous Affairs and the Attorney-General released the *Leading practice agreements: maximising outcomes from native title benefits* discussion paper (Agreements Discussion Paper).[100] In this discussion paper, the Australian Government stated that it

> has decided to amend the Act to provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions.[101]

I am pleased that the Government has indicated a willingness to revisit the requirements for 'good faith' negotiations. As my predecessor observed, 'the obligation on miners to negotiate in good faith … is one of the few legal safeguards that native title parties have under the future act regime'.[102]

In the *Native Title Report 2009*, the Social Justice Commissioner recommended that the Australian Government consider measures to strengthen procedural rights and the future acts regime. In general, I would welcome legislative reform to strengthen the right to negotiate to ensure a more level playing field.

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96 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 14. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

97 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 34. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

98 Transcript of proceedings, *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 14 October 2010).

99 S Hawkins, CEO, Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

100 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

101 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 14. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

102 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 34. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

In its submission in response to the Agreements Discussion Paper, the Australian Human Rights Commission recommended that the Native Title Act should be amended to include explicit criteria as to what constitutes good faith, and be supplemented by a code or framework to guide parties and the NNTT as to the requirements of good faith negotiation. The Commission further recommended that the Australian Government consider broader options for reforming the right to negotiate regime.[103]

I will closely monitor the progress of these proposals.

2.4 The Native Title Amendment Bill (No 2) 2009 (Cth)

During the Reporting Period, the Attorney-General introduced the Native Title Amendment Bill (No 2) 2009 (Cth) (the Amendment Bill (No 2)) into Parliament.[104]

The purpose of the Amendment Bill (No 2) was to introduce a new future act process into the Native Title Act to 'assist the timely construction of public housing and a limited class of public facilities … for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land'.[105] I analyse the process leading to the introduction of the Amendment Bill (No 2) in Chapter 3.

In the previous section, I considered the steps that the Australian Government has taken to promote negotiations and agreement-making within the native title system. The new future act process appears to be at odds with this approach.

I understand that this reform is aimed at improving the delivery of measures to alleviate the chronic housing shortages in Aboriginal and Torres Strait Islander communities. However, the Native Title Act provides mechanisms for facilitating the construction of housing and infrastructure with the consent of Traditional Owners – that is, through the use of ILUAs.

I believe that the new future act process may encourage governments to circumvent agreement-making processes. This would diminish the ability of Aboriginal and Torres Strait Islander peoples to exercise their rights, including their rights to self-determination; to participate in decision-making; and to determine and develop strategies and priorities for the development or use of their lands or territories and other resources.[106]

(a) Background to the Amendment Bill (No 2)

The states and the Northern Territory are the 'major deliverer[s] of housing for Indigenous people in remote areas of Australia' under the Council of Australian

103 Australian Human Rights Commission, *Submission on the Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010).

104 The Native Title Amendment Bill (No 2) 2009 (Cth) lapsed on 28 September 2010. The Native Title Amendment Bill (No 1) 2010 (Cth), which is almost identical to the original Bill, received assent on 15 December 2010 as the *Native Title Report 2010* was in the final stages of preparation. Throughout this *Native Title Report 2010*, I refer to the original Bill as it was introduced during the Reporting Period.

105 Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), p 2. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

106 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 32(1). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

Governments' $5.5 billion National Partnership Agreement on Remote Indigenous Housing (National Partnership Agreement).[107]

The Australian Government's commitment to provide additional funding for remote Indigenous housing is 'conditional on secure land tenure being settled'.[108] This includes ensuring that governments have 'access to and control of, the land on which construction will proceed for a minimum period of 40 years', and that native title issues have been resolved.[109]

State governments have expressed concerns that native title is 'delaying their ability to provide such housing and infrastructure'.[110] These concerns were said to arise because:

- there is no specific subdivision in the future act regime covering public housing and infrastructure in Indigenous communities
- there is uncertainty about the application of existing future act processes to these types of development[111]
- negotiating ILUAs 'to provide for the non extinguishment principle to apply clearly adds delays to the provision of essential public works to communities'.[112]

(b) Where would the process apply?

The Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) have stated that the process would 'only apply to future acts on land which is held by or for the benefit of Aboriginal

107 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 16(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.rtf (viewed 24 September 2010). See also Department of Families, Housing, Community Services and Indigenous Affairs, *National Partnership Agreement on Remote Indigenous Housing*, http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx (viewed 24 September 2010).

108 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 15(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 24 September 2010).

109 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 18 August 2009.

110 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 4. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

111 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

112 Department of Housing (Western Australia), 'Native Title Amendment Bill (No 2) 2009: Commonwealth Request for Information', p 1, Attachment A to the Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

peoples or Torres Strait Islanders'.[113] It would not apply to acts creating or affecting certain 'Aboriginal / Torres Strait Islander land or waters'[114] that are excluded from the definition of a 'future act'.[115] The process is 'most relevant' to Queensland and Western Australia.[116]

(c) What acts would be covered by the process?

The process is designed to cover acts of an 'action body'[117] that permit, require or consist of the construction, operation, use, maintenance or repair of:

- public housing provided for Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area
- public education or health facilities, and police or emergency facilities that benefit those people
- certain facilities in connection with the above-mentioned public housing or facilities.[118]

The act would need to be done or commenced within 10 years of the commencement of the amendments.[119] The process would not apply in instances of compulsory acquisition.[120]

(d) Would the process promote agreement-making and relationship-building?

The Attorney-General stated that the Amendment Bill (No 2)

> contains important safeguards to ensure genuine consultation with native title parties.
>
> It sets in place a framework for meaningful engagement with key stakeholders in decisions about housing and other services for Indigenous communities.

113 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 1. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010). Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(b).

114 This includes land or waters held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Lands Trust Act 1966* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Pitjantjatjara Land Rights Act 1981* (SA) or any other law, or part of a law, prescribed for the purposes of the provision in which the expression is used: *Native Title Act 1993* (Cth), s 253.

115 *Native Title Act 1993* (Cth), s 233(3). The scope of the proposed amendment may be even further limited, see Law Council of Australia, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (31 January 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a94aebeb-0b01-46a1-9129-11ea3903e9ff (viewed 24 September 2010).

116 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

117 Defined as the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities: Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(c).

118 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(1)(c), 24JAA(3). The *Native Title Amendment Act (No 1) 2010* (Cth) also covers staff housing.

119 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(d).

120 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(2).

> The new process sets out reasonable and specific periods for comment and consultation, and provides flexibility to allow native title parties to choose the level of engagement they feel is appropriate for each individual project.[121]

An act would be invalid unless, before the act is commenced or done, the action body:

- gives notice of, and an opportunity to comment on, the act to certain native title parties
- provides a report on the things done regarding the requirements to provide notice, an opportunity to comment and, in limited circumstances, to engage in consultation.[122]

The act would also be invalid if it is done or commenced before the end of the 'consultation period'.[123]

The non-extinguishment principle would apply and native title holders may be entitled to compensation.[124] Heritage processes[125] and any processes under the particular land rights legislation or arrangements governing the use of the land[126] would also have to be complied with.

I welcome the Australian Government's emphasis on the importance of 'genuine consultation'. However, for the reasons outlined below, I am unable to agree with the Attorney-General's assessment of the new future act process.

(i) The notice provisions are limited

The action body is to provide notice to any registered native title claimant, Registered Native Title Body Corporate (RNTBC) and any representative Aboriginal / Torres Strait Islander body in relation to the land or waters in the area. The action body must provide notice in the way determined by the Minister by legislative instrument.[127]

The notice must specify a 'notification day', that is, 'a day by which, in the action body's opinion, it is reasonable to assume that all notices … in relation to the act will have been received by, or will otherwise have come to the attention of, the persons who must be notified'.[128]

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121 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 2009, p 10468 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr211009.pdf (viewed 27 September 2010).

122 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(4), (5).

123 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(6). If no claimant or body corporate requests to be consulted, the consultation period ends two months after the specified notification day. If there is such a request, the consultation period ends four months after the specified notification day: Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(19).

124 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(7), (8).

125 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(e). See also Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), p 5. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

126 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

127 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(10). See Native Title (Notices) Amendment Determination 2010 (No. 1).

128 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(12).

Further, the notice must contain statements to the effect that comments on the act and requests to be consulted must be made within two months of the notification day.[129]

I am concerned that the 'action body's opinion' plays such a pivotal role in determining whether it is reasonable to assume that all notices have been received, or have come to the attention of, the relevant persons. I share the view of the Law Council of Australia that action bodies should be obliged to take reasonable steps to identify and notify all relevant claimants, body corporates or representative bodies, and report those steps to the Minister.[130]

It is also important that the notice be accessible and in a form that is able to be readily understood by Traditional Owners. For example, I consider that the notice should be translated into all relevant languages.

The notice should also provide all relevant details relating to the act. In the context of other future act processes, the Full Federal Court has stated that the obligation to give notice for the purpose of affording an opportunity to comment 'can be fulfilled by the decision-maker providing to the designated recipient only general information'.[131]

Getting this notification process right is crucial. If Traditional Owners do not receive a notice, or if they do not understand the notice or the potential impact of the proposed act, they may miss the limited window of opportunity to comment or request to be consulted about the proposed act.

(ii) The 'opportunity to comment' does not enable Aboriginal and Torres Strait Islander peoples to participate genuinely in decision-making processes

The action body must give registered native title claimants, RNTBCs and any representative Aboriginal / Torres Strait Islander body in relation to the land or waters, an opportunity to comment on the act. Comments on the act must be made within two months of the notification day.[132]

This procedure does not allow Aboriginal and Torres Strait Islander peoples to participate genuinely in decision-making processes. As a previous Social Justice Commissioner observed, 'the "opportunity to comment" process places effectively no restrictions at all upon the manner or outcome of the decision-making process'.[133]

The Full Federal Court has found that the 'opportunity to comment' provides only 'a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate'.[134] There is no right to participate in decision-making or to seek information from the decision-maker. It is entirely up to the decision-maker 'whether the comment should cause it to change or modify its decision'.[135] As the Western Desert Lands Aboriginal Corporation (Jamakurnu-

129 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(11).

130 Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (23 December 2009), para 25. At http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91A681EE-1E4F-17FA-D2CF-53E8735AAECF&siteName=lca (viewed 27 September 2010).

131 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 73.

132 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(10), (11).

133 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2001), p 153. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport00/index.html (viewed 28 June 2010).

134 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 71.

135 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 74.

Yapalinkunu) RNTBC observes, this procedural right 'does not and will not result in meaningful participation of native title parties'.[136]

(iii) Consultation requirements may not be stringent

A registered native title claimant or RNTBC would be entitled to be consulted if, within two months of the notification day, they request to be consulted.[137] The right to request consultation does not extend to representative bodies or to Traditional Owners that have not achieved registration.[138]

If such a request is made, the action body must consult:

- about ways of minimising the act's impact on registered native title rights and interests in relation to land or waters in the area
- if relevant, about any access to the land or waters
- if relevant, about the way in which anything authorised by the act might be done.[139]

I am concerned that this process would place the onus upon under-resourced Traditional Owners and RNTBCs to assess the proposed act, and request to be consulted, within a short timeframe.

Further, the consultation timeframe is short. The maximum 'consultation period' is four months from the notification day.[140] During this time, Traditional Owners and RNTBCs that wish to be consulted would have to assess the notice (assuming they receive it), request to be consulted, ascertain the views of Traditional Owners and engage in consultations with the action body. This may not be sufficient time for genuine consultations to take place.

While I do not support the introduction of a new future act process, in general I welcome that, in consulting with a claimant or RNTBC, the action body would need to comply with any requirements determined by the Minister by legislative instrument.[141] I consider that any consultation requirements should be developed in partnership with Aboriginal and Torres Strait Islander peoples. I consider the elements of effective engagement in Chapter 3.

The Explanatory Memorandum to the Amendment Bill (No 2) indicates that the legislative instrument

> may, for example, require the action body to hold one or more face-to-face meeting with native title claimants or body corporate who have requested consultation, provide translators during consultation, or address issues of the design, location and nature of the proposed act. The Commonwealth Minister will be able to refine these requirements

136 T Wright, Acting CEO, Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC, Correspondence to C Edwards, Manager – Land Reform Branch, Department of Families, Housing, Community Services and Indigenous Affairs, 4 September 2009. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform (viewed 28 September 2010).

137 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(11)(b), (13), (14).

138 For concerns about this limitation, see NTSCORP, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (27 November 2009), para 30. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e8cbcf54-d770-497a-b3fc-9b86884627be (viewed 28 September 2010).

139 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(14).

140 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(19).

141 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(15).

> in light of the experiences of action bodies and native title parties over time and having regard to differing projects and community circumstances.[142]

Encouragingly, the Attorney-General's Department and FaHCSIA state that:

> The concept of 'consulting' has an established meaning. It is insufficient to simply 'go through the motions', and a proponent who failed to seriously engage or to consider information and arguments put forward would not in fact be 'consulting'.[143]

(iv) Action bodies may not be held accountable

I welcome that an action body must provide a written report to the Minister on the things it has done with respect to the procedural steps outlined above.[144] However, I am concerned that the Amendment Bill (No 2) does not require the Minister to publish these reports.

Further, Traditional Owners may not have the opportunity to challenge the action body's report or put forward their views on the adequacy of consultation. Similarly, the Torres Strait Regional Authority expressed concern that the Amendment Bill (No 2) denies native title holders 'the opportunity to confirm whether the information provided was appropriate, sufficient and easily understood'.[145]

(v) There are no guarantees that the process would be used as a measure of last resort

The Attorney-General's Department and FaHCSIA have stated that:

> The existing Indigenous Land Use Agreements (ILUA) provisions would remain as an option for future acts otherwise covered by the new process. However, the new process would be available in circumstances where the timely negotiation and registration of an ILUA is not possible or timely.[146]

Certainly, the new future act process does not restrict the ability of parties to enter into ILUAs. However, it does not encourage agreement-making. There are no safeguards to ensure that the process would be used only as a measure of last resort. Indeed, as stated by one NTRB:

> The Bill creates an incentive for Governments to avoid trying to reach an agreement with Aboriginal people in favour of the simpler option of overriding their legal rights and interests.[147]

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142 Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), para 1.14. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

143 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 3. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

144 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(16).

145 Torres Strait Regional Authority, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (21 December 2009). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=10e5d762-ea65-470f-9e9b-7adaeb4b4ce2 (viewed 28 September 2010).

146 Attorney-General's Department and Department of Families, Housing, Community Services, and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

147 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 32. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 28 September 2010).

Indeed, President Neate of the NNTT has observed that:

> If the Bill is passed, the amendments might result in fewer ILUAs being negotiated, given that the cost and delay of negotiating area agreement ILUAs for these purposes, particularly in Queensland and Western Australia, was said to be one reason for the proposed amendments.[148]

NTRBs submitted that the new process may even jeopardise negotiations that are currently under way, and reduce goodwill among the parties to negotiate broader settlements.[149] I am concerned that this would detract from efforts to rebuild the relationships between governments and Aboriginal and Torres Strait Islander peoples.

(e) Governments should address the real barriers to agreement-making

I welcome the Australian Government's commitment to overcoming disadvantage in Aboriginal and Torres Strait Islander communities, including through addressing chronic housing shortages. However, this objective can best be pursued by working in partnership with Aboriginal and Torres Strait Islander peoples to solve problems, rather than by implementing a new future act process.

Native title is not the reason for the deplorable state of infrastructure and housing that exists in many Aboriginal and Torres Strait Islander communities. Yet, if it is concerned that delays in agreement-making processes have impeded the construction of public housing and infrastructure, the Australian Government should confront the reasons behind any such delays.

The Western Australian Department of Housing has stated that the negotiation of ILUAs delays the provision of essential public works, for reasons including:

- the resourcing of NTRBs
- that the expectations of Traditional Owners may differ from community expectations
- the time, resourcing and workload issues faced by Prescribed Bodies Corporate (PBCs)
- the costs and the legal nature of negotiations under the Native Title Act.[150]

The new future act process will not solve these fundamental problems. For instance, it will not resolve conflicting community expectations. If anything, the construction of public housing and infrastructure by governments without the agreement of Traditional Owners could exacerbate community disputes.

Nor will a new future act process address the chronic underfunding of NTRBs, NTSPs and PBCs.

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148 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 13. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

149 See, for example, National Native Title Council, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (11 November 2009). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=80a8d226-856e-4a3b-8c07-bb6aeb08135c (viewed 28 September 2010).

150 Department of Housing (Western Australia), 'Native Title Amendment Bill (No 2) 2009: Commonwealth Request for Information', Attachment A to Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 28 September 2010).

Ultimately, it is by no means clear that options for improving agreement-making processes have been exhausted such that the new future act process is necessary. For example, NTRBs and NTSPs have proposed that template ILUAs be developed in order to facilitate agreement-making.[151] This worthy initiative could reduce the costs associated with agreement-making and create goodwill. I encourage governments to work with NTRBs and NTSPs to progress template ILUAs to support the timely negotiation of agreements.

2.5 Future reforms: maximising outcomes from native title benefits?

During the Reporting Period, the Australian Government signalled an intention to focus future reform efforts on ensuring the sustainability of agreements and improving the governance of native title entities that receive native title payments.

This issue had also been on the Government's agenda in previous years. In 2008, the Government convened a Native Title Payments Working Group (Working Group) to recommend 'leading policy and practice to optimise financial and non-financial benefits from resource agreements'.[152] In December 2008, the Government released a discussion paper on 'optimising benefits from native title agreement-making'.[153]

During the Reporting Period, the Government progressed its work in this area through JWILS. It also foreshadowed a public consultation process on measures to promote 'leading practice principles'.[154]

(a) Activities of JWILS

The management of native title benefits was a central component of the 2009–2010 terms of reference of JWILS. These terms of reference focus on:

- supporting and building the capacity of PBCs to effectively manage benefits
- designing culturally appropriate and effective governance structures to manage benefits, including cross-generational benefits

151 See, for example, Queensland South Native Title Services, *Submission on the Possible Housing and Infrastructure Native Title Amendments Discussion Paper* (September 2009), p 8. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Queensland+South+native+Title+Services+-+Submission.pdf/$file/Queensland+South+native+Title+Services+-+Submission.pdf (viewed 29 September 2010).

152 See 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 29 September 2010).

153 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 28 September 2010).

154 This consultation process began with the release of the Agreements Discussion Paper on 3 July 2010, but was suspended in accordance with caretaker conventions when the federal election was called later that month. The process recommended in October 2010. Submissions closed 30 November 2010. See Attorney-General's Department, *Native title reform*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 29 November 2010).

- maximising economic development, leadership and governance opportunities.[155]

On 8 April 2010, JWILS convened a workshop on sustainable benefits management in native title settlements. The results of this workshop will assist JWILS to develop recommendations against its terms of reference.[156]

(b) The Agreements Discussion Paper

Towards the end of the Reporting Period, the Minister for Indigenous Affairs and the Attorney-General announced that the Australian Government would release a discussion paper which would 'outline a package of reforms to promote leading practice in native title agreements and the governance of native payments'.[157] The Agreements Discussion Paper was released on 3 July 2010.[158]

In addition to the options for clarifying the good faith negotiation requirements under the Native Title Act (see section 2.3, above), the Agreements Discussion Paper included options to:

- encourage entities that receive native title payments to adopt measures to strengthen their governance
- create a new statutory function to review native title agreements, with the objective of improving the sustainability of these agreements
- streamline ILUA processes.

The Agreements Discussion Paper includes a proposal for a new 'statutory review function'.[159] 'Future act' agreements would be required to be registered with a review body. This body could be responsible for:

- receiving and reviewing native title agreements and maintaining a confidential register of those agreements
- assessing some native title agreements against leading practice principles
- advising and assisting parties to implement leading practice in native title agreements

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155 'Joint Working Group on Indigenous Land Settlements: Terms of Reference 2009–10' in Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), Attachment A. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILSTermsofReference_post-settlement_project_2009.pdf/$file/JWILSTermsofReference_post-settlement_project_2009.pdf (viewed 28 September 2010). The terms of reference of JWILS were endorsed at the Native Title Ministers' Meeting in August 2009: Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments#4 (viewed 7 October 2010).

156 The executive summary of the workshop was released for comment in July 2010. See Joint Working Group on Indigenous Land Settlements, *Governance Workshop: Sustainable Benefits Management in Native Title Settlements: Consultation Process* (2010).

157 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 29 September 2010).

158 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

159 For criticism of this proposal see, for example, 'Native title reforms labelled racist, paternalistic', *The World Today*, 5 July 2010. At http://www.abc.net.au/worldtoday/content/2010/s2944814.htm (viewed 28 September 2010).

- research and communication to develop and promote leading practice in agreement-making
- reporting on trends and issues via an annual report tabled in Parliament
- advising relevant Ministers, including where parties are not prepared to adopt leading practice principles, or in relation to measures to further assist parties to native title agreements
- assessing access to tax benefits for financial benefit packages paid under the agreements.[160]

The Australian Government suggests that certain governance measures and leading practice principles could be mandated. Alternatively, favourable tax treatment could be conditional on the adoption of these measures and principles.[161]

I recognise the importance of government support to assist native title groups to negotiate beneficial agreements and develop robust governance structures. However, I consider that such support should focus on capacity development, rather than on increased regulation, review or assessment.

Without access to adequate financial resources and expert advice, Aboriginal and Torres Strait Islander peoples are unlikely to be able to enter into 'sustainable' agreements, enforce the implementation of such agreements or develop effective governance structures.

I consider that the Australian Government has not adequately demonstrated the need for a new statutory review function. I also believe that the statutory function will do little to empower Aboriginal and Torres Strait Islander peoples and their representatives to negotiate beneficial agreements. Further, as elaborated in the Australian Human Rights Commission's submission in response to the Agreements Discussion Paper, the potential elements of the review function are problematic and should be reconsidered.[162]

I urge the Australian Government not to proceed with any reforms without consulting and cooperating with Aboriginal and Torres Strait Islander peoples in order to obtain our free, prior and informed consent, consistent with article 19 of the Declaration.

I emphasise that any reform should be guided by the minimum standards affirmed in the Declaration. These include our rights to:

- self-determination
- participate in decision-making in matters which would affect our rights

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160 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), pp 8-9. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 28 September 2010).

161 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 7. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010). On 18 May 2010, the Treasury released a consultation paper in which it outlined options to improve the relationship between the taxation and the native title systems. See Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010). At http://www.treasury.gov.au/documents/1809/RTF/Consultation_Paper_Native_Title_IED_and_Tax.rtf (viewed 7 October 2010). Consultations were suspended in accordance with caretaker conventions when the federal election was called. The process recommended in October 2010. Submissions closed 30 November 2010.

162 Australian Human Rights Commission, *Submission on the Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010).

- determine and develop priorities and strategies for the development or use of our lands, territories and resources.[163]

I will continue to monitor the progress of the Agreements Discussion Paper, and any related reforms, during the 2010–2011 reporting period.

2.6 Conclusion

I commend the Australian Government for its actions during the Reporting Period to promote and facilitate agreement-making. These are important first steps towards transforming the culture of the native title system and building better relationships with Aboriginal and Torres Strait Islander peoples.

However, the Government needs to commit to a more substantial reform agenda if it truly wants the system to change.

I understand the Government's concern to ensure that agreements are beneficial and sustainable. However, 'good' agreements will remain the exception rather than the rule while the system is so heavily weighted against the interests of Aboriginal and Torres Strait Islander peoples.

However, it is not good enough for governments to deal with perceived problems by imposing further layers of unwanted regulation, just as it is not enough for governments to deal with complex problems by offering piecemeal solutions. Nor is it acceptable for the Australian Government to introduce further incursions into our rights by expanding the future act regime, effectively reducing our ability to negotiate agreements.

I encourage the Australian Government to build on its reforms designed to improve agreement-making, but to do so in a way that fully respects our rights.

Recommendations

2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of:

- the impact of the current burden of proof
- the operation of the law regarding extinguishment
- the future act regime
- options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).

163 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 32. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure.

2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making.

2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011.

2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the *Native Title Amendment Act (No 1) 2010* (Cth)) as a measure of last resort.

2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the *Native Title Amendment Act (No 1) 2010* (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.

2.7 That the Australian Government:

- consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples
- provide a clear, evidence-based policy justification

before introducing reforms that are designed to ensure the 'sustainability' of native title agreements.

2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.