

Chapter 1:

Working together in ‘a spirit of partnership and mutual respect’: My native title priorities

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1.1 Introduction

In many ways, Australia has come a long way since the High Court first recognised native title in *Mabo (No 2)*.¹

As at 30 June 2010, registered determinations of native title covered 12.2% of the land mass of Australia.²

Seventy-two Prescribed Bodies Corporate (PBCs) have been registered as Registered Native Title Bodies Corporate to either hold native title rights on trust for, or to act as the agent of, native title holders.³

In addition, a milestone was reached when the National Native Title Tribunal (NNTT) registered the 400th Indigenous Land Use Agreement (ILUA) in November 2009.⁴

Behind these statistics, there are many stories of resilience, recognition and triumph. For some Aboriginal and Torres Strait Islander peoples, their engagement in the native title system has led to a long-awaited recognition of their rights. This recognition may further the ability of Aboriginal and Torres Strait Islander peoples to achieve their social, cultural and economic aspirations.

However, this is not always the case. In the first *Native Title Report*, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Dodson commented that:

Indigenous Australians hold very modest hopes for the capacity of the *Native Title Act* to deliver justice through the protection of our titles. The likelihood is that our aspirations will be confined to very limited horizons.⁵

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

2 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 26. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf> (viewed 19 October 2010).

3 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 22. At <http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf> (viewed 19 October 2010).

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

5 M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: January–June 1994*, Human Rights and Equal Opportunity Commission (1995), p 7. At <http://www.austlii.edu.au/au/other/IndigLRes/1995/3/index.html> (viewed 19 October 2010).

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Unfortunately, this prediction has been borne out for too many Aboriginal and Torres Strait Islander peoples. As the CEO of one Native Title Representative Body (NTRB) recently commented, ‘we have seen the evidentiary bar raised and the goal posts constantly change. We have seen the landscape move from cautious hope to bleak despair’.⁶

On many levels – legally, financially and culturally – the native title system is skewed in favour of non-Indigenous interests. Traditional Owners must surmount significant evidential barriers to prove their rights. And once a determination is made or an agreement is reached, inadequate resources may hinder the ability of Traditional Owners to effectively enjoy their rights.

Eighteen years after the *Mabo (No 2)* decision, I believe it is time to ask – where should we go from here? How can we move towards a reconciled Australia in which our native title rights are protected and respected?

I have given these questions significant thought during the first months of my term as Aboriginal and Torres Strait Islander Social Justice Commissioner. As I explained in the Introduction to this Report, I have visited Aboriginal and Torres Strait Islander communities and organisations across Australia in an effort to understand the issues that they face, and the solutions that they have developed.

I have also attended sessions of international human rights mechanisms to better understand how international engagement can assist our efforts to ensure that Australia honours its commitments to respect, protect and fulfil our rights.

These activities have helped me to identify an overarching framework to guide me in my work as Social Justice Commissioner. In Chapter 1 of the *Social Justice Report 2010*, I explain in detail my priorities for moving towards a reconciled Australia. I have included a summary of these priorities in Text Box 1.1.

Text Box 1.1: Priorities of the Social Justice Commissioner, 2010–2015

1. To advance the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*⁷ in Australia.
2. To promote the development of stronger and deeper relationships:
 - between Aboriginal and Torres Strait Islander peoples and the broader Australian community
 - between Aboriginal and Torres Strait Islander peoples and governments
 - within Aboriginal and Torres Strait Islander communities.

In this Chapter, I build upon this framework in the context of our rights to our lands, territories and resources.

I first consider the relevance of the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration)⁸ to the native title system, and discuss how the

6 K Smith, “Our old people are dying”; a cry for broader land settlement and social justice not just native title claim disposition (Speech delivered to the 2nd Annual National Native Title Law Summit, Brisbane, 16 June 2010), p 1.

7 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 October 2010).

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

Declaration will inform my work relating to our rights to our lands, territories and resources.

I then explain the four broad themes in native title and land rights that I will focus on during my term. These themes are:

- building an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia
- creating a just and fair native title system through law and policy reform
- promoting effective engagement between governments and Aboriginal and Torres Strait Islander peoples
- enhancing our capacity to realise our social, cultural and economic development aspirations.

In articulating these themes, I do not seek to confine the scope of my monitoring and reporting role. The importance of remaining flexible in such a fast-moving policy environment cannot be overstated. Rather, the objective of this Chapter is to signal my intention to work with governments, with Aboriginal and Torres Strait Islander peoples and their representatives, and the wider Australian community to develop lasting solutions to the issues that have long plagued the native title system.

1.2 My overarching priority: Advancing the implementation of the Declaration

The United Nations General Assembly adopted the Declaration on 13 September 2007. As the United Nations High Commissioner for Human Rights observes, the Declaration is ‘the United Nations’ key tool in advancing the rights of indigenous peoples, and support for this landmark instrument is widening’.⁹

Under the Howard Government, Australia was one of only four States to vote against the Declaration in the General Assembly.¹⁰ On 3 April 2009, the Rudd Government reversed Australia’s position and formally supported the Declaration.

By supporting the Declaration, Australia joined ‘the international community to affirm the aspirations of all Indigenous peoples’.¹¹ As stated by the Minister for Families, Housing, Community Services and Indigenous Affairs (Minister for Indigenous Affairs), Australia had taken ‘another important step in re-setting the relationship between Indigenous and non-Indigenous Australians and moving forward towards a new future’.¹²

Well over a year has passed since the Minister for Indigenous Affairs delivered Australia’s statement of support for the Declaration. It is now time for the Australian Government to take the next steps towards implementing the Declaration. This

9 United Nations High Commissioner for Human Rights, *Report of the United Nations High Commissioner for Human Rights on the rights of indigenous peoples*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/34 (2010), para 92. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

10 General Assembly, *Official Records*, 107th plenary meeting, 61st session, UN Doc A/61/PV.107 (13 September 2007), p 19. At <http://www.un.org/depts/dhl/resguide/r61.htm> (viewed 19 October 2010).

11 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 19 October 2010).

12 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 19 October 2010).

should involve a process to align all laws and policies, including those laws and policies that affect our rights to our lands, territories and resources, with international human rights standards. Only then will we be truly able to rebuild our relationships with the Government.

(a) What does the Declaration say about our rights to our lands, territories and resources?

Our lands, territories and resources are essential to our survival, dignity and wellbeing. Rights to country form an integral part of our identities and cultures. Further, access to traditional lands can act as a determinant of health status, particularly where that land is culturally significant and provides sources of food, water and shelter. While more research in this area is needed, one recent study concluded that '[g]reater Indigenous participation in caring for country activities is associated with significantly better health'.¹³

It is therefore fitting that our rights to our lands, territories and resources feature prominently in the Declaration.

Among other things, the Declaration affirms that we have rights to the lands, territories and resources that we have traditionally owned, occupied or otherwise used or acquired. For example, we have the right to:

- maintain and strengthen our spiritual relationship with our lands, territories and resources
- control, own, develop and use our lands, territories and resources
- redress for our lands, territories and resources which have been confiscated, taken, occupied, used or damaged without our free, prior and informed consent.

As set out in Text Box 1.2, rights to our lands, territories and resources, and to participate in decision-making regarding our lands, territories and resources, form a fundamental part of the Declaration.

Text Box 1.2: Our rights to our lands, territories and resources

United Nations Declaration on the Rights of Indigenous Peoples

Article 3

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

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

Article 10

Indigenous peoples shall not be forcibly removed from their lands or territories. No relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned and after agreement on just and fair compensation and, where possible, with the option of return.

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

Article 11

1. Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.
2. States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.

Article 12

1. Indigenous peoples have the right to manifest, practise, develop and teach their spiritual and religious traditions, customs and ceremonies; the right to maintain, protect, and have access in privacy to their religious and cultural sites; the right to the use and control of their ceremonial objects; and the right to the repatriation of their human remains.
2. States shall seek to enable the access and/or repatriation of ceremonial objects and human remains in their possession through fair, transparent and effective mechanisms developed in conjunction with indigenous peoples concerned.

Article 18

Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

Article 23

Indigenous peoples have the right to determine and develop priorities and strategies for exercising their right to development. In particular, indigenous peoples have the right to be actively involved in developing and determining health, housing and other economic and social programmes affecting them and, as far as possible, to administer such programmes through their own institutions.

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 26

1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.
2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.
3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.

Article 27

States shall establish and implement, in conjunction with indigenous peoples concerned, a fair, independent, impartial, open and transparent process, giving due recognition to indigenous peoples' laws, traditions, customs and land tenure systems, to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources, including those which were traditionally owned or otherwise occupied or used. Indigenous peoples shall have the right to participate in this process.

Article 28

1. Indigenous peoples have the right to redress, by means that can include restitution or, when this is not possible, just, fair and equitable compensation, for the lands, territories and resources which they have traditionally owned or otherwise occupied or used, and which have been confiscated, taken, occupied, used or damaged without their free, prior and informed consent.
2. Unless otherwise freely agreed upon by the peoples concerned, compensation shall take the form of lands, territories and resources equal in quality, size and legal status or of monetary compensation or other appropriate redress.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 30

1. Military activities shall not take place in the lands or territories of indigenous peoples, unless justified by a relevant public interest or otherwise freely agreed with or requested by the indigenous peoples concerned.
2. States shall undertake effective consultations with the indigenous peoples concerned, through appropriate procedures and in particular through their representative institutions, prior to using their lands or territories for military activities.

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.
2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.

2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Article 43

The rights recognized herein constitute the minimum standards for the survival, dignity and well-being of the indigenous peoples of the world.

(b) How will the Declaration inform my approach to the *Native Title Report*?

As a party to seven of the major human rights treaties,¹⁴ Australia has made a commitment to the international community to respect, protect and fulfil our human rights in Australian law and practice.¹⁵

The Declaration affirms the ‘minimum standards for the survival, dignity and well-being of the indigenous peoples of the world’.¹⁶ In doing so, it elaborates the rights set out in human rights instruments, including the treaties to which Australia is a party. In many ways, the Declaration also reflects customary international law.¹⁷

Therefore, the Declaration can and should be used to inform our understanding of how existing, universal human rights apply to the situations faced by Indigenous peoples worldwide.¹⁸ It is not simply an ‘aspirational’ document.

Given the widespread international support for the Declaration, it is appropriate that the Declaration be used as the yardstick against which the actions of the Australian Government are assessed.

As Social Justice Commissioner, I consider that my overarching priority is to advance the implementation of the Declaration. Accordingly, I intend to be guided by the Declaration in the performance of my statutory functions. This includes my

14 This includes the *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965. At <http://www2.ohchr.org/english/law/cerd.htm> (viewed 19 October 2010); *International Covenant on Civil and Political Rights*, 1966. At <http://www2.ohchr.org/english/law/ccpr.htm> (viewed 19 October 2010); *International Covenant on Economic, Social and Cultural Rights*, 1966. At <http://www2.ohchr.org/english/law/cescr.htm> (viewed 19 October 2010).

15 For a discussion of the international obligations assumed by Australia in entering into human rights treaties, see Australian Human Rights Commission, *Submission to the National Human Rights Consultation* (June 2009), pp 13–15. At http://www.humanrights.gov.au/legal/submissions/2009/200906_NHRC.html (viewed 19 October 2010).

16 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), art 43. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 October 2010).

17 For commentary on the legal status of the Declaration, see P Joffe, ‘Canada’s Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?’ in J Hartley, P Joffe and J Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (2010) 70, pp 85–93; ‘Article 42 of the United Nations Declaration on the Rights of Indigenous Peoples’ in United Nations Permanent Forum on Indigenous Issues, *Report on the eight session (18–29 May 2009)*, UN Doc E/2009/43, E/C.19/2009/14 (2009) Annex, paras 6–13. At http://www.un.org/esa/socdev/unpfii/documents/E_C_19_2009_14_en.pdf (viewed 29 November 2010).

18 For example, the Committee on the Elimination of Racial Discrimination has recommended that the Declaration be used as a guide to interpret the obligations of the United States of America under the *International Convention on the Elimination of All Forms of Racial Discrimination* relating to Indigenous peoples: Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: United States of America*, UN Doc CERD/C/USA/CO/6 (2008), para 29. At <http://www2.ohchr.org/english/bodies/cerd/cerds72.htm> (viewed 19 October 2010).

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responsibility to report annually on the operation of the *Native Title Act 1993* (Cth) (Native Title Act) and the effect that it has on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples.¹⁹

In my *Native Title Reports*, I will recommend action that the Australian Government can take to ensure that our rights, as affirmed by the Declaration, are fully respected in laws and policies that affect our lands, territories and resources. I will also monitor and report on the Government's progress in implementing these recommendations.

(c) How can the Australian Government better engage with the *Native Title Report*?

The Declaration was proclaimed by the General Assembly 'as a standard of achievement to be pursued in a spirit of partnership and mutual respect'.²⁰ I therefore encourage the Australian Government to engage in public dialogue regarding the recommendations contained in the *Native Title Report* and the *Social Justice Report*.

The Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur) has recommended that the reports of the Social Justice Commissioner 'should be given greater attention in government administration to promote a higher level of accountability and sensitivity to human rights commitments'.²¹ There are many ways that this could be achieved.

For example, I consider that the Native Title Act should be amended to require the Attorney-General to table the annual *Native Title Report* in Parliament. This obligation already exists with respect to the annual *Social Justice Report*.²² I acknowledge, and applaud, the decisions of successive Attorneys-General to table the *Native Title Report* along with the *Social Justice Report*. I encourage the Australian Government to pursue amendments to the Native Title Act to formalise this arrangement.

Secondly, I consider that the Australian Government should be required to provide a formal response to my reports.

In its 2003 inquiry into progress towards reconciliation, the Senate Legal and Constitutional References Committee recommended 'that the Government should be required by statute to respond to the reports of the Aboriginal and Torres Strait Islander Social Justice Commissioner'.²³

To promote transparency and accountability, I believe that the Attorney-General should be required by legislation to table a response to the *Social Justice Report* and the *Native Title Report* in Parliament within a set timeframe. This response should indicate how the Australian Government intends to address the recommendations made in these reports.

19 *Native Title Act 1993* (Cth), s 209.

20 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular para 24. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 October 2010).

21 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 78. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

22 *Australian Human Rights Commission Act 1986* (Cth), s 46M.

23 Senate Legal and Constitutional References Committee, Parliament of Australia, *Reconciliation: Off track* (2003), p xii (recommendation 9). At http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/reconciliation/report/report.pdf (viewed 19 October 2010).

As Social Justice Commissioner, I:

- will be guided by the Declaration in the performance of my statutory functions regarding the native title system, including in the preparation of my annual *Native Title Report*
- recommend that the Australian Government introduce legislation into Parliament to require the Attorney-General to table the annual *Native Title Report*
- recommend that the Australian Government introduce legislation to require the Attorney-General to provide a formal response to the annual *Native Title Report* and the annual *Social Justice Report*
- will monitor and report on the Australian Government's progress in implementing the recommendations contained in the annual *Native Title Report* and the annual *Social Justice Report*.

1.3 Building an understanding of, and respect for, our rights to our lands, territories and resources

I believe that a real understanding of what native title means to us as peoples, and the impact of the native title system on our human rights, is still missing from the nation's consciousness.

It is questionable whether the wider Australian community has truly embraced our rights to our lands, territories and resources. During my consultations for the *Native Title Report 2010*, the South Australian Native Title Services commented that:

[T]here appears to be a general public misconception that the resolution of native title will result in un-fairness for non-Indigenous stakeholders. A consequence of this perception is a general lack of support for native title.²⁴

I believe that governments and the corporate sector have a responsibility to work with us to address such misconceptions.

(a) Understanding our rights: governments

States are to promote respect for, and the full application, of the provisions of the Declaration.²⁵ This includes our rights to our lands, territories and resources.

If the Australian Government is genuine about its commitment to 'reset' its relationship with us, it needs to start by developing a better understanding of our rights.

There are encouraging signs that governments are slowly beginning to appreciate the importance of our rights to our lands, territories and resources to our peoples. In her statement in support of the Declaration, the Minister for Indigenous Affairs acknowledged 'the desire, both past and present, of Indigenous peoples to maintain and strengthen their distinctive spiritual relationship with land and waters'.²⁶

24 P Agius, CEO, South Australian Native Title Services, Correspondence to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 1 October 2010.

25 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 42. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 October 2010).

26 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 19 October 2010).

Further, the Minister understood that '[t]he ownership and management of land gives Indigenous Australians the capacity to forge new partnerships and pursue economic development'.²⁷

I am also pleased that the federal Opposition has begun to refer to the standards affirmed by the Declaration in matters relating to our lands, territories and resources.²⁸

Despite these statements, there is still a great deal of misunderstanding among governments about the importance of our rights. The links between the enjoyment of our rights and our well-being as peoples is still not fully appreciated in law and policy-making processes. Without this understanding, unnecessary and unjustifiable incursions into our rights will continue.

For instance, native title is often perceived merely as a hurdle that needs to be overcome in order to allow development proposals to proceed. As the Carpentaria Land Council Aboriginal Corporation has observed, 'government agencies often seem to view native title issues as simply a box to tick in the development process. Unfortunately, it is also often left as the last box to tick'.²⁹

Further, governments sometimes perceive native title to be a barrier to the social and economic development of our communities. For example, the Australian Government reports that it has consistently received advice from state governments that native title is delaying their ability to provide housing and infrastructure.³⁰

It is questionable whether there is any evidence to support these assertions.³¹ However, the Australian Government responded to the concerns of the states by proposing a new future act process to facilitate the construction of public housing and infrastructure. I discuss this further in Chapters 2 and 3.

Human rights are universal, indivisible, interdependent and interrelated.³² It is incumbent on the Australian Government to take steps to progressively realise our right to adequate housing, while also respecting our rights to self-determination

27 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 19 October 2010).

28 See, for example, Senator the Hon G Brandis, Shadow Attorney-General, 'What right to develop their land?', *The Australian*, 12 January 2010, p 10. At <http://www.theaustralian.com.au/news/opinion/what-right-to-develop-their-land/story-e6frg6zo-1225818205719> (viewed 18 August 2010); Commonwealth, *Parliamentary Debates*, House of Representatives, 8 February 2010, p 715 (The Hon T Abbott MP, Leader of the Opposition). At <http://www.aph.gov.au/hansard/rep/dailys/dr080210.pdf> (viewed 19 October 2010).

29 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the Native Title Act 1993 (Cth)* (4 September 2009), para 4.9. At [http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/\\$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf](http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf) (viewed 19 October 2010).

30 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Constitutional and Legal Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 4. At <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631> (viewed 19 October 2010).

31 See J Altman, *Submission to the Senate Constitutional and Legal Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (6 November 2009), p ii. At <https://senate.aph.gov.au/submissions/comitees/viewdocument.aspx?id=4aefac4d-1178-4e95-962e-d3ab0d5a8119> (viewed 19 October 2010); Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the Native Title Act 1993 (Cth)* (4 September 2009), paras 3.1-3.10. At [http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/\(3A6790B96C927794AF1031D9395C5C20\)-Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/\\$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf](http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)-Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf) (viewed 19 October 2010).

32 World Conference on Human Rights, *Vienna Declaration and Programme of Action*, UN Doc A/CONF.157/23 (1993), p 5 (para 5).

and to our lands, territories and resources. This could be achieved by improving agreement-making processes, rather than by eroding our rights through a new future act process.

This perception of native title as simply a ‘box to tick’, or worse, as a barrier to our own well-being, does not do justice to the central importance of our lands, territories and resources to our cultures and peoples. There is clearly a need for governments to develop a deeper understanding of our rights.

(b) Understanding our rights: the corporate sector

There is also a need for greater understanding about our rights among the corporate sector, including those participating in the exploration and extraction of natural resources.

As the Special Rapporteur has said, the majority of Indigenous peoples and communities are not opposed to corporate activity in itself, or to the potential benefits of such activity for their own economic and social development. However, Indigenous peoples are opposed to

development which is carried out without respect for their basic rights, which brings with it only adverse impacts and which does not result in any visible benefits for their communities.³³

I believe that there is a need to promote an increased awareness of human rights among the corporate sector.

Corporations have a degree of responsibility not only for the economic consequences of their activities, but also for the social and environmental implications of those activities.³⁴ Corporations also have a responsibility to respect human rights.³⁵ As the Special Rapporteur outlines, ‘companies have, at the very least, the duty to comply with international standards relating to the human rights of indigenous peoples’.³⁶ In order to do this, corporations need to understand our rights.

Certainly, there are some good examples of resource companies taking action to understand our cultures, laws and rights. The process leading to the Argyle Diamond Mine Participation Agreement is a well-known example of relationship-building between a resource company and Traditional Owners.³⁷ We need to ensure such an approach becomes commonplace.

33 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37 (2010), para 31. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

34 See Australian Human Rights Commission, *Corporate Social Responsibility & Human Rights (2008)*, http://www.humanrights.gov.au/human_rights/corporate_social_responsibility/corporate_social_responsibility.html (viewed 19 October 2010).

35 See J Ruggie, *Protect, Respect and Remedy: a Framework for Business and Human Rights*, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises to the Human Rights Council, 8th session, UN Doc A/HRC/8/5 (2008), paras 51–81. At <http://www2.ohchr.org/english/bodies/hrcouncil/8session/reports.htm> (viewed 19 October 2010).

36 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37 (2010), para 83. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

37 For a profile of this agreement, see 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 2010).

As Social Justice Commissioner, I will engage with governments, the corporate sector and the broader Australian community to develop a better understanding of, and respect for, our rights to our lands, territories and resources.

1.4 Creating a just and fair native title system

The Declaration provides that States are to establish and implement ‘a fair, independent, impartial, open and transparent process ... to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources’.³⁸

In the preamble to the Native Title Act, the ‘people of Australia’ expressed their intention ‘to rectify the consequences of past injustices’.³⁹ However, it is difficult to contend that the Native Title Act currently creates a ‘fair’ process for recognising and adjudicating our rights.

The Minister for Indigenous Affairs has stated that ‘Australia’s laws concerning land rights and native title are not altered by our support of the Declaration’.⁴⁰ While this is certainly the case, Australia’s support for the Declaration invites a reappraisal of the Native Title Act.

(a) A failure to take action

Over the years, Aboriginal and Torres Strait Islander peoples have continually drawn attention to the discriminatory, costly and adversarial aspects of the Native Title Act. For instance, the National Native Title Council (NNTC) recently submitted to the Committee on the Elimination of Racial Discrimination (CERD) that ‘the current expenditure of time and resources in prosecuting a claim raises serious questions about the actual benefits of the system to Indigenous people’.⁴¹

Numerous international human rights mechanisms have recommended that Australia take action to ensure the full enjoyment by Aboriginal and Torres Strait Islander peoples of their rights to their lands, territories and resources.⁴² Most recently, in August 2010 CERD expressed regret regarding

38 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 27. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 19 October 2010).

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

40 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 19 October 2010).

41 National Native Title Council, *Submission to the United Nations Committee on the Elimination of Racial Discrimination* (undated), p 2. At http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NNC_Australia77.doc (viewed 19 October 2010).

42 See, for example, Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At <http://www2.ohchr.org/english/bodies/cerd/cerds66.htm> (viewed 19 October 2010); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At <http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm> (viewed 19 October 2010); Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, UN Doc E/C.12/AUS/CO/4 (2009), para 32. At <http://www2.ohchr.org/english/bodies/cescr/cescrs42.htm> (viewed 19 October 2010); J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), paras 29, 84–87. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, and the fact that despite a large investment of time and resources by indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5).⁴³

Successive governments have failed to take action in response to such recommendations. As the NNTC observes, ‘there appears to have been no close consideration given to statements made by UN bodies in the past’.⁴⁴

The Australian Government has introduced some welcome reforms to the native title system in recent years. I explore some of these reforms and reform proposals as they relate to agreement-making in Chapter 2.

However, the Australian Government has failed to address the most significant obstacles within the native title system to the full realisation of our rights. These obstacles include the onerous burden of proving native title, the injustices of extinguishment, and other impediments to negotiating just and equitable agreements. As one Native Title Service Provider (NTSP) commented, the current nature of the law ‘and the lack of substantive reform – results in significant burdens of proof and contributes to the fostering of unsustainable relationships with other stakeholders’.⁴⁵

(b) Reappraising the native title system

I agree with the Special Rapporteur that:

The strengthening of legislative and administrative protections for indigenous peoples’ rights over lands and natural resources should involve aligning those protections with applicable international standards, in particular those articulated in the Declaration on the Rights of Indigenous Peoples.⁴⁶

If the Government is serious about rebuilding its relationship with Aboriginal and Torres Strait Islander peoples, it needs to ensure that the Native Title Act is consistent with international human rights standards. Only then will this country be able to begin ‘to rectify the consequences of past injustices’ arising from our dispossession.

Many necessary reforms to the Native Title Act have been proposed and extensively analysed by Aboriginal and Torres Strait Islander peoples and non-Indigenous advocates and scholars. For example, there is a strong groundswell of support for amendments to reverse the burden of proof that is currently placed upon Aboriginal and Torres Strait Islander peoples. Supporters of such amendments include the current Chief Justice of the High Court.⁴⁷ Other essential reforms were proposed by my predecessor in the *Native Title Report 2009*.⁴⁸

43 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/15-17 (2010), para 18. At <http://www2.ohchr.org/english/bodies/cerd/cerds77.htm> (viewed 2 December 2010).

44 National Native Title Council, *Submission to the United Nations Committee on the Elimination of Racial Discrimination* (undated), p 2. At http://www2.ohchr.org/english/bodies/cerd/docs/ngos/NNC_Australia77.doc (viewed 19 October 2010).

45 P Agius, CEO, South Australian Native Title Services, Correspondence to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 1 October 2010.

46 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

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

48 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 19 October 2010).

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My consultations for the *Native Title Report 2010*, and my community visits more generally, have affirmed my view that piecemeal reform will not solve the problems that Aboriginal and Torres Strait Islander peoples face in their engagement with the native title system. Indeed, such reform can serve to add even more layers of complexity to the system.

I consider that a global, holistic review of the operation of the native title system is required. The Special Rapporteur has recommended that:

[T]he Government should establish a mechanism to undertake a comprehensive review at the national level of all such laws and related institutions and procedures, giving due attention to the relevant reports of the Australian Human Rights Commission and the Committee on the Elimination of All Forms of Racial Discrimination.⁴⁹

I support this recommendation, and recommend in Chapter 2 that the Australian Government should commission an independent review of the Native Title Act. The purpose of this review should be to develop reforms to ensure that the Native Title Act complies with international standards.

The terms of reference for any such review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. I consider that the review should at least involve an inquiry into:

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

As Social Justice Commissioner, I will:

- **advocate an independent review of the Native Title Act**
- **advocate reform to the Native Title Act to ensure that it aligns with international human rights standards**
- **monitor and report on amendments and proposed amendments to the Native Title Act and related policies.**

1.5 Promoting effective engagement between governments and Aboriginal and Torres Strait Islander peoples

The Declaration affirms our rights to self-determination and to participate in decision-making in matters that would affect our rights. It also imposes a duty upon states to consult and cooperate with us in order to obtain our free, prior and informed consent before adopting and implementing legislative or administrative measures that affect us.⁵⁰

49 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 85. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

50 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 19, 32. At <http://www.un.org/esa/socdev/unpfi/en/drip.html> (viewed 19 October 2010).

During my community visits, I frequently heard examples of governments failing to adequately engage with Aboriginal and Torres Strait Islander peoples. I received this message consistently, across communities and across issues – including in relation to matters involving the native title system.

Governments need to develop a new approach to consulting and engaging with Aboriginal and Torres Strait Islander peoples. Governments must enable us to be full and effective participants in decision-making processes regarding laws and policies that would affect our rights.

(a) The case for effective engagement

In 2007, the National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse expressed its belief that:

[T]here needs to be a radical change in the way government and non-government organisations consult, engage with and support Aboriginal people. A different approach is urgently needed.⁵¹

I am also firmly of this view.

There is a sorry history in the native title system of governments adopting practices, pursuing policies and enacting legislation without seeking or obtaining the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

To confirm this, we need look no further than the 1998 amendments to the Native Title Act (also known as ‘the *Wik* amendments’).⁵² In 1999, CERD highlighted, with concern, ‘[t]he lack of effective participation by indigenous communities in the formulation of the amendments’.⁵³

More recently, there have been welcome signs that the Australian Government has begun to embrace a new approach to working with us. For example, the Minister for Indigenous Affairs has stated that the principle of ‘strong engagement with Indigenous people ... underpins all our Indigenous policies and the implementation of programs’.⁵⁴ Further, the Australian Government ‘aims to ensure that those most affected are equal partners’ in the formation of its Indigenous Economic Development Strategy.⁵⁵

However, the reality of native title law and policy does not yet fully match the Australian Government’s rhetoric of ‘equal partnership’ and ‘strong engagement’.

51 National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meko Mekarle “Little Children are Sacred”* (2007), p 50. At http://www.inquiryisaac.nt.gov.au/pdf/bipacsa_final_report.pdf (viewed 19 October 2010).

52 For a review of these amendments, see M Dodson, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report: July 1996–June 1997*, Human Rights and Equal Opportunity Commission (1997). At http://humanrights.gov.au/social_justice/nt_report/index.html#1997 (viewed 19 October 2010); Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1998 (viewed 19 October 2010); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1999*, Human Rights and Equal Opportunity Commission (1999). At http://humanrights.gov.au/social_justice/nt_report/index.html#1999 (viewed 19 October 2010).

53 Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, UN Doc A/54/18 (1999) 6, p 7 (para 9).

54 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Budget 2010–11: Closing the Gap Between Indigenous and Non-Indigenous Australians* (Statement, 11 May 2010). At http://www.fahcsia.gov.au/about/publications/articles/corp/BudgetPAES/budget10_11/Documents/indig_statement.htm (viewed 19 October 2010).

55 Australian Government, *Indigenous Economic Development Strategy: Draft for Consultation* (2010), p 8. At http://resources.fahcsia.gov.au/IEDS/ieds_default.htm (viewed 19 October 2010).

Too often, the ability of Aboriginal and Torres Strait Islander peoples to fully participate in decision-making processes is stymied by factors such as inadequate timeframes, predetermined outcomes, a lack of access to all relevant information and insufficient consideration of our decision-making processes. While we may be involved in certain government consultation processes, our views may not be reflected in the outcomes of these processes. I illustrate these issues further in Chapter 3.

Without meaningful and effective consultation, we will continue to have things done to us rather than in partnership with us. In such an environment, it will be impossible for governments to 'reset' their relationship with us. It will also be impossible to truly close the gap.

Respect for our rights to self-determination and to participate in decision-making is not just a matter of symbolism or empty rhetoric. Fundamentally, it makes common sense to respect our rights. As observed by the Special Rapporteur:

[W]ithout the buy-in of indigenous peoples, through consultation, at the earliest stages of the development of Government initiatives, the effectiveness of Government programmes, even those that are intended to specifically benefit indigenous peoples, can be crippled at the outset.⁵⁶

Aboriginal and Torres Strait Islander communities frequently live with the consequences of poor policy coordination and consultation. We know our communities, our challenges and our strengths. We should be equal partners in the development and delivery of government services, policies and programs.

(b) Building a framework for engagement

As I highlight in the *Social Justice Report 2010*, I am committed to working with governments and Aboriginal and Torres Strait Islander communities to improve our relationships.

I consider that improving the quality of consultation in relation to proposed reforms to native title law and policy is an integral part of this relationship-building endeavour.

In my statement to the recent session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP), I recommended that EMRIP develop 'a consultation and negotiation framework that clearly outlines the practical steps necessary to achieve effective participation in decision making by Indigenous peoples'.⁵⁷

It is important that we also progress such a framework in Australia.

In Chapter 3, I begin to outline the elements of a meaningful and effective consultation process in relation to native title law and policy reform. A summary of these elements is contained in Appendix 4. I will further refine these elements during my term.

56 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people*, James Anaya, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 36. At <http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm> (viewed 19 October 2010).

57 M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Statement to the Expert Mechanism on the Rights of Indigenous Peoples*, 3rd session, agenda item 3 (12–16 July 2010). At http://www.humanrights.gov.au/social_justice/international_docs/2010_EMRIP_Gooda.html (viewed 15 September 2010).

As Social Justice Commissioner, I will:

- **monitor and report on the adequacy of government consultation processes regarding reforms to laws and policies that affect our rights to our lands, territories and resources**
- **seek to work with governments to improve the quality of consultation processes in relation to matters that would affect our lands, territories and resources**
- **engage with international human rights mechanisms to develop a consultation framework that can guide the domestic application of international standards.**

1.6 Enhancing our capacity to realise our social, cultural and economic development aspirations

The social, cultural and economic aspirations of the Aboriginal and Torres Strait Islander communities that engage with the native title system are as diverse as the communities themselves. Some people may simply seek a long-awaited recognition of their inherent rights. Others may seek to leverage their native title rights to secure employment and other benefits for their people, including through environmental management activities.

We need to be able to develop the capacity to articulate, obtain and enjoy the benefits that we seek through our engagement with the native title system.

I believe that we need to consider ‘capacity’ in a broad, holistic way. Janet Hunt and Diane Smith define ‘capacity’ as:

[T]he capabilities of people, groups, organisations and whole societies to reach their own goals over time. ‘Capabilities’ may consist of skills, abilities, knowledge, behaviours, values, motivations, institutions, resources, powers and so on. But more than that, capabilities represent the real opportunities people have to achieve the combination of functionalities that are necessary to their well-being.⁵⁸

A lack of capacity can affect our ability to engage effectively in native title claims processes, negotiate beneficial agreements, respond to future act processes, and manage our native title rights and interests post-determination. Ultimately, it can impede our abilities to realise our social, cultural and economic development aspirations.

We must build our capacity to prosper and to realise our rights and aspirations. Governments must assist us to achieve this. I firmly believe that governments need to empower us to be the agents of our own change.

Article 39 of the Declaration affirms our right to have access to financial and technical assistance from States for the enjoyment of our rights. In addition, governments need to work with us to remove the structural barriers to the full realisation of our social, cultural and economic aspirations.

At the same time, we also have responsibilities to do what we can to ensure that our own communities are strong and able to realise our aspirations.

58 J Hunt & D E Smith, *Building Indigenous community governance in Australia: Preliminary research findings*, Centre for Aboriginal Economic Policy Research, Working Paper No 31/2006 (2006), p 50. At <http://caep.r.anu.edu.au/Publications/WP/2006WP31.php> (viewed 19 October 2010).

(a) Developing our financial and technical capacity

Our organisations need to be able to access adequate resources in order to best represent our interests and advance the enjoyment of our rights. At the most basic level, we need skilled members, organisational support, and strong governance structures to ensure we can utilise our native title rights and interests, and make informed choices about our development.

(i) NTRBs and NTSPs

I frequently receive information that the work of NTRBs and NTSPs is severely constrained by their limited funds. As one NTRB recently put it:

The ongoing funding crisis has forced brutal prioritisation of our work, causing legitimate dissatisfaction from claimants, courts and respondents about the limited number of claims that are being progressed.⁵⁹

Capacity deficits are also evident in our access to human resources. NTRBs and NTSPs report that they struggle to recruit and retain professional advisors, including anthropologists and legal representatives.⁶⁰ This affects our ability as Traditional Owners to achieve beneficial outcomes from negotiations.

(ii) PBCs

This resource deprivation cuts even more sharply at the post-determination and post-agreement stages. Our ability to manage our native title rights and interests and to make informed choices about how to realise our aspirations is directly affected by a lack of capacity.

I have repeatedly heard that there is a dire need for increased government investment in PBCs. As the Yamatji Marlpa Aboriginal Corporation informed me:

Given the significant amount of time, resources and effort that goes into recognising native title, an investment in post-native title services will ensure that the opportunities and benefits brought about by these rights are fully realised and not lost.

Governments should not assume that all native title groups will have sufficient income to establish and maintain a PBC with the capacity to comply with the myriad regulatory obligations and requirements under the NTA.⁶¹

I am informed that their lack of resources, remoteness, and difficulties in accessing governance training and services affects

the ability of the PBCs to take steps to build their capacities in the areas they may wish to strengthen; whether in relation to governance, leadership, partnerships, heritage protection, management or any other area of interest.⁶²

Many PBCs struggle to perform basic administrative tasks – let alone engage strategically with economic development or other funding opportunities. I have also frequently heard that PBCs require further support to develop culturally appropriate and effective governance structures.

59 Goldfields Land and Sea Council Aboriginal Corporation, *Annual Report 2008–2009* (2009), p 7. At http://www.glc.com.au/pu_xx/AR%2008-09.pdf (viewed 19 October 2010).

60 See, for example, Cape York Land Council Aboriginal Corporation, *Annual Report 2008–2009* (2009), p 38. At http://www.cylc.org.au/index.php?option=com_docman&task=doc_download&gid=24&Itemid=53 (viewed 19 October 2010).

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

62 P Agius, CEO, South Australian Native Title Services, Correspondence to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 1 October 2010.

A common observation is that PBCs need direct and upfront establishment funding. The Cape York Land Council observes that a ‘high level of assistance and support at the front end is critical to allow PBCs to develop effective governance, compliance and decision-making frameworks’.⁶³

I understand that many PBCs are supported by NTRBs and NTSPs, even though these organisations are themselves stretched for resources. However, I question whether the financial position of many PBCs provides the foundation for long-term, sustainable development.

(iii) More needs to be done

In recent years, I have been pleased to witness the growth of programs and projects to support capacity development in the native title system. These include the Aurora Project⁶⁴ and the training activities conducted by Office of the Registrar of Indigenous Corporations (ORIC).⁶⁵

I am also informed that the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) committed close to \$3 million in funding during the Reporting Period to support capacity-building projects for NTRBs and NTSPs.⁶⁶ Further, FaHCSIA provided just over \$1 million for PBC Basic Support during the Reporting Period.⁶⁷

I discuss other initiatives, such as the Australian Government’s new Native Title Anthropologists Grants Program and the activities of the inter-governmental Joint Working Group on Indigenous Land Settlements, in Chapter 2.

But much more needs to be done. I frequently hear from NTRBs, NTSPs and PBCs that this level of government support barely scratches the surface. I agree with the Special Rapporteur’s assessment that:

The Government should increase the availability and effectiveness of technical and financial resources to support indigenous representation and participation in the procedures to identify and protect indigenous peoples’ native title.⁶⁸

(b) Strengthening our communities

As Aboriginal and Torres Strait Islander peoples, we also need to strengthen our communities in order to realise our aspirations. I am fully aware that the native title structures and systems imposed by governments have often served to divide us.

We have fought hard for our rights to our country to be recognised. However, we know that in some places there is work to be done within our families and our clan,

63 Cape York Land Council, ‘Information requested for the *Native Title Report 2010*’ (10 October 2010).
 64 See *The Aurora Project*, <http://www.auroraproject.com.au/About.htm> (viewed 12 October 2010).
 65 During the Reporting Period, ORIC received 10 training requests from Registered Native Title Bodies Corporate (RNTBCs). ORIC organised and funded 13 workshops, which were attended by 16 PBCs and RNTBCs: A Beven, Registrar of Indigenous Corporations, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 August 2010.
 66 These include the Aurora Project, the AIATSISS Native Title Research Unit, the University of Western Australia’s Anthropology Subsidy, and training and workshops for NTRB boards and staff: G Roche, Branch Manager, Indigenous Programs, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 13 August 2010.
 67 G Roche, Branch Manager Indigenous Programs, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 13 August 2010.
 68 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 87. At <http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm> (viewed 19 October 2010).

language or kinship groups. Internal disputes, harassment and bullying can affect our ability to function, let alone achieve our economic, social and cultural aspirations. For instance, it disturbs me that recent research by ORIC has found that disputes constitute the third most prevalent ‘class’ of Indigenous corporate failure.⁶⁹

I welcome the emergence of recent initiatives to support the resolution of disputes within our communities. For instance, ORIC has initiated and led a pilot program for the management of post-determination disputes. This collaborative project involves representatives from ORIC, NNTT, FaHCSIA and the Attorney-General’s Department. I am informed that the pilot will be evaluated in 2010–11.⁷⁰

I encourage the Australian Government to further support our efforts to address disputes and violence within our communities.

Yet, sometimes there is only so much that a government program can do. Governments cannot and should not intervene to fix our internal relationships. We bear the ultimate responsibility for the quality of our relationships with each other. But governments can work with us and our communities as enablers and facilitators. They can also work to remove existing structural and systemic impediments to healthy relationships within our communities.

(c) Improving our access to development opportunities

When considering law and policy reform proposals, we must always remember that there is no ‘one-size-fits-all’ model of development. Not every community will wish to develop their own enterprises. Not every community will seek to ‘develop’ their lands in strictly economic terms. As article 23 of the Declaration affirms, we have the right to determine and develop our own priorities and strategies for exercising our right to development.

However, we must also have access to opportunities to enable us to realise our social, cultural and economic aspirations. Governments need to work with us to remove the barriers to our individual and collective prosperity.

This invites consideration of whether the current legal and policy framework enables us to realise our aspirations. For example, are our communities able to use our native title rights to leverage economic development if we choose to? Are we able to access new and emerging markets, including carbon markets?

I believe it is important to ask these questions as we move, more and more, towards post-determination and post-agreement environments.

69 Office of the Registrar of Indigenous Corporations, *Analysing key characteristics in Indigenous corporate failure: research paper* (2010), p 46. At http://www.oric.gov.au/html/publications/other/Analysing-key-characteristics-in-Indigenous-corporate%20failure_v-2-2.pdf (viewed 19 October 2010).

70 A Beven, Registrar, Office of the Registrar of Indigenous Corporations, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 August 2010; A Beven, Registrar of Indigenous Corporations, ‘Strengthening governance in PBCs’ (Speech delivered at the 2010 Native Title Conference, Canberra, 2 June 2010), p 6. At http://www.oric.gov.au/html/publications/speeches/2010_speech_Native-title-conference-paper_strengthening-PBCs.doc (viewed 19 October 2010).

As Social Justice Commissioner I will:

- **encourage further dialogue between Aboriginal and Torres Strait Islander peoples, governments and other stakeholders to identify solutions to the barriers to the full realisation of our social, cultural and economic development aspirations**
- **encourage the Australian Government to provide adequate financial and technical assistance to Aboriginal and Torres Strait Islander peoples and organisations to help us develop our capacity.**

1.7 Conclusion

The Native Title Act was 'intended to further advance the process of reconciliation among all Australians'.⁷¹ Accordingly, native title needs to be an important part of any conversation about the future of reconciliation in Australia.

We cannot achieve reconciliation in this country while:

- there is limited understanding about our rights to our lands, territories and resources
- injustices exist within native title law and policy
- we are not fully able to participate in decision-making in matters that affect our rights
- we lack the capacity and the opportunity to realise our social, cultural and economic aspirations.

My aim in this Chapter has been to outline the key themes that will guide my work in relation to native title, and, in doing so, to begin a conversation about our rights. In my recommendations, below, I identify three key ways in which the Australian Government can respond to my invitation to engage in dialogue with our peoples.

Over the next four years, I look forward to working with Aboriginal and Torres Strait Islander peoples, governments, the corporate sector and other native title stakeholders to achieve the full realisation of our human rights 'in a spirit of partnership and mutual respect'.⁷²

⁷¹ *Native Title Act 1993* (Cth), preamble.

⁷² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular para 24. At <http://www.un.org/esa/socdev/unpfii/en/drip.html> (viewed 19 October 2010).

Recommendations

- 1.1 That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.
- 1.2 That the Australian Government introduce legislation into Parliament to require the Attorney-General to table the annual *Native Title Report* within a set timeframe.
- 1.3 That the Australian Government introduce legislation into Parliament to require the Attorney-General to provide a formal response to the annual *Native Title Report* and the *Social Justice Report* within a set timeframe.