

# Introduction

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As the Aboriginal and Torres Strait Islander Social Justice Commissioner, one of my primary responsibilities is to report annually on the impact of the *Native Title Act 1993* (Cth) on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.<sup>1</sup> I fulfil this responsibility by producing the annual *Native Title Report*.

It is with great pleasure that I present my first *Native Title Report*. In the *Native Title Report 2010*, I review developments in native title that occurred during the Reporting Period, 1 July 2009–30 June 2010.

## Building on a legacy

Over the years, the annual *Native Title Report* has played an important role in holding governments to account for their failure to respect our rights to our lands, territories and resources. Previous Social Justice Commissioners have reported on, and recommended reforms to, significant legislative developments such as the *Native Title Amendment Act 1998* (Cth) (also known as ‘the *Wik* amendments’).<sup>2</sup>

In more recent times, the *Native Title Report* has led the way in identifying environmental challenges that will increasingly threaten our ability to exercise our rights. These challenges include climate change.<sup>3</sup>

Indeed, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur)<sup>4</sup> has recognised the position of the Social Justice Commissioner as ‘an exceptional model for advancing the recognition and protection of rights of indigenous peoples’.<sup>5</sup>

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

2 See, for example, 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](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](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](http://humanrights.gov.au/social_justice/nt_report/index.html#1999) (viewed 19 October 2010).

3 See, for example, T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009). At [http://humanrights.gov.au/social\\_justice/nt\\_report/ntreport08/index.html](http://humanrights.gov.au/social_justice/nt_report/ntreport08/index.html) (viewed 19 October 2010).

4 On 30 September 2010, the Human Rights Council adopted a resolution to extend the mandate of the Special Rapporteur for three years and to change the title of the office to ‘Special Rapporteur on the rights of indigenous peoples’: *Human rights and indigenous peoples: mandate of the Special Rapporteur on the rights of indigenous peoples*, HRC Resolution 15/14, UN Doc A/HRC/RES/15/14 (2010). Throughout the *Native Title Report 2010*, I will refer to the Special Rapporteur’s full title as it existed during the Reporting Period.

5 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).

I am honoured to have the opportunity to build on this strong legacy.

### The foundations of the *Native Title Report 2010*

My five-year term as Social Justice Commissioner began on 1 February 2010. Since that time, I have made it a priority to meet with as many Aboriginal and Torres Strait Islander organisations, communities and community leaders as possible. In a series of community visits, I have sought first-hand information about the human rights issues that Aboriginal and Torres Strait Islander peoples believe should be given specific attention.

I have asked them to share with me their challenges, their strengths and their hopes. I have heard about their frustrations. And I have listened to the solutions that they propose.

For the purposes of the *Native Title Report 2010*, I have specifically sought information from Native Title Representative Bodies, Native Title Service Providers and Prescribed Bodies Corporate about their priorities and strategic goals. I have asked them to identify the barriers to social justice that they face in their region, their experiences in government consultation processes, and what it would take to achieve a just and equitable native title system.

I have also had the privilege of attending the ninth session of the United Nations Permanent Forum on Indigenous Issues (UNPFII) and the third session of the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP).

These international mechanisms provide an opportunity for governments, independent experts and Indigenous peoples to discuss matters that affect Indigenous peoples worldwide. At these sessions, I was reminded that many of the issues that Aboriginal and Torres Strait Islander peoples face are not very different to those faced by Indigenous peoples in countries that are considered to be extremely impoverished.

For example, at the UNPFII session, Indigenous peoples articulated the need for a new approach to development that embraces their cultures and identities. In the lead-up to the UNPFII session, a group of independent experts explained:

Indigenous peoples want development with culture and identity where their rights are no longer violated, where they are not discriminated against, excluded or marginalized and where their free, prior and informed consent is obtained before projects and policies affecting them are made and equitable benefit-sharing is recognized and operationalized.<sup>6</sup>

Similarly, discussions at the EMRIP session focused on the right of Indigenous peoples to participate in decision-making. The EMRIP considered that:

indigenous participation in decision-making on the full spectrum of matters that affect their lives forms the fundamental basis for the enjoyment of the full range of human rights.<sup>7</sup>

This is consistent with what I have heard during my community visits. Time and time again, I have heard that Aboriginal and Torres Strait Islander peoples want

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6 United Nations Permanent Forum on Indigenous Issues, *Indigenous peoples: development with culture and identity: articles 3 and 32 of the United Nations Declaration on the Rights of Indigenous Peoples: Report of the international expert group meeting*, UN Doc E/C.19/2010/14 (2010), para 17. At <http://www.un.org/esa/socdev/unpfii/documents/E.C.19.2010.14%20EN.pdf> (viewed 19 October 2010).

7 Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), para 2. At [http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35\\_en.pdf](http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf) (viewed 19 October 2010).

governments to change the way they do business. We want governments to embrace our rights, including our right to self-determination, in all laws, policies and programs.

Most importantly, we want to forge new relationships with governments, the corporate sector and the wider community. We want these relationships to be based on equality, non-discrimination and full respect for our rights. Unless we are able to build these new relationships, we will not achieve reconciliation in this country.

## Overview of the *Native Title Report 2010*

In preparing the *Native Title Report 2010* and its companion, the *Social Justice Report 2010*, I have been inspired by the issues and perspectives that I encountered during my community visits and at the UNPFII and EMRIP sessions. ‘Relationship-building’ and ‘effective engagement’ are the common threads that run through both reports.

In Chapter 1 of the *Native Title Report 2010*, I outline my key priorities relating to native title. I consider how the *United Nations Declaration on the Rights of Indigenous Peoples*<sup>8</sup> provides a guiding framework for my work. I also set out the themes in native title on which I will focus during my five-year 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.

Chapters 2 and 3 build on the importance of ‘effective engagement’ in the creation of stronger relationships between governments and Aboriginal and Torres Strait Islander peoples. In these Chapters, I analyse a selection of laws, policies and reform proposals that affect our rights to our lands, territories and resources.

In Chapter 2, I consider one way that governments can build and maintain relationships with Aboriginal and Torres Strait Islander peoples – that is, through reaching just and fair agreements. I analyse the initiatives that the Australian Government has pursued during the Reporting Period to improve agreement-making processes. I also recommend further reform.

In Chapter 3, I turn to another aspect of engagement and relationship-building – that is, consultation, cooperation, and free, prior and informed and consent. In this Chapter, I consider the elements of an effective and meaningful consultation process. I also analyse the importance of consultation and consent to the development of a ‘special measure’ under the *Racial Discrimination Act 1975* (Cth).

I then analyse the consultation processes in relation to two law reform initiatives that were pursued by the Australian Government during the Reporting Period:

- the Native Title Amendment Bill (No 2) 2009 (Cth)<sup>9</sup>

8 *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).

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

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- the amendments to the provisions of the *Northern Territory National Emergency Response Act 2007* (Cth) concerning the power of the Australian Government to compulsorily acquire five-year leases over certain land.

Finally, I outline some of the steps that should be taken to improve government consultation processes.

## Towards a reconciled Australia

As Social Justice Commissioner, my work is underpinned by two unshakeable and personal commitments. The first is my commitment to addressing the disadvantages that Aboriginal and Torres Strait Islander peoples continue to experience. The second is my commitment to doing all in my power to achieve a truly reconciled Australia.

The core themes of the *Native Title Report 2010* – building relationships and promoting effective engagement between governments and Aboriginal and Torres Strait Islander peoples – lie at the heart of my priorities as Social Justice Commissioner. I intend to develop these themes during my term.

In the coming years, I look forward to working with Aboriginal and Torres Strait Islander peoples, governments and the wider Australian community and to promote reconciliation based on partnership, trust and mutual respect.