Chapter 3:
Towards a just and equitable native title system

3.1 Improving the native title system – the time for change is now!

As I discussed in Chapter 1 of this Report, there was a new energy and a stir of activity in the native title sector during the reporting period.

In my previous two *Native Title Reports,* I have strongly argued the need to reform the native title system. Stakeholders from all sectors engaged in the native title system have also stressed the need for the Government to take significant steps to ensure that the system meets the original objectives set out in the preamble to the *Native Title Act 1993* (Cth) (Native Title Act).

The federal Attorney-General has responded to this call and has committed to improving the operation of the native title system. He has clearly identified reform to the native title system as a strategic priority.[1]

The Attorney-General has advanced reforms to the native title system aimed at fostering 'broader, quicker and more flexible negotiated outcomes for native title claims'.[2] In particular, the *Native Title Amendment Act 2009* (Cth) commenced on 18 September 2009. I have outlined these reforms in Chapter 1 of this Report. The Minister for Families, Housing, Community Services and Indigenous Affairs has also worked with the Attorney-General and native title stakeholders to bring about positive change in the system, with a particular focus on maximising the benefits derived from native title agreements.[3]

However, further reform is required to realise the hopes of Aboriginal and Torres Strait Islander peoples for the system.

There are signs that the Attorney-General recognises this.

The Government has indicated that it is receptive to constructive and concrete ideas for reform. For example, the Attorney-General has stated:

> I have an open mind as to how the operation of the system can be improved and am willing to explore ideas for reform such as the amendments you proposed in your 2008 Report.

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

2 Commonwealth, *Parliamentary Debates*, House of Representatives, 14 May 2009, p 3889 (The Hon R McClelland, Attorney-General). At http://www.aph.gov.au/Hansard/reps/dailys/dr140509.pdf (viewed 12 October 2009).

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

> The Government is committed to genuine consultation with Indigenous people and other relevant native title stakeholders in exploring ways to improve the native title system. The Government will not rush into making significant change to the Native Title Act. History has shown that such change requires proper consideration and consultation.[4]

I am greatly encouraged by the Attorney's comments.

Over the past 16 years, millions of dollars have been spent on the native title system. There have been minimal obvious returns for Aboriginal and Torres Strait Islander peoples. Significant studies have generated proposals for improving the operation of the native title system. Yet, many reports are now gathering dust on shelves in Canberra.

I consider that reforms are urgently required to improve the system and fulfil the underlying purposes of the Native Title Act – including the rectification of 'the consequences of past injustices'.[5]

The native title system must be viewed holistically. Its deficiencies can only be addressed through a comprehensive reform process in which Aboriginal and Torres Strait Islander peoples are actively involved, every step of the way. I reiterate my firm belief that any reform to the native title system needs to respect the *Racial Discrimination Act 1975* (Cth) and international human rights standards. Reforms must not be implemented without full consultation and the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

We now have a historic opportunity to transform the native title system to ensure that it truly delivers justice for Aboriginal and Torres Strait Islander peoples and facilitates our social and economic development. The Attorney must seize this opportunity and succeed where other governments have failed. To do so would leave a lasting legacy of reconciliation.

It is therefore an optimal time to have an informed discussion about what changes should be made to improve native title.

In Chapter 2 of this Report, I considered principles and standards that should underpin a fresh approach to native title.

In Chapter 3, I raise a number of my concerns about the native title system as it currently operates. The purpose of this Chapter is to highlight possible options for reform and to encourage further dialogue on ways to improve the native title system.

In particular, this Chapter considers several key areas that require attention:

- recognition of traditional ownership
- shifting the burden of proof
- more flexible approaches to connection evidence
- improving access to land tenure information
- streamlining the participation of non-government respondents
- promoting broader and more flexible native title settlement packages
- initiatives to increase the quality and quantity of anthropologists and other experts working in the native title system.

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4 R McClelland, Attorney-General, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, undated.

5 *Native Title Act 1993* (Cth), preamble.

These issues have been specifically identified throughout the reporting period as future directions for reform.[6]

There are undoubtedly other elements of the native title system in need of improvement, many of which I have analysed in previous *Native Title Reports.* However, the range of issues raised in this Chapter indicates that governments must do more than simply tinker at the edges of the native title system to achieve social justice for Aboriginal and Torres Strait Islander peoples.

3.2 Recognition of traditional ownership

The recognition of native title can be empowering for traditional owners.

The experience of Yamatji Marlpa Aboriginal Corporation is that for claimant groups

> native title is not merely about gaining (generally quite limited) rights over their traditional country. What is particularly important to many claimants is the recognition and status that comes with a positive determination – that is, that the white legal system and the Australian Government recognise the existence of the group and their status as traditional owners.[7]

Murray Wilcox, a former Federal Court judge, has also commented on the significance of formal recognition for native title claimants:

> A court decision to recognise native title always unleashes a tide of joy. I believe this has nothing to do with any additional uses of the land – generally very marginal – that the determination makes available; rather, the fact that a government institution has formally recognised the claimant group's prior ownership of the subject land and the fact of its dispossession. That recognition is what Aboriginal peoples are seeking.[8]

As discussed in Chapter 2, the Australian Constitution does not recognise our traditional ownership of our lands, territories and resources. Further, the legal barriers for proving native title are often insurmountable, leaving many communities without formal recognition of their traditional ownership.

In an attempt to overcome this significant issue, Mr Wilcox has raised the idea of allowing courts to recognise traditional ownership when the claimants fall short of proving native title.

He has suggested that the Federal Court should be empowered to make a declaration about traditional ownership based on descent, and without needing to find continuous observance of laws and customs, or to make orders about particular uses of the land.[9]

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6 As discussed throughout this Chapter, the first two areas have been proposed and supported by a number of native title stakeholders, judges and practitioners. Along with 'partnerships with State and Territory Governments to develop new approaches to the settlement of claims through negotiated agreements', the other areas have been specifically listed for attention by the Attorney-General: see Attorney-General's Department, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing) (viewed 19 September 2009).

7 Yamatji Marlpa Aboriginal Corporation, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 3 September 2009.

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

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

This proposal is worthy of further consideration. It raises some important questions. How might it work in practice? What rights would be associated with recognition of traditional ownership, if not native title rights and interests?

Creating a 'second tier' of recognition of traditional owner status could be useful in some circumstances. As the National Native Title Council (NNTC) identifies:

> Such a power would enable the regional identification of the traditional country of a claimant group even where native title has been, for example, extinguished by the grant of an extinguishing tenure.[10]

However, in creating such a second tier, the Government should be very careful not to simply give incentives for respondent parties to 'race to the bottom' of the recognition ladder. As the NNTC further comments:

> [T]he capacity for the Federal Court to make a determination of 'traditional owner status' [must] not operate to the disadvantage of native title claimants. For example, it should not operate as an incentive to respondents to reduce their willingness to participate in consent determinations.[11]

While the idea of alternative modes of recognition is innovative, I consider that the ultimate issue is: how do we transition from the existing law to a native title system that works, and thereby allows full recognition of traditional ownership? After all, the Native Title Act was intended to do exactly that – give legal recognition to the traditional owners of this land.

The devastating reality is that native title is inaccessible and unrealistic for many traditional owners. This includes the Yorta Yorta people in Victoria, who could not clear the legal hurdles of proving native title. In my view, the answer is not necessarily to create a second tier of legal recognition of traditional ownership, but to amend the law and make native title accessible and achievable.

However, if such amendments are not made and native title determinations remain elusive to the majority of Aboriginal and Torres Strait Islander peoples, the Government should consider and consult on how other mechanisms can acknowledge traditional ownership. Some mechanisms such as consent determinations and Indigenous Land Use Agreements (ILUAs) already exist, but their use as tools for recognition could be promoted and made more attractive and accessible to the parties.

3.3 Shifting the burden of proof

(a) Background

Over the past five years, I have consistently voiced my concerns that the evidential burden of proving native title is simply too great. Similarly, Les Malezer has argued that the onus upon Aboriginal and Torres Strait Islander peoples of proving that they have a customary connection to their lands is one of the 'fundamentally discriminatory aspects' of the Native Title Act.[12]

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10 National Native Title Council, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (20 February 2009), p 3.

11 National Native Title Council, *Submission to the Attorney-General's discussion paper on minor amendments to the Native Title Act* (20 February 2009), p 3.

12 L Malezer, *2009 Mabo Lecture* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009), p 4. At http://ntru.aiatsis.gov.au/conf2009/papers/2009_MaboLecture.pdf (viewed 12 October 2009).

This view is shared by the United Nations Committee on the Elimination of Racial Discrimination, which has expressed concern:

> about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands. ...
>
> [The Committee] recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.[13]

As one academic put it, 'the question should not be how we can deal with indigenous "claims" against the state, but rather how can the colonisers legitimately settle and establish their own sovereignty'.[14]

One way to address this problem could be to amend the Native Title Act to provide certain presumptions in favour of native title claimants. For instance, there could be a presumption of the 'continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time'.[15] Once these presumptions are triggered, the burden would shift to the respondents to rebut the presumptions with proof to the contrary.

Such an approach is not inconsistent with the Native Title Act. The preamble states that the High Court has held that the common law 'recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands'. Presumptions in favour of the native title claimants would simply recognise and give respect to this fact.

Nor would this approach be novel. As I outlined in my submission to the Senate Standing Committee on Legal and Constitutional Affairs Inquiry into the Native Title Amendment Bill 2009, there are a number of laws in Australia in which a presumption is made or certain elements must be proven, after which the burden of proof shifts to the respondent.[16]

In most cases the government party would presumably take on the role of adducing evidence to rebut the relevant presumptions. In my view, this is appropriate. Government parties typically hold a lot of information relevant to the claim. Governments are also better resourced than native title claimants. Significantly, governments are responsible for dispossession.

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13 Committee on the Elimination of Racial Discrimination, *Concluding Observations of the Committee on the Elimination of Racial Discrimination: Australia,* UN Doc CERD/C/AUS/CO/14 (2005), para 17. At http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CERD.C.AUS.CO.14.En?Opendocument (viewed 1 November 2009).

14 D Short, 'The social construction of Indigenous "Native Title" land rights in Australia' (2007) 55(6) *Current Sociology* 857, p 872 (original emphasis). At http://csi.sagepub.com/cgi/reprint/55/6/857.pdf (viewed 12 October 2009).

15 Chief Justice RS French, *Lifting the burden of native title: Some modest proposals for improvement* (Speech delivered to the Federal Court Native Title User Group, Adelaide, 9 July 2008), para 29. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

16 See, for example, *Sex Discrimination Act 1984* (Cth), s 7C; *Workplace Relations Act 1996* (Cth), s 664. See further, Australian Human Rights Commission, *Inquiry into the Native Title Amendment Bill 2009 – Submission by the Aboriginal and Torres Strait Islander Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs* (24 April 2009), paras 258–260. At http://www.humanrights.gov.au/legal/submissions/2009/20090424_ntab.html (viewed 1 November 2009).

As Tony McAvoy comments:

> The evidence which traditional owners inevitably have to rely upon for that period which is beyond the living memory of traditional owners comes from the government. That material is often in the hands of the government or government functionaries ... The state has the resources and the capacity to look at the material itself. If it wants to challenge the continuity of particular people's connection then let them do so. Let them access their own material and do so. Instead, the onus is placed upon the traditional owners and complaints are made about the length of time it takes for claims to be settled.[17]

Shifting the burden of proof is intended to encourage positive outcomes in a higher proportion of native title claims, either by consent or through litigation. If the burden of disproving a claim rests more heavily on the respondents, states and territories may be more inclined to settle claims with strong prospects of success by consent. It could mean, as Justice North and Tim Goodwin argue, that for 'most cases moving towards resolution by consent determination, the timeline would be streamlined beyond recognition and the costs of such a process would be reduced out of sight'.[18]

However, this reform alone may not lead to better outcomes for native title claimants. A respondent would still be able to defeat a native title claim due to the operation of s 223, as currently interpreted and applied. And unless the attitudes and behaviours of states and territories change, the system will likely remain highly adversarial in nature.

In this section, I consider:

- what could trigger the presumptions in favour of native title claimants
- the benefits of a presumption of continuity
- proposals for reforms to terminology associated with the application of s 223 of the Native Title Act, including 'traditional', 'connection' and 'substantial interruption'
- the need for fundamental changes in the attitudes and behaviours of states and territories to make these reforms work.

(b) Triggering presumptions in favour of native title claimants

One option for further consideration is to amend the Native Title Act to shift the burden of proof once native title claimants meet the registration test. Section 190A of the Native Title Act requires the Native Title Registrar to assess the merits of a native title claim, requiring the native title applicants to submit evidence to:

- identify the area subject to native title
- identify the native title claim groups
- identify the native title rights and interests under claim
- provide a factual basis to the claim
- establish a prima facie case that at least some of the native title rights and interests claimed in the application can be established.[19]

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17 Evidence to Senate Standing Committee on Legal and Constitutional Affairs, Sydney, 16 April 2009, p 21 (T McAvoy). At http://www.aph.gov.au/hansard/senate/commttee/S11978.pdf (viewed 12 October 2009).

18 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 15.

19 *Native Title Act 1993* (Cth), s 190B.

Using the registration test to trigger a shift in the burden of proof could allay fears that such a change would result in opening the 'floodgates'. The Native Title Act also includes a number of other procedural requirements related to the registration test that could act as a safeguard to address floodgate concerns.[20]

If this proposal is adopted, it is important that the bar for meeting the registration test is not raised. This would simply shift the current problems of proof to an earlier stage in the claims process. It would also jeopardise access to the important procedural rights that are gained through registration and place the assessment of evidence outside the court system.

Alternatively, the presumption could be engaged (and the burden shift) once the native title claimants prove certain threshold matters.

Chief Justice French of the High Court of Australia has suggested that the Native Title Act could be amended to provide for a presumption in favour of native title applicants, which 'could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time'.[21] A presumption could apply:

> to an application for a native title determination brought under section 61 of the Act where the following circumstances exist:
>
> (a) the native title claim group defined in the application applies for a determination of native title rights and interests where the rights and interests are found to be possessed under laws acknowledged and customs observed by the native title claim group
>
> (b) members of the native title claim group reasonably believe the laws and customs so acknowledged to be traditional
>
> (c) the members of the native title claim group, by their laws and customs have a connection with the land or waters the subject of the application
>
> (d) the members of the native title claim group reasonably believe that persons from whom one or more of them was descended, acknowledged and observed traditional laws and customs at sovereignty by which those persons had a connection with the land or waters the subject of the application.[22]

The Chief Justice further suggests that, once the above circumstances exist, the following could be presumed in the absence of proof to the contrary:

> (a) that the laws acknowledged and customs observed by the native title claim group are traditional laws and customs acknowledged and observed at sovereignty
>
> (b) that the native title claim group has a connection with the land or waters by those traditional laws and customs
>
> (c) if the native title rights and interests asserted are capable of recognition by the common law then the facts necessary for the recognition of those rights and interests by the common law are established.[23]

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20 *Native Title Act 1993* (Cth), ss 66, 190C.

21 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 29. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

22 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 31. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

23 Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), para 31. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 9 October 2009).

Justice North and Tim Goodwin have also suggested legislative amendment to establish a reverse onus of proof in native title applications. As to the circumstances that would engage such a reverse onus, they comment:

> Applicants would need to show that there were Indigenous people at sovereignty occupying the land in question according to traditional laws and customs. The onus would then shift to the respondents to demonstrate that the other requirements of the *Yorta Yorta* test do not exist.[24]

The circumstances that would trigger a presumption are worthy of further consideration. Yet, a common theme from these proposals is that once the presumptions are triggered, it should fall to the respondents to adduce evidence to rebut the presumptions and prove the contrary.

(c) A presumption of continuity

At the very least, the Native Title Act should provide for a presumption of continuity.

To prove native title, claimants are required to demonstrate continuity:

- of a society from sovereignty to the present
- in the observance of law and custom
- in the content of that law and custom.[25]

However, as Justice North and Tim Goodwin have observed,

> those who have been most dispossessed by white settlement have the least chance of establishing native title. They find it hardest, and usually impossible, to establish that they belong to a society which has led a continuous vital existence since white settlement because the policy of the settlers had the effect of destroying or dissipating members of the society. Consequently Indigenous people who were connected to areas the subject of greater white settlement are further dispossessed of their lands by the operation of native title law.[26]

The application of the tests for continuity, derived from *Yorta Yorta v Victoria* (*Yorta Yorta*) [27] has had a devastating effect on native title claims. For example, the Larrakia people were unable to prove their native title claim over Darwin because the Federal Court found their connection to their land and their acknowledgement and observance of their traditional laws and customs had been interrupted – even though they were, at the time of the claim, a 'strong, vibrant and dynamic society'.[28]

Chief Justice French is of the view that a presumption:

> could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time. … And if by those laws and customs the people have a connection with the land or waters today, in the sense explained earlier, then a continuity of that connection, since sovereignty, might also be presumed.[29]

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24 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 14.

25 For discussion on the requirement for continuity, see H McRae et al, *Indigenous Legal Issues* (4th ed, 2009), p 348.

26 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 2.

27 *Yorta Yorta v Victoria* (2002) 214 CLR 422.

28 *Risk v Northern Territory* [2006] FCA 404, para 839. The decision was upheld on appeal to the Full Federal Court: *Risk v Northern Territory* (2007) 240 ALR 75.

29 Chief Justice R S French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, p 13.

The Native Title Act should specify that, where a claimant meets the threshold for triggering a presumption, continuity in the acknowledgement and observance of traditional law and custom and of the relevant society shall be presumed, subject to proof of substantial interruption. This would clarify that the onus rests upon the respondent, usually the government party, to prove a substantial interruption rather than upon the claimants to prove continuity.

This would mean that, if the respondent chose not to challenge the presumption, the parties could, in practice, disregard a substantial interruption in continuity of observance of traditional laws and customs.[30]

However, these reforms alone would not lead to a just and fair native title system. They need to be accompanied by amendments to s 223 of the Native Title Act and, most importantly, shifts in the attitudes and behaviours of states and territories.

(d) Reforms to section 223 of the Native Title Act

Section 223 of the Native Title Act defines 'native title' and the rights and interests which constitute it. These include hunting, gathering, fishing and other statutory rights and interests.[31]

Section 223 has been interpreted and applied in successive court decision in ways that deny the promise of recognition inherent in the preamble to the Native Title Act. Consequently, reforms to s 223 are required to ensure that the proposed presumptions operate fairly and justly.

This includes clarifying the definitions of 'traditional' and 'connection' as used in s 223(1) and the related concept of 'substantial interruption'.

(i) Clarify the definition of 'traditional'

Native title rights and interests must be 'possessed under the traditional laws acknowledged, and the traditional customs observed' by the claimants.[32]

Courts have interpreted 'traditional' to mean that laws and customs must remain largely unchanged.[33] If this interpretation of 'traditional' is retained, it may be too easy for a respondent to rebut the presumption of continuity by establishing that a law or custom is not practiced as it was at the date of sovereignty.

I recommend that 'traditional' should encompass laws, customs and practices that remain identifiable through time. This would go some way to allowing for recognition of Indigenous peoples' rights to culture and would also clarify the level of adaptation allowable under the law.[34]

(ii) Clarify the definition of 'connection'

Section 223 requires that claimants 'have a connection with the land or waters' that is the subject of the claim, and have such a connection by virtue of their traditional law and customs.

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30 Chief Justice R S French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, p 13.

31 *Native Title Act 1993* (Cth), ss 223(1)–223(3).

32 *Native Title Act 1993* (Cth), s 223(1).

33 Justice A North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), pp 8–9.

34 For a discussion of the rights of Indigenous peoples to culture, including comments on the adaptation and revitalisation of culture, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), pp 87–88. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

The Native Title Act should explicitly state that claimants are not required to have a physical connection with the land or waters.

Requiring evidence of physical connection sets an unnecessarily high standard that may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.

Since the Full Federal Court decision in *De Rose,*[35] the courts have rejected the need for the claimants to demonstrate an ongoing physical connection with the land. However, setting this out clearly in s 223 would assist to clarify this issue for courts and parties.

(iii) Clarify what constitutes 'substantial interruption'

In the *Native Title Report 2008,* I proposed amendments to the Native Title Act to address the court's inability to consider the reasons for an interruption to the observance of traditional laws and customs.[36]

Currently, the definition of native title in the Native Title Act does not require continuity, and for this reason, the Act similarly does not contemplate what constitutes a break in continuity. However, the courts have interpreted the Native Title Act as requiring literal continuous connection, ignoring 'the reality of European interference in the lives of Indigenous peoples'.[37]

In *Yorta Yorta*, the High Court stated that 'the acknowledgement and observance of those laws and customs must have continued substantially uninterrupted since sovereignty'.[38]

Yet, as Justice North and Tim Goodwin have stated, '[a]lthough the *Yorta Yorta* test includes certain ameliorating considerations, such as that the continuity required need not be absolute as long as it is substantial, the ameliorating factors have not had any significant practical effect'.[39]

What constitutes a 'substantial interruption' is open to interpretation. As discussed above, the claim of the Larrakia people illustrates the vulnerability and fragility of native title, as currently interpreted. A break in continuity of traditional laws and customs for just a few decades was sufficient for the Court to find that native title did not exist. However, Justice Mansfield found that the Larrakia people 'clearly' existed as a society in the Darwin area with a structure of rules and practices directing their affairs.[40]

Although referring to the text of s 223 as the basis for its decision, the majority in *Yorta Yorta* made a policy choice, although not expressly, in favour of a restricted entitlement to a determination of native title. No reference was made by the Court to the purpose of the Native Title Act to redress past injustices.

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35 *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.

36 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), p 90. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

37 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title, A proposal for reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 7.

38 *Yorta Yorta v Victoria* (2002) 214 CLR 422, 456.

39 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 14.

40 *Risk v Northern Territory* [2006] FCA 404, para 938.

A consequence of this construction of s 223 is that there is little room to raise past injustice as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs.

Further, in cases where the claimant group has revitalised their culture, laws and customs, a comparatively minimal interruption should not be sufficient to defeat a claim to native title.

A shift in the burden of proof alone would not be sufficient to address the issues around continuity of connection that arise from the *Yorta Yorta* test.

In order to address this injustice, I recommend legislative amendments to address the Court's inability to consider the reasons for interruptions in continuity. Such an amendment could empower Courts to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

For example, amendments could provide:

- for a presumption of continuity, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.[41]
- that where the respondent establishes that the society which existed at sovereignty has not since then continuously and vitally acknowledged laws and observed customs relating to land (as required by the *Yorta Yorta* test), any lack of continuity or vitality resulting from the actions of settlers is to be disregarded.[42] This could be achieved through providing a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the relocation of communities onto missions.[43]

These amendments would complement a shift in the burden of proof.

(e) Shifting the attitudes of states and territories

Providing for presumptions and shifting the burden of proof can lead to better outcomes for native title claimants. However, as Justice North and Tim Goodwin observe, such provisions will

> not solve the whole problem. … Much will depend on the position taken by State respondents. Under the reverse onus amendment provision it would be still open to the respondents to prove lack of necessary continuity or that the applicants do not belong to the relevant society. It remains to be seen whether State respondents or other respondents would attempt such proof. … Unless State respondents react to the spirit of the change as well as to the letter, the benefits of the reduction of cost and delay otherwise available might not eventuate.[44]

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41 As previously recommended in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), p 90. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

42 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

43 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

44 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 16.

I reiterate my belief, expressed in Chapter 2 of this Report, that there needs to be a fundamental shift in the attitudes of the states and territories to make these reforms work. I also believe that the Australian Government needs to play a leadership role in encouraging states and territories to change their behaviour, including through using its financial position and the processes of the Council of Australian Governments.

3.4 More flexible approaches to connection evidence

(a) Overview of connection evidence requirements

Sections 87 and 87A of the Native Title Act provide that the Federal Court may make a consent determination of native title when it is within its power and appropriate to do so.

As described by Justice Greenwood in the *Kuuku Ya'u* decision:

> Section 87 … provides that if … the parties reach agreement on the terms of a proposed consent order in resolution of the proceeding (the agreement being filed in the Court) and the Court is satisfied that such orders are within power, the Court may make orders in or consistent with those terms, if it appears to the Court to be appropriate to do so. As to the question of power, s 13(1) of the Act provides that an application for a determination of native title may be made to the Court under Part 3 in relation to an area for which there is no approved determination of native title. The Act encourages parties to resolve such applications by negotiation, mediation and ultimately agreement rather than contested adversarial proceedings.[45]

In most instances, state and territory governments set requirements that native title claimants must meet before the state or territory will engage in mediation or negotiations. In general, state and territory governments want to be 'satisfied that the claim meets the evidentiary requirements of the NTA and case law, in particular s 223 and the requirement for proof of connection'.[46]

States and territories determine their own connection evidence requirements. These requirements are generally set out in guidelines and other policy documents.[47] The connection requirements differ between state and territories. Figure 3.1 sets out an example of a state process for assessing connection material. Note that in stage two of this process, claimants are required to provide a 'Native Title Report' to the state, including evidentiary material such as reports, affidavits and transcripts.

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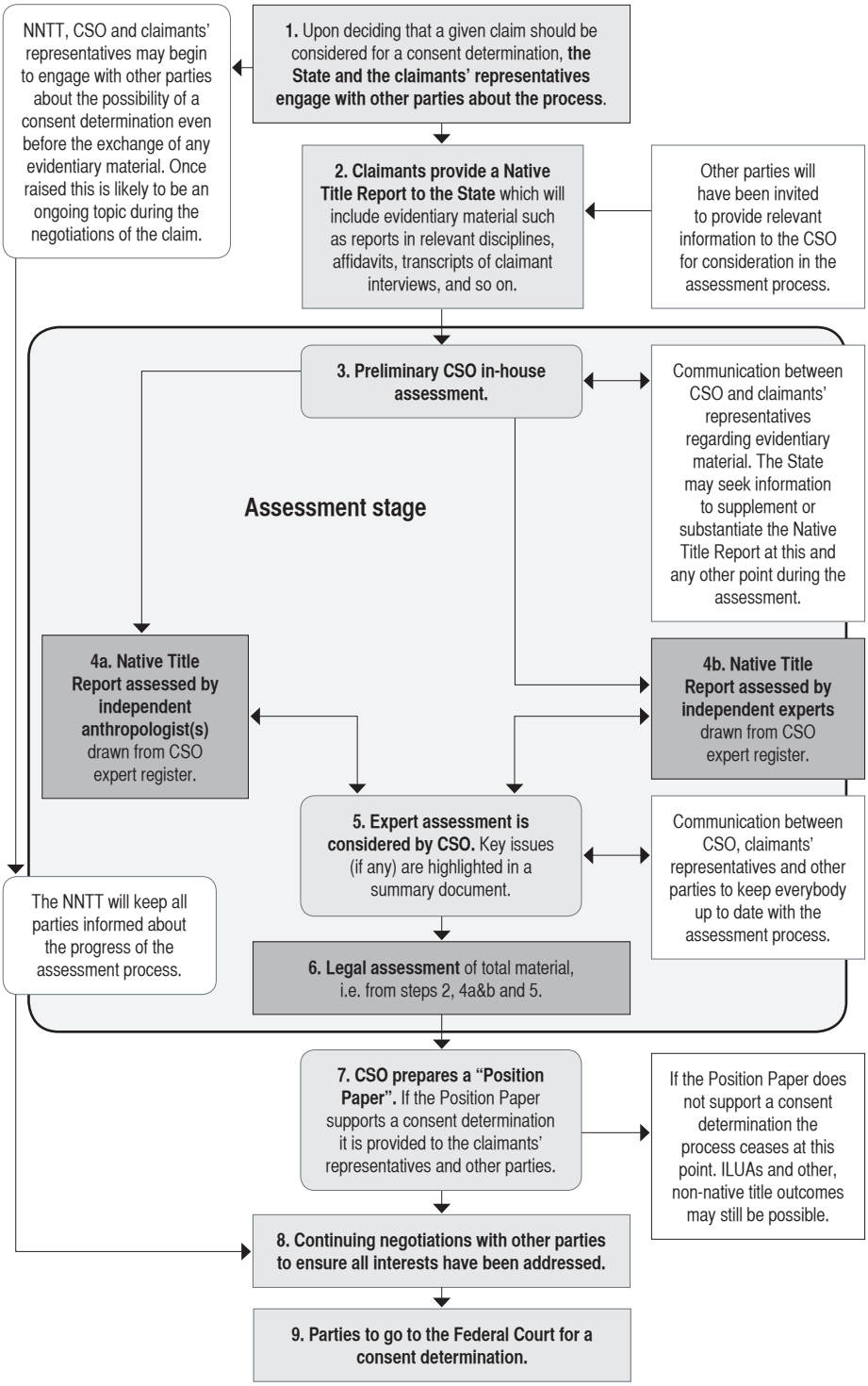
45 *Kuuku Ya'u People v State of Queensland* [2009] FCA 679, para 10.

46 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007). At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

47 For an overview of state and territory approaches to the preparation and assessment of connection materials, see R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), app 3. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

Figure 3.1: South Australia's assessment process



Source: Government of South Australia, *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports* (2005), p 31. At http://www.iluasa.com/dl/Consent_Determinations_in_South_Australia.pdf (viewed 8 August 2009).

(b) What are some of the problems with connection evidence requirements?

The connection evidence requirements imposed by states and territories can be onerous. For example, in *Hunter v State of Western Australia* (*Hunter*),[48] North J considered that the burden upon the claimants to satisfy Western Australia's Guidelines for the Provision of Information and Support of Applications for a Determination of Native Title did 'not seem to fulfil the purpose of ss 87 and 87A, namely, to assist in resolving applications quickly and with minimal cost'.[49]

He further commented:

> The power conferred by the Act on the Court to approve agreements is given in order to avoid lengthy hearings before the Court. The Act does not intend to substitute a trial, in effect, conducted by State parties for a trial before the Court. Thus, something significantly less than the material necessary to justify a judicial determination is sufficient to satisfy a State party of a credible basis for an application. …
>
> It is to be hoped that the State will give careful consideration in future matters under s 87 and s 87A to easing the present unnecessary burden either placed on or assumed by native title applicants.[50]

Similarly, the authors of a report on a Native Title Connection Workshop facilitated by the National Native Title Tribunal (NNTT) and the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS) in 2007 commented that 'in most jurisdictions the current processes have simply relocated the evidentiary process from the Court to, largely, State or Territory governments'.[51] This shift is problematic, especially considering that the state and territory governments are also the primary respondents. The unfettered ability of states and territories to impose and unilaterally alter these requirements creates an inequality of bargaining power.

Meeting the requirements for connection materials imposed by the states and territories places under-resourced Native Title Representative Bodies (NTRBs) under a heavy burden. As observed in the *Native Title Report 2004,* 'connection reports require a substantial investment in terms of human and financial resources'.[52]

Compiling connection materials is time consuming and can lead to significant delays. The NNTT identifies 'the timely preparation and assessment of native title connection materials' as critical for ensuring the steady progress of native title applications to resolution through mediation. Yet, this task is 'the primary source of delay in resolving many claimant applications'.[53]

Some have suggested that uncertainty surrounding the criteria used by the Court in applying ss 87 and 87A further complicates this process and contributes to the early demands for significant connection materials.

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48 *Hunter v State of Western Australia* [2009] FCA 654.

49 *Hunter v State of Western Australia* [2009] FCA 654, para 22.

50 *Hunter v State of Western Australia* [2009] FCA 654, paras 22–25.

51 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), p 22. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

52 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2004,* Human Rights and Equal Opportunity Commission (2005), p 21. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport04/index.html (viewed 12 October 2009).

53 National Native Title Tribunal, *National Report: native title* (2009), p 3. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Corporate%20publications/National%20Report%20Card%20-%20March%202009.pdf (viewed 13 August 2009).

The Court may make an order under ss 87 and 87A only when 'it is appropriate to do so'. The concept of 'appropriate' has been considered to be 'elastic'.[54]

In *Hunter*, North J indicated that '[i]n most circumstances the fact of agreement will be sufficient evidence upon which the Court may act'.[55] However, as Tony McAvoy observes, the approach:

> varies depending on which of the Justices of the Court are sitting on the matter ... on one view, it seems that nothing less than evidence meeting all the essential elements of native title will suffice.[56]

The Victorian Government has commented that:

> so long as what is expected by the Act regarding a consent determination is unclear, parties will feel compelled to provide, and to demand, more rather than less, for fear of falling short of the Federal Court's expectations.[57]

(c) Possible solutions

(i) Legislative responses

One response to the issue identified by the Victorian Government, and others, could be to remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought by the parties (that is, to approve their agreement). Alternatively, ss 87 and 87A could be amended to give greater guidance as to what Courts should consider when determining whether it would be appropriate to grant the order.

For example, the Victorian Government has suggested that an amendment to s 87 'should be aimed at alerting the Federal Court to questions of the strength and fairness of process in reaching agreement worthy of a consent determination, and not just the evidentiary facts themselves'.[58] This could involve the Court being satisfied that 'the agreement is genuine and freely made on an informed basis by all parties, represented by experienced independent lawyers'.[59]

It has also been suggested that the examination of appropriateness should be confined to the consideration of whether the parties have had appropriate legal advice.[60]

This focus on the 'strength and fairness of process' could have a further advantage of providing incentives to governments to ensure that native title claimants are adequately resourced and represented.

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54 Chief Justice RS French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, p 12.

55 *Hunter v State of Western Australia* [2009] FCA 654, paras 16–17.

56 T McAvoy, 'Native Title Litigation Reform' (2008) 8(12) *Native Title News* 193, p 195.

57 Victorian Government, *Comments on the Australian Government's Discussion Paper: Proposed minor native title amendments* (2008), p 3. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf (viewed 17 August 2009).

58 Victorian Government, *Comments on the Australian Government's Discussion Paper Proposed minor native title amendments* (2008), p 3. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf (viewed 17 August 2009), p 3.

59 *Kuuku Ya'u People v State of Queensland* [2009] FCA 679, para 13.

60 T McAvoy, 'Native title litigation reform' (2009) 39 *Reform* 30, p 31.

Introducing presumptions in favour of native title claimants may also help alter the expectations of states and territories as to the connection materials that native title claimants must marshall. Justice North and Tim Goodwin suggest that:

> If the law required the applicants to establish only that Indigenous people occupied the land in question at sovereignty, State respondents would doubtless alter their practices, rewrite the guidelines, and in many cases make agreements for determinations of native title without delay and consequently with much reduced cost.[61]

(ii) Policy responses

Ultimately, the solutions to the onerous connection evidence requirements imposed by the states and territories will not lie in legislative reform alone. A fundamental change in attitudes on behalf of states and territories is essential to reducing the adversarial nature of the native title system, which is reflected by the burdens placed upon native title claimants to produce connection materials.

Rita Farrell, John Catlin and Toni Bauman observe that '[t]he States and Territories have an obligation and responsibility to act in the public interest and to be satisfied that they will be entering into agreements on behalf of their constituents with the people who hold native title over a particular area'.[62]

However, states and territories need to understand that it is also in the public interest to arrive at agreements without unnecessary delay and expense. And, as I discussed in Chapter 2 of this Report, governments also have a responsibility to protect our rights and interests.

The legislative responses outlined above may go some way to encourage changes in attitude and behaviour. However, the Australian Government clearly has an important role to play in leading the process of change through non-legislative means. The Australian Government has a great deal of financial leverage with which to influence state behaviour and encourage the making of consent determinations.

For example, the Australian Government could play a leading role in setting national standards for connection requirements. These standards should be aimed at improving the likelihood of agreements being reached and claims being resolved with minimal delay and expense. The report of the NNTT / AIATSIS 'Getting Outcomes Sooner Workshop'[63] outlines some best practice principles that could inform the development of national standards (see Text Box 3.1).

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61 Justice A M North & T Goodwin, *Disconnection – the Gap between Law and Justice in Native Title: A Proposal for Reform* (Paper delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009), p 15.

62 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007*, Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), p 27. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

63 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007,* Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), pp 20–21. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

Text Box 3.1: Report of the 'Getting Outcomes Sooner Workshop' – July 2007[64]

Best practice principles

Basing connection processes on the following principles would significantly enhance connection outcomes:

- Connection assessment processes are non-adversarial and observe the principles of good faith, co-operation and goodwill. In other words, the preparation and assessment of connection materials should form part of the mediation framework, and not be a precursor to it.
- All parties are mindful of resource limitations and plan together to ensure practical outcomes and realistic timeframes for preparing research and assessing connection.
- The early scoping of connection requirements with independent process management can:
  - clarify the needs and expectations of all parties
  - assist the parties to narrow the research brief by identifying specific issues that need to be addressed and eliminate issues that are not contentious
  - identify areas of concern
  - clarify threshold issues which match the nature of agreements
  - establish appropriate methods for incorporating direct evidence from Indigenous witnesses and the preferred formats for presenting research
  - facilitate regular meetings between the authors of the connection reports and government representatives
  - establish ways of keeping all parties informed
  - establish processes for tenure research
  - investigate the possibilities of parallel processes.
- Collaboration and co-operation involves the sharing of information, resources and support to produce reports in a timely manner and takes place during the production and assessment of research, with frequent consultation.
- Independent analysis of what is succeeding and what is unsuccessful will assist native title researchers, lawyers and claimants.

Suggested policy and strategic changes

A number of suggestions were made at the workshop that would require a significant shift in the policies of governments at state, territory and Commonwealth levels including:

- state and territory governments removing their requirement for comprehensive proof of connection before entering into negotiations
- developing a national framework and standards
- forming a national panel of peer review experts.

64 R Farrell, J Catlin & T Bauman, *Getting Outcomes Sooner, Report on a native title connection workshop: Barossa Valley, July 2007,* Report prepared on behalf of the National Native Title Tribunal and the Australian Institute of Aboriginal and Torres Strait Islander Studies (2007), pp 20–21. At http://ntru.aiatsis.gov.au/major_projects/connectionpdfs/getting_outcomes_sooner.pdf (viewed 31 August 2009).

3.5 Improving access to land tenure information

The progress of native title claims depends greatly on the time it takes states and territories to release land tenure information and assess it. Claimants invest significant human and financial resources to prepare claims. However, the discovery of historic and extinguishing tenures after a claim has been initiated can significantly undermine this investment in resources.

I consider that native title claimants should be able to access relevant tenure history information at the earliest possible opportunity. The Australian Government could facilitate this through statutory amendment and / or by use of financial and other leverage over the policies and practices of the states and territories. For example, state and territory governments should be required to provide comprehensive tenure information to the native title claimants and their representatives before requiring the native title claimants to submit connection reports.

The appropriate party to provide tenure information is the government party. The states and territories are responsible for land administration in their respective jurisdictions. As they also hold the relevant information, and have the resources to commit, the state and territory governments are in the best position to undertake thorough tenure searches and provide tenure information to claimants at the earliest possible opportunity.

The costs and delays described above can also be attributed to the lack of readily accessible, comprehensive land tenure information. Improving access to land tenure information could significantly reduce the time and costs associated with claims processes.

In 2004, a National Summit on Improving the Administration of Land and Property Rights and Restrictions (the Summit) was held to consider ways to improve the supply of information concerning land and property rights, obligations and restrictions (RORs) in Australia.

One of the issues considered at the Summit was the increasing difficulty experienced in every jurisdiction in obtaining comprehensive information on RORs affecting the use and / or ownership of land and property.

For example, Barry Cribb of the Department of Land Information in Western Australia informed the Summit that there are over 180 different types of property interests residing in some 23 custodian agencies in Western Australia alone. An interest may be a ROR that affects the use and / or enjoyment of land. Types of interests include easements and environmental, cultural, planning, building and health interests. Mr Cribb raised a number of concerns including that:

- the majority of property interests are not held in the Torrens Register
- there is no definitive source of interests in land
- there is no mechanism for the recognition or discovery of new interests.[65]

65 B Cribb, *Register of Interests in Land* (Presentation delivered at the National Summit on Improving the Administration of Land and Property Rights and Restrictions, Brisbane, 16 November 2004).

I consider that there is a further deficiency with the current level of access to tenure information. Aboriginal and Torres Strait Islander peoples have varying degrees of access and control of at least 20% of the Australian continent.[66] However, there is currently no baseline information that defines on a national basis the lands, waters, and tenures that make up the Indigenous estate.

At the Summit, Margaret C Hole AM considered that 'it is desirable to provide a registration system that discloses all things relating to title including ownership, mortgages, leases, easements, covenants, planning requirements, zoning, geographical restrictions, weather patterns, demographics etc'.[67]

Since 2004, considerable work has been undertaken to address the concerns raised at the Summit. This includes a project initiated by the National Land and Water Resource Audit with the intention of creating a land tenure data set with Australia-wide coverage.[68]

Further, the NNTT, in collaboration with other Australian Government agencies, is pursuing the development of a National Information Management framework for land tenure through ANZLIC – the Spatial Information Council, which is the intergovernmental body for spatial information.[69]

I support the establishment of a comprehensive national information management database that co-ordinates national and jurisdictional land tenure information. To improve accessibility, this database could be made available online.

States and territories should be encouraged to provide a full inventory that maps the various tenures across their jurisdictions to contribute to such a database. This database should include native title rights and interests and other forms of Indigenous tenure, and lands where tenure resolution is required.[70]

An online national land tenure database would significantly increase the ability of claimants to access information and reduce pressure on their resources.

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66 J Altman, G Buchanan & L Larsen, *The environmental significance of the Indigenous estate: Natural resource management as economic development in remote Australia*, CAEPR Discussion Paper No 286/2007 (2007), p 14. At http://www.anu.edu.au/caepr/system/files/Publications/DP/2007_DP286.pdf (viewed 21 October 2009).

67 M C Hole AM, *Where to from here – some options* (Paper delivered at the National Summit on Improving the Administration of Land and Property Rights and Restrictions, Brisbane, 16 November 2004).

68 PSMA Australia Limited, *Final Project Report: Land Tenure: Version 1.0* (2008). At http://nlwra.gov.au/files/products/national-land-and-water-resources-audit/pn21458/pn21458.pdf (viewed 30 October 2009).

69 G Neate, National Native Title Tribunal, Email to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 September 2009.

70 For a discussion on how access to such information could help Aboriginal and Torres Strait Islander peoples to identify opportunities to engage in economic development, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008,* Australian Human Rights Commission (2009), p 120. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 21 October 2009).

3.6 Streamlining the participation of non-government respondents

There are frequently a large number of parties to native title proceedings. This can lead to unnecessary delays, costs and the frustration of settlement efforts.

The Australian Government has acknowledged that the numbers of respondent parties in native title claims is unacceptable. In Australia's comments to the United Nations Human Rights Committee, the Government said:

> The involvement of a large number of non-government respondent parties in native title claims contributes to the complexity, time and cost of claims. While the interests of non-government respondents need to be considered to ensure sustainable outcomes, respondents should be concerned to clarify the interaction between Indigenous and non-Indigenous property rights, not to expend public resources on determining whether native title exists.[71]

The participation of respondents in native title proceedings must be managed effectively. Addressing the problems associated with excessive party numbers and improving the processes involved to become a party is critical to improving the efficiency of the native title system.

I believe that the current balance between the representation of native title and non-native title interests is poorly struck. Consideration needs to be given to a number of matters concerning the participation of respondents in native title claims, including:

- the role of state and territory governments in representing respondent interests
- party status
- processes for removing parties
- representative parties
- funding for respondent parties.

(a) The role of state and territory governments

The role of governments in a native title claim is primarily to represent the interests of the community and to test the validity of the claim.

Consequently, South Australian Native Title Services comments that:

> Amendments should provide that the Federal Court should rely on the first respondent, being the State Government, to represent all respondent interests whose interests are gained from a grant of rights from the State…The State under legislation manages for example the Fishery or the Mineral resources for the public generally and as such, the State as the grantor of such interests is best placed to represent all persons holding such interests in the native title context.[72]

71 UN Human Rights Committee, *International covenant on civil and political rights – Replies to the list of issues to be taken up in connection with the consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/Aus/5),* UN Doc CCPR/C/AUS/Q/5/Add.1 (5 February 2009), para 42. At http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm (viewed 1 November 2009).

72 South Australian Native Title Services, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 14 August 2009.

Consistent with this, Daniel O'Dea of the NNTT stated:

> Bearing in mind that the State goes to great lengths to ensure that all extant interests are listed in schedules to all determinations and that those interests will prevail over the native title interests to the extent of any inconsistency, it is arguable there is no real need for current holders [of those interests] to actively participate.[73]

Given the role that state and territory governments play, I agree that the involvement of so many respondents in native title claim proceedings should be reappraised. Options for reform are discussed below.

(b) Party status

To streamline the participation of non-government parties, the Native Title Act should include stricter criteria that respondents must meet in order to become and remain parties to native title proceedings.

Text Box 3.2: Section 84 of the *Native Title Act 1993* (Cth)

Section 84 of the Native Title Act identifies who can become a party to a native title claim. In essence, the Act divides potential parties into two groups: those who have a specified interest in the proceeding, and those who fall within broad catch-all provisions.

Section 84 of the Native Title Act provides an extremely broad test for party status. The result is that there can be hundreds of parties to native title proceedings. In addition, the breadth of this test means that, exceptional cases aside, there is virtually no prospect of the claimant successfully challenging the addition of a particular respondent.

Amendments made to s 84 in 2007 included some positive elements.[74] For example, the amendments narrow one ground for eligibility as a party from 'interests' to 'interest ... in relation to land or waters'.[75] The Court must now additionally consider whether it is 'in the interests of justice' to add a party that seeks to be joined after proceedings are already underway.[76] However, these amendments only apply to applications lodged on or after the date the amendments came into effect. The result is that the amendments do not apply to the 500 or so native title claims that had already commenced.

73 D O'Dea, *Negotiating consent determinations: Co-operative mediation – the Thalanyji experience* (Paper delivered to the Third Negotiating Native Title Forum Melbourne, 19 February 2009), p 28. At http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2009/Thalanyji%20Experience%20-%20Negotiating%20Consent%20Determinations.pdf (viewed 7 July 2009).

74 The 2007 amendments slightly amended the test for party status by requiring that the interest is in 'relation to land or waters' and other minor changes. See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Human Rights and Equal Opportunity Commission (2008), p 35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009).

75 *Native Title Act 1993* (Cth), s 84(3)(iii).

76 *Native Title Act 1993* (Cth), s 84(5).

The following options should be considered.

The threshold for joinder as a party could be amended to reflect more traditional tests for standing in civil proceedings, such as the 'special interest' test under general law[77] or the 'person aggrieved' test under the *Administrative Decisions (Judicial Review) Act 1977* (Cth).[78]

Another alternative would be to require the party seeking to be joined to satisfy criterion set out in Order 6 Rule 8 (Addition of Parties) of the Federal Court Rules, which includes that joinder of the person 'is necessary to ensure that all matters in dispute in the proceeding may be effectually and completely determined and adjudicated upon'.

A further option is to revisit the criteria in ss 84(3) and 84(5). The following persons are among those who are entitled to be parties to a native title claim:[79]

- a person whose interest, in relation to land or waters, may be affected by a determination in the proceedings[80]
- any person who, when notice of a native title claim is given, holds a proprietary interest that is registered on a public register in relation to any of the area covered by the application.[81]

Such persons could be required to show that their interests are likely to be *substantially* affected by a determination in the proceedings. The Native Title Act could provide that a person claiming that their interests are substantially affected must make an application to the Court before they can be joined as a party.[82] The application should set out how the person's interests are likely to be substantially affected if the Court were to make the determination sought. The claimant and the primary respondent should then have an opportunity to make submissions to the Court.

Alternatively, the Government could explore options to enable a reduced form of participation in native title proceedings for certain respondents, such as those who may seek only to be added as a party to ensure that their rights and interests are preserved under any final determination.

It may not be necessary to afford full procedural and other rights to such parties. A tiered system of participation may allow for certain procedural matters to be dealt with more expeditiously by only requiring the consent of the 'key players' to the proceeding, usually the native title claimant and the government party.

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77 *Australian Conservation Foundation v Commonwealth* (1978)146 CLR 493. See further *Onus v Alcoa* (1981) 149 CLR 27; *Bateman's Bay Local Aboriginal Land Council v Aboriginal Benefit Fund Pty Ltd* (1998) 194 CLR 247.

78 See generally, *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 54 FLR 421; *United States Tobacco Co v Minister for Consumer Affairs* (1988) 83 ALR 79; *Cameron v Human Rights and Equal Opportunity Commission* (1993) 46 FCR 509; *Right To Life Association (NSW) Inc v Secretary, Department of Human Services and Health & Anor* (1995) 56 FCR 50; *Ogle v Strickland* (1987) 13 FCR 306.

79 Persons who meet the criteria listed in s 84(3)(a) must notify the Federal Court in writing that they want to be a party to the proceedings within the specified timeframes: *Native Title Act 1993* (Cth), s 84(3)(b).

80 *Native Title Act 1993* (Cth), s 84(3)(iii). See also *Native Title Act 1993* (Cth), s 84(5): 'The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person's interests may be affected by a determination in the proceedings and it is in the interests of justice to do so'.

81 *Native Title Act 1993* (Cth), ss 84(3)(a)(i), 66(3)(a)(iv).

82 It is acknowledged that persons who become parties under ss 84(3)(a)(ii) or 84(3)(a)(i) (by virtue of ss 66(3)(a)(i)–(iii), 66(3)(a)(v)–(vi)) have interests of a nature that they would be substantially affected by a determination if it is made, and consequently they should not be required to make a formal application to the Court to be joined as a party.

If these amendments are made, the Court would retain the discretion as to whether to join the person as a party. However, raising the threshold for addition as a party, as well as requiring the proposed respondent to carry the burden of proof in establishing why they should be added, would contribute to the more effective management of the number of parties to claims.

In particular, claimants and primary respondents would have a firmer basis on which to challenge the addition of parties whose interests appear peripheral or adequately represented by other parties, together with a formal opportunity to make that challenge before the Court.

(c) Removal of parties throughout proceedings

Many people who become parties when a native title claim is first made may lose their relevant interest as the claim progresses. This might be due to changed circumstances over the intervening years or due to the fact that extinguishment is often not considered until late in the proceeding.

The Native Title Act already provides for the removal of parties from proceedings. Section 84 of the Act details a number of ways a party may be removed from the proceeding, such as through leave of the Court after the proceeding has begun.[83] Section 84(9) also states that the Court is to consider making an order that a person cease to be a party if the Court is satisfied that the person no longer has interests that may be affected by a determination in the proceeding.

However, the Court's powers to remove parties are not used regularly or consistently throughout native title proceedings. The most recent amendments to the Native Title Act give the Federal Court 'a central role' over the management of native title proceedings.[84] Complemented by focused amendments to provisions related to respondent parties, this power could enable proceedings and agreements to progress more efficiently.

The negotiation of the Thalanyji consent determination provides a practical example of where the Court's power to remove parties has been utilised:

> the NNTT, in co-operation with the registrars of the Federal Court, sought the making of orders by His Honour, essentially in the character of a springing order, which required all parties, except specified parties who were actively participating, to notify the Court of their intention to remain a party within a specified time. Failure to do this would lead to those parties losing that status. Due to the number of parties, the process involved a great deal of correspondence and telephone communication and was extremely time-consuming. However, in the end, in the Thalanyji matter, a significant number of parties (approximately one third) chose to withdraw voluntarily and, subsequent to the springing orders being made, all the remaining parties consented to the determination in the form proposed to the Court.[85]

83 *Native Title Act 1993* (Cth), s 84(7).

84 Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), p 1. At http://www.comlaw.gov.au/ComLaw/Legislation/Bills1.nsf/framelodgmentattachments/AFDD13BE259AA5D7CA25757F000DB152 (viewed 12 October 2009).

85 D O'Dea, *Negotiating consent determinations: Co-operative mediation – the Thalanyji experience* (Paper delivered to the Third Negotiating Native Title Forum, Melbourne, 19 February 2009), pp 28–29. At http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2009/Thalanyji%20Experience%20-%20Negotiating%20Consent%20Determinations.pdf (viewed 7 July 2009).

This example demonstrates the benefits of requiring parties to advise the court on a periodic basis how their interests continue to be affected by the proceedings in order to remain a party. I consider that the Native Title Act should be amended to require this. Such a process may assist with managing the current numbers of parties to native title proceedings.

Specifically, ensuring a regular 'clean up' of the party list could be achieved through amendments to s 84(9) of the Native Title Act. The Court should be required to regularly review the party list for all active native title proceedings and, where appropriate, require a party to show cause for its continued involvement.

The NNTT may also have a role to assist the Court, drawing on its expertise and access to information necessary to undertake such a review. The NNTT could also provide advice to the Court about parties that no longer hold the necessary interest to maintain party status.[86]

If the above proposals to raise the threshold for party status were to be adopted, this could encourage the more effective utilisation of the Court's power to remove parties. Above all, it would enable claimants and respondents to more effectively challenge the ongoing involvement of parties whose interests have faded or disappeared during the life of the claim.

(d) Exploring the potential for using representative parties

The use of representative parties may also assist in the management of the number of respondents to native title claims.

Representative parties can already be used in Federal Court proceedings in a number of circumstances. In particular, Order 6, Rule 13 of the Federal Court Rules deals with representative respondents. It enables the Court, at any stage in proceedings, to appoint any one or more of the respondents to represent others with the same interests.

Further consideration could be given to how this rule or a similar rule could be used to achieve a more rational management of parties in native title proceedings. The Australian Government could also explore legislative amendments to facilitate the appropriate use of representative respondents to streamline native title litigation.

(e) Improving transparency in respondent funding processes

Currently, respondents may be funded by the Commonwealth under the 'respondent funding scheme' to participate in native title proceedings.[87] The Attorney-General may make guidelines that are to be applied in authorising the provision of assistance.[88]

I consider that greater transparency in the implementation and operation of this funding scheme is required.

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86 Section 94J (formerly s 136DA) of the *Native Title Act 1993* (Cth) already allows a member of the NNTT to refer to the Federal Court the question of whether the party should cease to be a party.

87 *Native Title Act 1993* (Cth), s 213A (formerly s 183, until the commencement of the *Native Title Amendment Act 2009* (Cth)). For more information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 4. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 12 October 2009).

88 *Native Title Act 1993* (Cth), s 213A(5).

In 2006, the Australian National Audit Office observed that the Attorney-General's Department 'is unable to evaluate either the effectiveness of the Respondents Scheme at either the individual grant level or the contribution the programme is making to the larger Native Title System outcome'.[89]

In particular, little information is available regarding which parties are being funded to participate in the proceedings, how the Attorney-General's funding guidelines (the Guidelines)[90] are being applied and whether the ongoing funding of particular parties is appropriate.

The Native Title Act and the Guidelines need to ensure greater transparency in the funding process.

For example, the Guidelines allow for the withdrawal of funding in certain circumstances, including where the respondent fails to act reasonably.[91] Yet, the reference to a failure to act reasonably is not defined or clarified. It might be appropriate for s 213A or the Guidelines to be amended to stipulate that recipients of funding under the scheme must agree to abide by standards applied to the Commonwealth and its agencies under the Commonwealth model litigant guidelines appended to the Legal Service Directions.[92] Section 213A or the Guidelines could also stipulate that failure to comply with these standards may result in withdrawal of funding.

Further, the Guidelines or s 213A could be amended to articulate a mechanism by which other parties or the appointed mediator can apply to the Attorney-General to have a party's funding withdrawn where a respondent inappropriately undermines the conduct or resolution of a claim. This could occur, for example, where the appointed mediator is of the view that the party has refused to make a bona fide and reasonable endeavour to resolve the dispute.[93]

3.7 Promoting broader and more flexible native title settlement packages

(a) Background

> The challenge is … to effectively engage … and to transform the potential wealth that participation in resource extraction may bring, into a sustainable social and economic future for those communities most impacted by the resources boom.[94]

In this section, I consider the changes to law and process that are required to promote broader and more flexible native title settlement packages to support our social and economic development.

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89 Australian National Audit Office, *Administration of the Native Title Respondents Funding Scheme,* Audit Report No 1 (2006), p 133. At http://www.anao.gov.au/uploads/documents/2006-07_Audit_Report_17.pdf (viewed 16 October 2009).

90 Attorney-General, *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006).

91 *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* (2006), div 7.9.

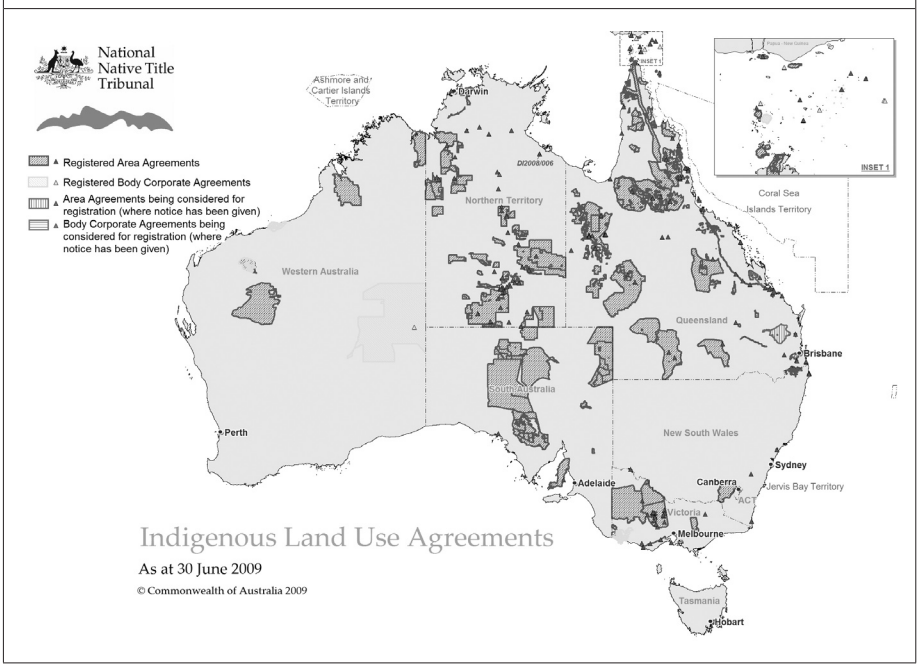
92 Legal Services Directions 2005, as amended, made under section 55ZF of the *Judiciary Act 1903* (Cth), app B.

93 See generally *Rubibi Community v State of Western Australia (No 7)* [2006] FCA 459, para 169.

94 L Godden et al, 'Introduction: Accommodating Interests in Resource Extraction: Indigenous Peoples, Local Communities and the Role of Law in Economic and Social Sustainability' (2008) 26(1) *Journal of Energy and Natural Resources Law* 1, p 22.

The 1998 amendments to the Native Title Act introduced a legal framework and process for the negotiation of ILUAs between native title holders and others about the use and management of lands, waters and resources. This agreement-making framework has gone some way to encourage negotiated outcomes and avoid costly litigation. As at 30 June 2009, 389 ILUAs had been registered with the NNTT.[95] See Map 3.1 for further information on ILUAs across Australia.

Map 3.1: Registered Indigenous Land Use Agreements as at 30 June 2009



Since 1996, Rio Tinto alone has signed nine major development agreements and negotiated more than 100 exploration agreements across Australia. This has resulted in a commitment of approximately $1.4 billion in social and economic investment over the next 20 years to Indigenous communities.[96]

However, the Government is concerned that the benefits accruing to Indigenous interests under native title agreements are not adequately addressing the economic and social disadvantage faced by Indigenous communities.[97] It has been estimated that only 12 of the hundreds of agreements that have been negotiated between

95 National Native Title Tribunal, *Annual Report 2008–2009* (2009), p 52. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20Report%202008-2009.pdf (viewed 7 December 2009).

96 Rio Tinto, *Submission to the House Standing Committee Inquiry to develop Indigenous Enterprises* (24 July 2008), p 10. At www.aph.gov.au/house/committee/atsia/indigenousenterprises/subs.htm (viewed 20 August 2009).

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

traditional owners and industry provide substantial benefits to Aboriginal and Torres Strait Islander people and exhibit principles embodying best practice in agreement-making.[98]

Further, agreements often deliver little in terms of cultural heritage protection or environmental management beyond what is already available under general legislation, and often require traditional owners to surrender their native title rights and interests.[99]

As discussed in Chapters 1 and 2 of this Report, the Government is seeking to build partnerships with Indigenous communities through 'equitable agreements'.[100]

Recent amendments to the Native Title Act enable the Federal Court to make determinations that cover matters beyond native title.[101] The Native Title Amendment Act 2009 (Cth) clarifies that the Court can make orders that reflect agreements made by the parties.

There are a number of matters that could be included in such agreements, including economic development opportunities, training, employment, heritage, sustainability and existing industry principles.[102]

The power for the Court to make orders about matters other than native title may also provide a mechanism for the 'alternative recognition of traditional ownership' (discussed in section 3.2, above), even in cases where native title was not determined to exist.

These reforms can ensure that agreements are formally recognised and more readily enforceable. This approach could also encourage parties to negotiate native title claims more laterally, creatively and flexibly, rather than to simply negotiate on an 'all or nothing' basis in relation to the determination of native title.

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98 Native Title Payments Working Group, *Report* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC (viewed 12 October 2009).

99 C O'Faircheallaigh, 'Aborigines, Mining Companies and the State in Contemporary Australia: A New Political Economic or Business as Usual?' (2006) 41(1) *Australian Journal of Political Science* 1, p 17.

100 R McClelland (Attorney-General), *Native Title Consultative Forum* (Speech delivered at the Native Title Consultative Forum, Canberra, 4 December 2008), para 7. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2008_FourthQuarter_4December2008-NativeTitleConsultative Forum (viewed 16 November 2009).

101 Section 86F of the Native Title Act recognises that broad agreements can be negotiated. As drafted prior to the *Native Title Amendment Act 2009* (Cth), the Act did not clearly provide that it was within the Court's jurisdiction to make determinations dealing with matters beyond native title, or recognise that the Court may be able to assist the parties to negotiate side agreements covering matters beyond native title: Attorney-General, *Discussion Paper: Proposed minor native title amendments* (2008), p 4. At http://www.ag.gov.au/www/agd/rwpattach.nsf/PublicbySrc/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf/$file/Native+Title+Amendment+Bill+2009+-+Discussion+paper.pdf (viewed 19 October 2009). The 2009 amendments allow the Court to make separate orders, under ss 87 and 87A, covering matters beyond native title. The parties would have to agree on these further matters. The change allows the Court to assist parties to resolve native title and related matters at the same time and is intended to create more certainty, more finalised native title claims and better outcomes for stakeholders. See the Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), p 31.

102 Explanatory Memorandum, Native Title Amendment Bill 2009 (Cth), p 6. See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), chs 4–6, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Human Rights and Equal Opportunity Commission (2008), ch 11, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

For example, the South Australian Native Title Services commented as follows:

> Depending on the terms of the agreement, native title claim groups who are either unable to establish native title by agreement, or are willing to surrender native title to avoid the risk of a determination of no native title, could secure other orders as to the terms of an agreement reached i.e. recognition of traditional rights, transfers of land etc.[103]

The ability for the Court to make orders concerning non-native title outcomes may provide a mechanism whereby agreement-makers are able to coordinate the multiple and complex agreements that they are party to under various legal regimes, including lands rights and heritage legislation. This would allow these agreements to provide comprehensive strategic directions for Indigenous communities.

It is positive that the Government is encouraging parties (including states and territories) involved in native title claims to work together to reach agreements with broad and beneficial outcomes. However, the 'broader settlement' framework needs to be accompanied by amendments to address inadequacies and inequality in the Native Title Act.

There are many ways that agreement-making processes could be improved, including:

- strengthening procedural rights and addressing concerns with the future acts regime
- amending the definition of native title in s 223 to include rights and interests of a commercial nature
- using long-term adjournments to support agreement-making
- developing the capacity of communities to engage in effective decision-making.

(b) Strengthening procedural rights and the future acts regime

The future acts regime is an essential element of the Native Title Act. Its strengths (or weaknesses) directly impact on the way parties behave in negotiating agreements. The operation of the regime is integral to good agreements which benefit the parties – a priority of this Government. I recommend that the Government consider how the future acts regime can be amended to strike a better balance between native title and non-native title interests and create stronger incentives for the beneficial agreements the Government wants to see.

The right to negotiate regime is also a crucial element of the Native Title Act. It should not be construed narrowly.[104]

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103 South Australian Native Title Services, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 14 August 2009.

104 *Smith on behalf of the Gnaala Karla Booja People v State of Western Australia* [2001] FCA 19.

Text Box 3.3: Procedural rights

The right to negotiate[105]

Part 2, Division 3 of the Native Title Act makes provision for registered native title claimants to access procedural rights where mining tenements and certain compulsory acquisitions of native title rights and interests are being sought. These procedural rights amount to a 'right to negotiate' and apply to any act that would be invalid to the extent that it affects native title, unless done in accordance with the Native Title Act.

Generally, a government has two options to validly do an act that attracts the right to negotiate. It can either negotiate an ILUA with the native title holders and carry out the act in the manner allowed by that ILUA, or it must comply with the 'right to negotiate' procedures set out in Subdivision P of the Native Title Act. Section 29 of the Native Title Act requires that before the doing of a future act under Subdivision P, the relevant government must give notice to native title parties and the public.

The future acts regime[106]

The Native Title Act seeks to protect native title rights by prescribing procedures that Commonwealth, state and territory governments must comply with before a future act can be validly done. Generally speaking, if a government department or agency is planning to do an act that has the potential to affect native title, governments involved in such activities need to consider the requirements of the Native Title Act.

A future act is an act done after 1 January 1994 (the date of the commencement of the Native Title Act) that affects native title. An act 'affects' native title if it extinguishes or is otherwise wholly or partly inconsistent with the continued existence, enjoyment or exercise of native title. The word 'act' is defined widely to include the making or amendment of legislation, the grant or renewal of licences and permits, and can include executive actions in some circumstances. An act of government may 'affect' native title if, for example, it allows someone to do an activity on native title land that they otherwise have no right to do, or it prevents a native title holder from doing what their native title entitles them to do. If a future act does not fit within the relevant subdivisions of the Act, it can only be validly done in accordance with a registered ILUA.

However, the future acts regime in its present form has been the subject of international criticism.[107] And, as Sarah Burnside notes, recent decisions have illustrated the limitations of the right to negotiate, stemming from the terms of the Native Title Act and the way they have been interpreted by the NNTT and the Federal Court.[108]

105 Attorney-General's Department, *The right to negotiate and the expedited procedure*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Therighttonegotiateandtheexpeditedprocedure (viewed 26 August 2009).

106 Attorney-General's Department, *The future acts regime*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Thefutureactsregime (viewed 26 August 2009).

107 For further analysis, see W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Human Rights and Equal Opportunity Commission (2000), ch 2. At http://www.humanrights.gov.au/word/social_justice/native_title_report_99.doc (viewed 19 October 2009).

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

The following reforms could address some of these limitations.

(i) Improving procedural rights over offshore areas

Procedural rights over the sea and offshore areas are limited, with the right to negotiate not being available for acts occurring below the high water mark.[109] However, the Court has considered that there is native title in offshore areas and this Government has recognised that native title can exist up to 12 nautical miles out to sea.[110] This recognition seems inconsistent with the limitations on procedural rights over the sea. This situation could be improved by the repeal of s 26(3) of the Native Title Act.

(ii) Addressing compulsory acquisition and extinguishment

Section 24MD(2)(c) of the Native Title Act currently states that compulsory acquisition extinguishes native title. As originally enacted, s 23(3) of the Native Title Act stated that acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition that led to extinguishment. There appears to be no policy justification for the current position. I consider that it would be appropriate for s 24MD(2)(c) be amended to revert to the wording of the original s 23(3).

(iii) Strengthening the requirement to negotiate in good faith

Parties are prevented from resorting to an arbitral body (usually the NNTT) for a period of six months from the issue of a notice that the government intends to grant a mining tenement.[111] During this negotiation period, s 31 of the Native Title Act obliges the parties involved to negotiate in good faith.

In Chapter 1, I reviewed the Full Federal Court's decision in *FMG Pilbara Pty Ltd v Cox* (*FMG Pilbara*).[112] It is clear from this decision that it is difficult for claimants to establish that a mining company has not acted in good faith.

Several problems are evident in the wake of the *FMG Pilbara* decision, which deserve the close attention of the Australian Government.

Reconsidering time periods for negotiations

The Native Title Act imposes a severe time constraint on mining negotiations. Six months is a very short period for the establishment of negotiations protocols, assembly of relevant information, presentation of proposals, discussions amongst native title parties and their advisers, the making of offers and counter-offers and so on. This is particularly so in areas such as the Pilbara where the abundance of mining activity creates huge pressures on under-resourced NTRBs. For situations where no claim is on foot, a credible application has to be prepared, lodged and registered within the first four months after the notice period.

The same statutory time limits apply regardless of the breadth of negotiations. In *FMG Pilbara*, the parties had sought to conclude an agreement on a 'whole of claim' basis. This not only sought to make efficient use of time and resources, but offered the mining company the prospect of much greater long-term resource security. Such negotiations are necessarily far more complex than the grant of a single

109 *Native Title Act 1993* (Cth), s 26(3).

110 See, for example, R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009), para 30. At http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2009_20February2009-3rdNegotiatingNativeTitleForum (viewed 4 September 2009).

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

112 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.

mining tenement. In this case, negotiations with one of the native title parties had not proceeded far past the conclusion of a preliminary protocol agreement on how the planned comprehensive negotiations were to be conducted. I find it difficult to agree with the Full Federal Court's assessment that six months 'ensures that there is reasonable time to enable those negotiations to be conducted'.[113]

Under such time pressures, miners can drive a very hard bargain on questions such as compensation, knowing that an arbitral body cannot make a mining grant conditional on a royalty or similar payment.[114]

The same six month time limit is also imposed regardless of whether the parties have negotiated before and have, for example, a process agreement in place to regulate their talks.

The brevity and uniformity of time limits under the right to negotiate need to be reviewed. Alternatively, s 31 could be amended to require parties to have reached a certain stage before they may apply for an arbitral body determination.

Shifting the onus of proof

In relation to s 31, the burden of proof for establishing the absence of good faith negotiations is on the native title party. Shifting the onus onto the proponents of development, to positively show their good faith, is likely to alter their behaviour during negotiations and alleviate some of the current unfairness embedded in the right to negotiate process. It may improve the quality of the offers made by miners and discourage conduct such as bringing negotiations to an end mid-stream and seeking arbitration without notice to the native title parties.

Revisiting the onus of proof offers another means for improving the fairness of the right to negotiate procedure and is likely to encourage agreement-making.

Allowing arbitral tribunals to impose royalty conditions

Agreements struck during the six month good faith negotiation period regarding a mining act or a compulsory acquisition can include provisions for royalties or profit sharing.[115]

Pursuant to s 38, if an agreement is not reached and the matter is referred to the NNTT for arbitration, the NNTT must make a determination either that the act:

- must not be done
- may be done
- may be done subject to conditions to be complied with by any of the parties.[116]

However, under s 38(2), the NNTT cannot a make a determination that an act may be done subject to conditions of profit-sharing or the payment of royalties.[117]

113 *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49, para 21.
114 *Native Title Act 1993* (Cth), s 38(2).
115 *Native Title Act 1993* (Cth), s 33.
116 *Native Title Act 1993* (Cth), s 38(1).
117 *Native Title Act 1993* (Cth), s 38(2).

When the drafters of the Native Title Act in 1993 denied the NNTT the capacity to include a royalty-style condition in an arbitral determination, their decision was premised on a certain prediction about the balance of power under the right to negotiate. As events have transpired, the drafters clearly over-estimated the impact on miners of a six-month hiatus in the approvals phase of a mining project. The premise of the drafters' decision has been falsified and that has seriously diminished the quality of outcome typically obtainable by native title parties from the right to negotiate.

As Tony Corbett and Ciaran O'Faircheallaigh observe, this creates a 'fundamental inequality'[118] and 'places native title holders and claimants under considerable pressure to conclude an agreement within the negotiation period'.[119]

The Victorian Government has recommended amendments to the Native Title Act to allow 'the arbitral body to make determinations about the amount of profits, income and productions that were the subject of negotiations'.[120] I also believe that s 38(2) should be reconsidered.

(c) Recognition of commercial rights

The Government has stated that it considers that Indigenous communities should be using their native title rights to leverage economic development.[121] The link between native title and economic development has been further acknowledged by the Government through its decision to include native title in its Indigenous Economic Development Strategy.[122]

Agreement-making can be an important vehicle for social and economic development. However, the Native Title Act does not clearly provide for the recognition of commercial rights.

This may prevent a community from being able to use native title rights to support their economic development aspirations.

Courts have often appeared to take the view that customary Indigenous laws and customs for the purpose of native title do not include commercial activity. This perception has created distinction between customary rights and commercial rights.[123]

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118 C O'Faircheallaigh, *Submission to the Department of Families, Housing, Community Services and Indigenous Affairs on Optimising Benefits from Native Title Agreements* (February 2009), pp 3–4.

119 T Corbett & C O'Faircheallaigh, 'Unmasking the politics of native title: the National Native Title Tribunal's application of the NTA's arbitration provisions' (2006) 33(1) *University of Western Australia Law Review* 153, pp 157–158.

120 Victorian Government, *Comments on the Australian Government's Discussion Paper Proposed minor native title amendments* (2008), p 7. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Submission+-+Victorian+Department+of+Justice.pdf/$file/Submission+-+Victorian+Department+of+Justice.pdf (viewed 17 August 2009).

121 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), *Beyond Mabo: Native title and closing the gap* (Speech delivered as the 2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008), p 3. At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/beyond_mabo_21may08.htm (viewed 19 October 2009).

122 See further, Chapter 2 of this Report.

123 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 10. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

There is growing evidence that this distinction is neither necessary nor accurate. For example, in the *Native Title Report 2007* I considered the experience of the Gunditjmara people in Victoria who were able to prove that their ancestors had established an ancient aquaculture venture. The Federal Court recognised their native title rights and the Gunditjmara peoples are now using these rights to re-establish commercial eel farming.[124]

Further, the high evidential bar for establishing the relevant bundle of native title rights excludes or significantly limits the prospect of commercial rights being recognised. For example, in *Yarmirr v Northern Territory* at first instance, in response to evidence of trade with neighbouring tribes in clay, bailer shells, cabbage palm baskets, spears and turtle shells, Olney J held:

> The so-called 'right to trade' was not a right or interest in relation to the waters or land. Nor were any of the traded goods 'subsistence resources' derived from either the land or the sea.[125]

His Honour also observed that evidence of trade with Macassan fishermen related only to the gathering of trepang, but did not assist in establishing rights or interests in relation to other resources of the sea.[126]

This is a very narrow approach to the characterisation of rights. In addition to an uninterrupted practice of commercial fishing, his Honour appeared to require further proof of a specific traditional right to commercial fishing before he would accept it as a 'right or interest in relation to waters'. Furthermore, even if a community could establish such a continuous right, his Honour's reasoning then calls for a 'drilling down' to the particular species being traded (such as trepang), rather than allowing a more generic right to trade in the marine resources of the claim area.

I consider that the definition of native title in s 223 should be amended to include rights and interests of a commercial nature. This would help to clarify that native title rights and interests should not be regarded as inherently non-commercial. Such an amendment might also provide guidance as to what evidential requirements must be met in establishing a commercial native title right and the scope of that right.

I also consider it appropriate for the Government to pursue amendments that discourage courts from over-specifying the rights and that allow for a reasonable level of generality. For example, a court could recognise a right to trade in resources of the area rather than confining the right to trading in specific species only under certain conditions.

In the *Native Title Report 2007,* I also raised the problem that even if commercial native title rights and interests are proven and recognised by the court, the commercialisation of those native title rights would remain subject to relevant state and territory laws and regulations.[127] The important protections for native title holders in s 211 of the Act would be unavailable due to its focus on non-commercial rights.

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124 *Lovett on behalf of the Gunditjmara People v State of Victoria* [2007] FCA 474. See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 225–227. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

125 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 587[D].

126 *Yarmirr v Northern Territory* (1998) 82 FCR 533, 588[C]. This approach appears to have been endorsed by Beaumont and von Doussa JJ in the Full Court, where their Honours noted 'the group was confronted with obvious difficulties in seeking to prove title to resources of the kind in question, given their diversity of specific character and location in a relatively large area of sea': *Commonwealth v Yarmirr & Ors* (2000) 101 FCR 171, 231.

127 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Human Rights and Equal Opportunity Commission (2008), pp 223–224. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

Section 211 of the Native Title Act provides native title holders with immunity from government permit or licensing regimes, when they carry on activities such as fishing and hunting in the exercise of their native title rights.

If a government regulates an activity under the section, then that regulation does not apply to restrict native title rights and interests to the extent that the activities are undertaken for personal, domestic or *non*-commercial needs. As a result, even if Indigenous people can overcome all of the s 223 requirements, any commercial use of their native title rights remain subject (and vulnerable) to government regulation. In short, having travelled the long road to establish a commercial native title right, the claimant would nevertheless still need to join the queue for the applicable permit or licence to engage in commercial activities.

There are valid reasons why regulation of a commercial activity in respect of native title rights is necessary, particularly in respect of protecting public safety, competing rights and interests and the environment. However, I propose that the Government explore options that would limit the impact of government regulation in relation to holders of native title rights in appropriate cases. For example the Government could explore options for:

- state and territory governments to afford priority treatment for native title holders in obtaining applicable permits and licences to commercialise the relevant right
- developing limited markets for particular commercial activities, such as trade within and between particular native title groups in a particular industry. Such limited markets could be freed from more complex layers of regulation that might otherwise apply and could be adapted to be more culturally appropriate to the particular groups and activities.

(d) Disregarding extinguishment

As discussed in the *Native Title Report 2002*, the breadth and permanency of the extinguishment of native title through the Native Title Act is contrary to Australia's international human rights obligations.[128] It is also an unnecessary approach, without a satisfactory policy justification.

I consider that the Government should explore alternatives to current approaches to extinguishment.

For example, Chief Justice French suggests that the Native Title Act could be amended to allow extinguishment to be disregarded where an agreement is entered into between the state and the applicant. The Chief Justice further suggests that this could be limited to situations where the land in question is Crown land or a reserve:

> If, for example, the vesting of a reserve was taken to have extinguished native title an agreement of the kind proposed could require that extinguishing effect to be disregarded while either applying the non-extinguishment principle under the [Native Title Act] or providing in the agreement itself for the relationship between native title rights and interests and the exercise of powers in relation to the reserve.[129]

128 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002,* Human Rights and Equal Opportunity Commission (2003), ch 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/chapter2.html#1.2 (viewed 12 January 2009).

129 Chief Justice RS French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, 13.

According to the Chief Justice, ss 47–47B provide a model for such a provision. These provisions provide for prior extinguishment concerning pastoral leases held by native title claimants, reserves and vacant Crown land to be disregarded in certain circumstances.

The Native Title Act could be amended to provide a greater number of specific circumstances in which extinguishment may be disregarded.

(e) Providing for long-term adjournments

In the course of collecting information for the *Native Title Report 2008*, I received suggestions from a number of stakeholders who believed that the Native Title Act should allow the parties (where the claimant and the primary respondent consent) to request a long-term adjournment. This would give the parties the room and time to negotiate ancillary outcomes, without being under pressure from the Court to resolve the determination of native title. For example, Victorian Attorney-General Robert Hulls MP has commented:

> The problem sometimes arises where these broader outcomes are not being realised because of pressure from the Court to resolve the native title question more quickly. This can lead to missed opportunities for Traditional Owners, or ancillary agreements that are difficult to implement because the policy development behind them was rushed. Preparing for regular Court appearances can divert resources from making progress on negotiating broader agreements.[130]

Under s 86F of the Native Title Act, the Court can order an adjournment to help negotiations. It may do this on its own motion or on application by a party. The Court can then end the adjournment on its own motion, on application by a party, or if the NNTT reports that the negotiations are unlikely to succeed.[131] However, Graeme Neate, President of the NNTT, has stated in respect of s 86F that the parties 'should not assume that alternative or even related agreement-making will be accepted by the Court as legitimate reason for delaying resolution of the claim'.[132]

Section 86F could be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

- the prospect of a negotiated outcome being reached
- the resources of the parties
- the interests of the other parties to the proceeding.

130 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

131 *Native Title Act 1993* (Cth), ss 86F(3), 86F(4).

132 G Neate, *Native title claims: Overcoming obstacles to achieve real outcomes* (Paper delivered at the Native Title Development Conference, Brisbane, 27 October 2008), p 36. At http://www.nntt.gov.au/News-and-Communications/Speeches-and-papers/Documents/2008/Overcoming%20obstacles%20to%20achieve%20real%20outcomes%20-%20Graeme%20Neate%20-%20October%202008.pdf (viewed 19 October 2009).

(f) Building the capacity of Indigenous communities to effectively engage in agreement-making

(i) Prerequisites for effective engagement

We as Indigenous stakeholders must be central participants in setting the development goals and agendas of our communities. It is imperative that those most affected by legislation or policy are actively included in the process of negotiating and deciding upon the economic and social details that will impact our communities.

Being able to fully understand agreement processes and having the time, the resources and the platform to participate meaningfully in decision-making are prerequisites for being able to give our free, prior and informed consent. This is the foundation of real self determination.

In the *Native Title Report 2006,* I presented the results of a national survey on land, sea and economic development.[133] The survey results demonstrated that the majority of traditional owners did not have a good understanding of agreements.

The survey results also demonstrate what communities feel they need in order to effectively engage in agreement-making processes and leverage opportunities from agreements.

Text Box 3.4: Survey on land, sea and economic development – 2006[134]

Understanding agreements

Only 25% of traditional owner respondents claimed an understanding of agreements, while 60% of their representative bodies claimed that traditional owners were able to understand agreements. This raises questions about whether our representatives are aware of the level of comprehension, the extent to which traditional owners are able to give informed consent to land decisions, and ultimately our capacity to effectively participate in negotiations. This can limit our ability to leverage opportunities from our lands. One traditional owner commented:

> Stop giving us tonnes of paperwork that we don't understand, put it clearly in simplified plain English, otherwise people sign on the dotted line without understanding what they're signing to.[135]

Traditional owners and their representative entities were asked to identify the three most significant factors preventing their understanding of land agreements.

133 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

134 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

135 Traditional owner from North Queensland (not specified), quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), p 25. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

The survey responses showed that the complex and technical terminology of native title and land rights is the greatest barrier. Almost all survey respondents cited some form of difficulty in understanding agreements. The following comments are typical of many responses:

> The Aboriginal Land Act was set up by lawyers and anthropologists …only the professionals can understand it … [they] become the gatekeepers and owners of our knowledge, they run everything on our behalf.[136]
>
> We need clear explanations of matters of law, anthropology and political development…The procedures are unfair and biased against Indigenous people. Our people are misled and individuals are paid off to act outside our social and decision-making structures.[137]

A lack of Indigenous perspective in the processes and a lack of information were also identified as the most significant factors preventing an understanding of land agreements.

Traditional owners and their representatives were asked to identify the three most important actions or resources that would help them understand and participate in land agreements.

- 90% of survey respondents identified the need to conduct meetings and workshops with traditional owner groups to explain agreements as the top priority
- 51% identified the need for plain English native title information
- 16.6% of respondents identified the amount of time afforded for consideration prior to giving a decision on aspects of agreements as equally important as training in governance and administration.

The survey also highlighted the need for an information campaign to improve understanding of land regimes and the funding and support programs available to assist indigenous people in pursuing economic and commercial initiatives. In particular, there is clearly a need to run workshops and meetings to explain native title and land rights regimes.

Leveraging opportunities from agreements

Survey respondents were asked to nominate the three most important resources required to progress development on land.

- 42% of survey respondents claimed that they need skilled personnel to support them
- 39% of survey responses identified funding, or an income source, as one of the top priorities to progress and support development on land
- 13% of respondents identified a need for training and employment.

136 Traditional owner of the Umpila territories, Cape York, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

137 Traditional owner of the Gubbi Gubbi and Butchulla territories, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

An economic base is required for any enterprise. Survey respondents also identified infrastructure as a major requirement for economic development, including roads, offices, equipment and capital. The lack of infrastructure in remote locations of Australia must not be underestimated in any discussion about economic development. A traditional owner commented that '[i]nfrastructure is needed badly. Our capacity is limited to volunteer work and no professional assistance'.[138]

Some survey respondents identified land ownership as a precondition for economic development.

I consider that the lack of understanding identified in the survey is a major impediment to the development of sustainable and beneficial agreements. Certainly, communities require improved access to resources to support them in their negotiations. Yet, I believe that the process of agreement-making could become easier to understand and to participate in if:

- communities were able to access other agreements, where appropriate, to learn from best practice models and the experience of other negotiations
- agreement-making was conducted in a spirit of cross-cultural communication.

I consider these options below.

(ii) Increasing access to agreements, including examples of best practice or 'model' agreements

One way to equip communities with information to assist them to negotiate and understand agreements would be to make examples of agreements widely accessible.

Native title agreements are confidential, in whole or in part. Indigenous peoples are entitled to have confidential information appropriately protected.

However, the Native Title Payments Working Group has argued that 'unnecessarily broad confidentiality provisions in agreements' results in a 'lack of available data about the terms of many native title agreements', which works against the interests of native title holders as a whole. Drafters of agreements can be more targeted and selective in identifying the aspects of an agreement that warrant confidentiality. Meanwhile greater transparency on issues such as structure and technical content can assist other native title groups entering into future negotiations.[139]

Victoria is attempting to strike a better balance between accessibility and confidentiality. For agreements entered into under the Victorian Alternative Settlement Framework (discussed in Chapter 1 of this Report), the state government will not seek for any part to be confidential. However, it will agree to reasonable requests from traditional owners to protect sensitive information.[140]

138 Traditional owner of the Gubbi Gubbi and Butchulla territories, quoted in quoted in T Calma, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), p 26. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/chp_1.html (viewed 12 August 2009).

139 Native Title Payments Working Group, *Report* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC (viewed 12 October 2009).

140 Department of Justice, Native Title Unit (on behalf of the State of Victoria), *Submission on Australian Government's discussion paper: "Optimising Benefits from Native Title Agreements"* (undated), p 12.

Further consideration should be given to expanding the information about agreements that is publicly available, while also respecting confidentiality, privacy obligations and the commercial in confidence content of agreements.

Existing mechanisms for sharing agreements, such as the Agreement, Treaties and Negotiated Settlements Project, hosted by Melbourne University, and the NNTT's Register of Indigenous Land Use Agreements (the Tribunal's Register) could be utilised more effectively for this purpose.

For example, s 199B of the Native Title Act specifies the details of agreements that are required to be entered on the Tribunal's Register. The Victorian Department of Justice suggests that the Tribunal's Register could be better utilised and provide access to greater levels of information if s 199B was amended to broaden the list of details that must be included on the Tribunal's Register.[141]

I also consider it important that further research be conducted into 'best practice' or 'model' agreements. We have much to learn from agreements such as the Argyle Participation Agreement, which I profiled in my *Native Title Report 2006* and discuss further in Text Box 3.5.[142]

Text Box 3.5: The Argyle Participation Agreement

The Argyle Participation Agreement was made up of two parts. The first part was the ILUA, which is legally binding on the parties and outlines and formalises the financial and other benefits that traditional owners receive (the confidential issues). It also specifies how the benefits are to be administered, and contains a process that ensures that the traditional owners' native title rights and interests are recognised to their fullest potential.

The second part was the Argyle Management Plan Agreement, which contained eight management plans that dealt with a number of areas important to the traditional owners, such as:

- Aboriginal site protection
- land access
- land management
- training and employment
- cross-cultural training
- decommissioning of the mine
- business development and contracting
- Devil Devil Springs – a significant site.

The traditional owners were happy to make the framework behind the ILUA available to other Indigenous peoples to assist them in these processes. However, the financial component and issues concerning traditional knowledge remain confidential.

141 Department of Justice, Native Title Unit (on behalf of the State of Victoria), *Submission on Australian Government's discussion paper: "Optimising Benefits from Native Title Agreements"* (undated), p 12.

142 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009). Other examples of templates and framework agreements are considered in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 4, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 29 October 2009); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 11, at http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 19 October 2009).

A further option is to draw upon these best practice examples to create template agreements or clauses that native title holders and their representatives can tailor to their circumstances. This could save traditional owners time and resources. It could also assist them to learn from the experiences of others. Such templates could provide clear guidance to other parties (including governments) as to best practice.

However, it is important that these templates be as flexible as possible, and that they be used as a starting point for discussions rather than treated as definitive or restrictive frameworks.

(iii) Encouraging cross-cultural communication and understanding

It is also important that agreement-making processes are tailored to enable the full and effective participation of traditional owners. For example, two-way cultural communication processes can provide opportunities for non-Indigenous parties to practically understand the cultural and spiritual importance of the lands they are seeking to access. It can also assist the native title holders to understand what will happen on their lands as a result of granting access. This approach has proven beneficial in previous negotiations.

The negotiating process that led to the Argyle Participation Agreement illustrates a powerful example of how this can be done.

Text Box 3.6: The Argyle Participation Agreement: Negotiation process[143]

The preparations for negotiation included a process for recognition and co-operation between two systems of law: Western law and Indigenous law. The mediation and negotiation processes guided by the Native Title Act and ILUA regulations met the requirements of Western law, while the conduct of particular ceremonies at the mine site met the responsibilities of Indigenous traditional law.

In the early meetings, the traditional owners made the point: 'we are not moving on with your system until you hear our grief, pain, distress and hurt from the past'. According to meeting participants, many of the early meetings had no formal agenda and Argyle Diamonds personnel made a point of listening to the traditional owners and apologising for the past.

The parties to negotiations recognised that there were implicit power imbalances between the mining interests and the traditional owner interests. Argyle Diamonds endeavoured to redress the imbalance by ensuring that communication was tailored to the needs of the traditional owners. Traditional owners were taken on tours of the mine, including the underground mine. Different visual strategies were developed to assist with explanations of the impact of the mining activity on their country. Translators were used throughout to ensure that everyone could follow and participate in the negotiations. All key documents were prepared in a format that included plain English interpretations.

The traditional owners also recognised that representatives of Argyle Diamonds required interpretations of the traditional processes of agreement-making and traditional law of the region. In a reciprocal process, the traditional owners provided the mining company representatives with information about their laws and customs. They also performed ceremonies to ensure that the mining operation could be conducted free from danger and interruption by the local Dreaming beings and spirits of the 'old people'.

143 See further T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006,* Human Rights and Equal Opportunity Commission (2007), ch 5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009).

Ted Hall, Chairperson of the Gelganyem Trust described what he saw as the legacy of the Argyle Participation Agreement for the traditional owners:

> It's been empowering, it has empowered us to made decisions on our own terms. We determine what happens in our area. We set the terms and goals and we are achieving them also. This process has bought unity between the elders and the young. The young bring the education and the elders bring the knowledge.[144]

The Argyle experience demonstrates the importance of a culturally appropriate negotiating process. I consider that further research should be conducted into best practice negotiating experiences. This research could involve the development of case studies and clear principles that other negotiating parties can access and learn from.

(g) Promoting a regional approach to agreement-making

The preamble to the Native Title Act provides that:

> Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:
>
> a. claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders
>
> b. proposals for the use of such land for economic purposes

Regional agreements are not new in Indigenous affairs. The previous Australian Government contemplated the use of broader Regional Partnership Agreements (RPAs) to complement its policy of pursuing more community-specific Shared Responsibility Agreements (SRAs), although only three RPAs were concluded (in 2005 and 2006).[145]

The benefits of regional agreements include that they:

- are a means of eliminating overlaps or gaps and promoting collaborative effort to meet identified regional needs and priorities
- seek to build communities' capacity to control their own affairs, negotiate with government, and have a real say in their region's future.
- should not affect Aboriginal people's access to benefits or services available to all Australians.[146]

Regional agreements may prove effective in the management of the various land dealings that are the responsibility of Indigenous land holders. The expanded breadth of Prescribed Bodies Corporate (PBCs) to also manage land trust responsibilities, for example those negotiated over national park lands, or lands held for the benefit of Aboriginal peoples could also be provided for in regional agreements. Governments will need to ensure that PBCs are adequately resourced and supported to undertake this duty.

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144 T Hall, quoted in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), p 136. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2009).

145 For further information about RPAs and SRAs, see Australian Government, *Indigenous Portal,* https://www.indigenous.gov.au/sra.html (viewed 12 October 2009).

146 Department of Indigenous Affairs (Government of Western Australia), *Regional Partnership Agreements*, http://www.dia.wa.gov.au/Our-Business/Partnerships/ (viewed 4 September 2009).

(h) Improving mechanisms for evaluation and monitoring

The Australian Government has identified that regular review of long-term objectives and the extent to which these are being met is a critical feature of a good agreement.[147]

The National Native Title Tribunal has also stressed that:

> Review mechanisms are important elements in helping to maintain and keep an agreement 'on-track', ensuring that the respective expectations and objectives of the parties are managed, as well as to ensure on-going communication between the parties. Few agreements appear to make provision for periodic or regular review despite the fact that it provides clear opportunities for the parties to get together to objectively examine the progress of an agreement. They do not need to wait for a dispute to arise to trigger communication. It may be a useful strategy to 'stage' implementation, and to undertake reviews when identified objectives or targets are reached.[148]

I consider that native title agreements should provide for regular review. During such reviews, parties could:

- monitor the progress on the implementation of the agreement
- evaluate the benefits derived from the agreement, including the social, economic, environmental and cultural benefits received by the Indigenous community
- consider issues concerning compliance with the terms of the agreement and identify any barriers to compliance
- consider whether outcomes remain achievable and relevant.

I recommend that the Australian Government work with native title parties to identify and develop criteria to provide guidance on how to monitor, measure, and evaluate agreements. It may be that the NNTT could play a central role in developing and promoting such criteria.

3.8 Initiatives to increase the quality and quantity of anthropologists and other experts working in the native title system

Assembling the expert services necessary to achieve a native title determination or to pursue complex negotiations with governments and miners is a time-consuming and expensive aspect of the native title system. However, native title claimants must have access to the necessary expertise to achieve the best outcomes. This may require advice from anthropologists, economists, investment advisors, business managers, contract lawyers and many others.

The Native Title Payments Working Group was established in 2008 by the Australian Government to advise on maximising benefits from native title agreements. It considered that any significant future act negotiations should be based on the

147 Australian Government, *Australian Government Discussion Paper* (undated), p 6. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC (viewed 12 October 2009).

148 M Allbrook & M Jebb, *Implementation and Resourcing of Native Title Agreements: Final Report,* National Native Title Tribunal (2004), p 23. At http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Implementation%20and%20resourcing%20of%20native%20title%20and%20related%20agreements.pdf (viewed 25 August 2009).

principle that traditional owners should have advice and representation of a similar quality as the mining company or other proponent. In other words, there should be a level playing field.[149]

A mining company would not come to the negotiating table without all of the necessary expertise required to secure the best protection possible for their interests. But many native title bodies do not have sufficient access to this expertise in-house. Nor do they have sufficient resources to obtain it by contracting-out. Non-recurrent funding also impacts upon the ability of native title bodies to recruit and retain experienced experts. NTRBs are substantially under-resourced for the tasks they are expected to perform or manage.[150] As a result, the playing field is often far from level.

In addition to providing further funding to NTRBs and PBCs, this inequality could be addressed by:

- establishing a register of experts
- promoting better use of independent experts in native title claims
- improving training and development opportunities for anthropologists.

(a) Establishing a register of experts

An innovative response to this issue would be for the Government to fund a register of experts through which NTRBs and native title parties have access to the expertise they require to negotiate the best native title agreement possible.

The register could also serve as a quality control mechanism – to be included on the register, experts should be required to prove that they meet relevant professional and ethical standards.

The expert register could extend to professions such as:

- interpreters
- legal and financial experts
- anthropologists.

There may be existing mechanisms that can be built upon and accessed by those engaged in native title processes. For example, the Government constituted and has maintained an Australia-wide panel of consultants to assist with its Indigenous affairs policies and to negotiate SRAs. These experts are required to undertake a number of roles including facilitating, negotiating, providing training to government employees, and providing support to community members.[151]

A register of experts will require dedicated resources. However, it can lead to the making of good agreements – facilitated by skilled negotiators and entered into by capable communities who know their rights.

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149 Native Title Payments Working Group, *Native Title Payments Working Group Report* (undated). At http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_wg_report/Native_title_working_group_report.pdf (viewed 10 August 2009).

150 Attorney-General's Department, *Closing the Gap – Funding For the Native Title System (Additional Funding and Lapsing): Budget 2009–10*, Fact Sheet (2009). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_FundingFortheNativeTitleSystem(AdditionalFundingandLapsing) (viewed 19 September 2009). See further, my comments in Chapter 1 of this Report.

151 Success Works, Melbourne Australia, *Facilitation of Community Development and Engagement, Department of Immigration and Multicultural Affairs (DIMIA) (current)*. At http://www.success-works.com.au/projects.htm (viewed 28 August 2009).

(b) Better use of independent experts in native title claims

Over the past five years, I have voiced concerns about the inappropriate nature of, and the negative consequences that flow from, the adversarial system in which native title is determined. I have supported changes to lessen the impacts of the adversarial system, including to the way that evidence is received.[152]

As discussed in Chapter 1 of this Report, the Australian Government has proposed new powers to allow the Federal Court to refer questions arising from proceedings to a referee for inquiry and report.[153] This may go some way to reducing the negative impacts of the adversarial setting upon native title claimants and the outcomes reached.

Significant time and expense is incurred in the collection of expert evidence. Courts are often faced with multiple and conflicting expert reports and testimony. A mechanism by which the court can deal with particular questions of fact, such as in respect of genealogy, by referring the question to one independent expert referee may therefore prove useful.

I consider that such a power should only be used with the agreement of the applicant and the primary respondent. The available pool of appropriate expert referees is small and parties may legitimately hold strong views about the appropriateness of a particular referee, particularly where the relevant question referred is pivotal to the claim.

This approach would also be consistent with the inquiries function provided for under Part 6, Division 5 of the Native Title Act. This Division provides for an inquiry to be undertaken by the NNTT at the request of the court (and in other circumstances) during mediation. However, s 138B(2)(b) provides that the applicant that is affected by the proposed inquiry must agree to participate. This consent is necessary for the efficient progression of the claim and to ensure that resources are not diverted away from the process that is already underway.

The proposed new provision for referees offers more flexibility in the native title area as to the timing of the inquiry and who can conduct it. Since its inception, Part 4 of the Native Title Act has permitted the Federal Court to make use of an assessor. Also, under the Federal Court rules, trial judges have convened experts' conferences outside the court process and had experts give evidence concurrently within that process.[154]

The question of who would be responsible for the costs of the independent expert is a matter for further consideration. If the costs are shared between the parties, it could have significant implications for NTRBs and the running of that claim and their other claims. It is my view that the most appropriate party to pay the expert's costs is the Australian Government. Ideally, a separate funding stream would be established by the Government under the Attorney-General's portfolio for this purpose.

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152 For example, for recommendations regarding the application of the rules of evidence to native title proceedings, see Australian Human Rights Commission, *Submission by the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Senate Standing Committee on Legal and Constitutional Affairs* (23 April 2009), paras 144–157. At http://www.humanrights.gov.au/legal/submissions/2009/20090424_ntab.html (viewed 16 October 2009).

153 Federal Justice System Amendment (Efficiency Measures) Bill (No 1) 2008 (Cth).

154 See R Farrell, '*Hot-tubbing' anthropological evidence in native title mediations* (2007). At www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Hot%20tubbing.pdf (viewed 6 October 2009).

(c) Improved training and development opportunities for anthropologists

Experts, such as anthropologists, play a vital role in the preparation and progress of a native title application and native title agreements. However, communities can face difficulties in attracting quality expert advice. A study conducted by the NNTT in 2004 concluded that a key factor in attracting and maintaining good quality professional anthropologists is whether or not native title work can positively contribute to the development of their careers.[155]

The study found that:

- only 20% of consultant anthropologists surveyed saw native title work as enhancing a career in anthropology
- 40% of consultant anthropologists considered that native title work limited their careers
- 30% of anthropologists working in NTRBs viewed native title as enhancing their career
- 40% of anthropologists surveyed offered no opinion.[156]

To ensure that communities are able to access quality advice, it is important that experts receive training that is appropriate for working within the native title system and that ongoing development opportunities are available to them.

I consider that courses for students and development programs for experts need to adopt an interdisciplinary approach. This is required to address challenges such as the need for anthropologists and other experts to be able to understand the role of expert witnesses in accordance with the Federal Court's guidelines.[157] It could also serve to promote effective cross-disciplinary communication between experts and to encourage team work and ethical professionalism.[158]

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155 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 13. At http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf (viewed 1 November 2009).

156 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 13. At http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf (viewed 1 November 2009).

157 Chief Justice M E J Black, Federal Court of Australia, *Practice Note CM 7 – Expert Witnesses in Proceedings in the Federal Court of Australia* (25 September 2009). At http://www.fedcourt.gov.au/how/practice_notes_cm7.html (viewed 16 October 2009).

158 Martin's study found anecdotal evidence from anthropologists working within NTRBs that suggests ongoing professional tension between legal and anthropological perspectives. For example, while anthropologists are often required to implement Federal Court directions relating to the role of expert witnesses, there have been claims of lawyers pressuring anthropologists into writing reports in terms with which they professionally and ethically disagree. See D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), paras 41, 42. http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf (viewed 1 November 2009).

David Martin comments that 'the place for training in anthropological native title practice (for consultants and those in NTRBs and government agencies etc) is not in Bachelors degrees but rather should lie in special purpose courses'.[159] An example of one such course is the University of Western Australia's Graduate Diploma in Applied Anthropology (Native Title and Cultural Heritage).[160]

Partnerships between communities, universities, government and industry are also essential for providing training and development opportunities for experts. For example, the Aurora Project works with university, corporate and government partners to deliver capacity building programs and professional development opportunities in disciplines such as law, anthropology, research, management and education.[161] This approach is commendable and worthy of further support.

3.9 Conclusion

The Prime Minister's National Apology to the Stolen Generations raised our spirits. It also raised our hopes that this Government would work with us to remedy the impacts of dispossession.

I believe that an effective native title system is essential to righting the wrongs of the past and to securing our future.

As I indicated in Chapter 1 of this Report, the Australian Government has taken some important first steps in reforming the native title system. It is also encouraging that the Australian Government has committed to engaging in discussions focused on improving the native title system. We must ensure that this opportunity is not wasted.

Throughout Chapter 3, I have identified a number of elements of native title law and policy in need of reform. I have also discussed proposals for further consideration. My hope is that we are able to continue this conversation. Above all, I encourage governments, in the spirit of reconciliation, to show genuine leadership and take action to create a just and equitable native title system.

159 D F Martin (Anthropos Consulting Services), *Report to the National Native Title Tribunal – Capacity of Anthropologists in Native Title Practice* (2004), para 175. At http://www.nntt.gov.au/Publications-And-Research/Tribunal-Research/Documents/Capacity%20of%20Anthropologists%20in%20Native%20Title%20Practice.pdf (viewed 1 November 2009).

160 See University of Western Australia, Faculty of Arts, Humanities and Social Sciences, *Graduate Diploma in Applied Anthropology (Native Title and Cultural Heritage),* http://www.arts.uwa.edu.au/courses/postgrad/coursework/graddipappanth (viewed 30 October 2009).

161 See The Aurora Project, http://www.auroraproject.com.au (viewed 29 October 2009).

Recommendations

3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.

3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.

3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.

3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.

3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.

3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.

3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.

3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.

3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.

3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.

3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.

3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.

3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* to provide greater transparency in the respondent funding process.

3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:

- repealing section 26(3) of the Native Title Act
- amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)
- reviewing time limits under the right to negotiate
- amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination
- shifting the onus of proof onto the proponents of development to show their good faith
- allowing arbitral bodies to impose royalty conditions.

3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.

3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.

3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.

3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

- the prospect of a negotiated outcome being reached
- the resources of the parties
- the interests of the other parties to the proceeding.

3.20 That the Australian Government:

- consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
- support further research into 'best practice' or 'model' agreements
- support further research into best practice negotiating processes.

3.21 That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.

3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.

3.23 That the Australian Government ensure that NTRBs are sufficiently resourced to access expert advice.

3.24 That the Australian Government provide further support to initiatives to provide training and development opportunities for experts involved in the native title system.