



Australian
Human Rights
Commission

Native Title Amendment Bill 2012 and future reform of the native title process

**AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE HOUSE
STANDING COMMITTEE ON ABORIGINAL AND TORRES STRAIT ISLANDER AFFAIRS**

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1 Introduction

1. The Australian Human Rights Commission makes this submission to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs in its Inquiry into the Native Title Amendment Bill 2012 (the Bill). The terms of reference for this Inquiry address:
 - whether a sensible balance has been struck in the Bill between the views of various stakeholders and/or
 - proposals for future reform of the native title process.
2. The Bill contains amendments to:
 - enable parties to agree to disregard the historical extinguishment of native title over an area that has been set aside or vested to preserve the natural environment such as parks and reserves
 - clarify the meaning of good faith under the right to negotiate regime, and the conduct and effort required of parties in seeking to reach agreement
 - streamline processes for Indigenous Land Use Agreements (ILUAs).
3. According to the Explanatory Memorandum to the Bill, these amendments 'aim to improve agreement-making, encourage flexibility in claim resolution and promote sustainable outcomes'.¹
4. The Commission notes that the Attorney-General's Department has consulted with a wide range of stakeholders on the development of the Bill.
5. The Commission also welcomes the opportunity to submit proposals for future reform of the native title process.
6. The Aboriginal and Torres Strait Islander Social Justice Commissioner (the Social Justice Commissioner) provides annual statutory reports to Parliament on the operation of the *Native Title Act 1993* and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples.² These reports contain extensive analysis and recommendations about future reform of the native title process – this submission focuses on recommendations detailed in the *Native Title Reports 2009–2012*.³

2 Summary

7. The Commission generally welcomes the Bill. The proposed amendments are compatible with the human rights to enjoy and benefit from culture and to self-determination contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).
8. The Commission makes four recommendations relating to the Bill – contained in the next section of this submission.
9. The Commission also notes that the *Native Title Act 1993* continues to impose significant burdens on Aboriginal and Torres Strait Islander peoples to prove their on-going connection to their lands, territories and resources. Some of the causes of these burdens are not addressed through the proposed amendments.
10. The Commission makes five recommendations about future reform of the native title process – contained in the next section of this submission. The Commission also recommends that the Australian Government establish an independent inquiry to comprehensively review the operation of the native title system and explore options for native title law reform.

3 Recommendations

11. The Australian Human Rights Commission recommends that the House Standing Committee on Aboriginal and Torres Strait Islander Affairs:
 - Support the passage of the Native Title Amendment Bill 2012. [Recommendation no. 1]
 - Consider incorporating the changes outlined in paragraph 15 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways:
 - i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
 - ii. expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there

is agreement between the government and native title claimants.
[Recommendation no. 2]

- Consider the implications of the amendment outlined in paragraph 28 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body. [Recommendation no. 3]
- Collaborate with the Senate Legal and Constitutional Affairs Legislation Committee on their Inquiry into the Native Title Amendment Bill 2012. [Recommendation no. 4]
- Consider the following outstanding recommendations in the *Native Title Report 2012* in relation to implementing the *United Nations Declaration on the Rights of Indigenous Peoples*:
 - i. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect.
 - ii. That the Australian Government ensures that the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.⁴ [Recommendation no. 5]
- Consider the following outstanding recommendations in the *Native Title Report 2009* in relation to shifting the burden of proof for native title:
 - i. That the *Native Title Act 1993* be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
 - ii. That the *Native Title Act 1993* provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.⁵ [Recommendation no. 6]
- Consider repealing section 26(3) of the *Native Title Act 1993* to allow procedural rights in relation to offshore areas. [Recommendation no. 7]
- Consider amending section 223(2) of the *Native Title Act 1993* to specify that native title rights and interests include the ‘right to trade and

other rights and interests of an economic nature'. [Recommendation no. 8]

- Consider the following outstanding recommendation in the *Native Title Report 2012* in relation to Prescribed Bodies Corporate:
 - i. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources. [Recommendation no. 9]
- Recommend that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title reform, with a view to aligning the system with the *United Nations Declaration on the Rights of Indigenous Peoples*. The terms of reference for this inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian, State and Territory governments, and respondent stakeholders including mining and pastoral interests. [Recommendation no. 10]

4 Native Title Amendment Bill 2012

4.1 Amendments to disregard the historical extinguishment of native title in areas set aside to preserve the natural environment

12. The *Native Title Act 1993* does not currently allow parties to reach agreement about disregarding extinguishment of native title except in particular circumstances set out in section 47 (pastoral leases held by native title claimants), section 47A (reserves covered by claimant applications) and section 47B (vacant Crown land covered by claimant applications).
13. The Bill inserts section 47C, which allows historical extinguishment of native title over national, State and Territory parks and reserves to be disregarded where there is agreement between the relevant government party and the

native title party. The intent of this amendment is to increase flexibility for parties to agree to disregard historical extinguishment of native title.

14. This amendment also:

- enables the government party to include a statement in the agreement that it agrees to disregard extinguishment of native title over public works within the agreement area, if the public works were established or constructed by or on behalf of the relevant government party
- provides notification requirements to give interested persons an opportunity to comment over a two month period on the proposed agreement
- ensures the validity of other prior interests (such as licenses and leases) and maintains public access to the area
- provides that the non-extinguishment principle applies, so that any current interests over the land will continue to exist but will suppress rather than extinguish any native title rights to the extent of any inconsistency
- excludes Crown ownership of natural resources from the operation of section 47C.

15. The Commission welcomes this amendment to expand the areas where historical extinguishment of native title can be disregarded. The Commission is of the view that this proposed provision should be further expanded in the following two ways:

- alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter
- expand section 47C to allow historical extinguishment of native title to be disregarded over *any* areas of Crown land where there is agreement between the government and native title claimants.

4.2 Amendments to clarify good faith requirements in the right to negotiate provisions

16. The Bill inserts section 31A, which sets out good faith criteria that establish the conduct expected of negotiating parties. The objective of this amendment is to 'encourage parties across the [resource] sector to focus on negotiated, rather than arbitrated, outcomes'.⁶

17. Section 31A establishes good faith requirements for parties in relation to negotiating a proposed agreement. These requirements are set out in section 31A(2) and include the negotiating parties:
 - attending and participating in meetings at reasonable times
 - disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
 - making reasonable proposals and counter proposals
 - responding to proposals made by other negotiation parties for the agreement in a timely manner
 - giving genuine consideration to the proposals of other negotiation parties
 - refraining from capricious or unfair conduct that undermined negotiation
 - recognising and negotiating with the other negotiation parties or their representatives
 - refraining from acting for an improper purpose in relation to the negotiations
 - any other matter the arbitral body considers relevant.
18. The Commission welcomes this amendment that clarifies the requirements for parties who need to demonstrate they have negotiated in good faith. This amendment seeks to address the uncertainty held by native title parties following the *FMG Pilbara Pty Ltd v Cox* Federal Court decision in 2009 that found the *Native Title Act 1993* does not require parties to reach a certain stage in negotiations before a party can apply to the arbitral body for a determination that the future act can proceed.⁷
19. The Bill amends paragraph 35(1)(a) that extends the time before a party may seek a future act determination from the arbitral body from six to eight months. The Commission agrees with this extension of time but is of the view that it is unlikely to create any substantial change to negotiation outcomes for native title parties.
20. The Bill replaces section 36(2), which specifies that where a negotiation party asserts that another negotiation party (the second negotiation party) has not satisfied the good faith requirements, it is the second negotiating party that must then establish that it has met the good faith negotiation requirements before seeking a determination from the arbitral body that the future act can proceed.

21. The Commission supports this amendment that requires the second negotiating party to demonstrate that good faith negotiation requirements have been met before seeking a determination that the future act can proceed. However, the Commission notes that the wording in subsection 36(2) is unnecessarily complex and the arbitral body (usually the National Native Title Tribunal) is in a more informed position to comment on the application and operation of this provision.

4.3 Amendments to Indigenous Land Use Agreement processes

22. Amendments to ILUA processes include provisions to:

- broaden the scope of body corporate (Subdivision B) ILUAs
- improve authorisation and registration processes for ILUAs
- simplify the process for amending ILUAs.

23. The intention of these amendments is to ‘ensure parties are able to negotiate flexible, pragmatic agreements to suit their particular circumstances’.⁸

(a) Broaden the scope of body corporate (Subdivision B) ILUAs

24. The Bill inserts subsection 24BC(2), which allows parties to make a body corporate ILUA over areas that are wholly determined but include areas where native title has been extinguished; and/or where an area has been excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.

25. The Commission supports this amendment as it provides greater flexibility for the use of body corporate ILUAs.

(b) Authorisation and registration processes for ILUAs

26. The Bill introduces a number of complementary amendments that aim to streamline authorisation, notification and registration processes for area agreement (Subdivision C) ILUAs.

27. The Commission’s view is that these amendments generally provide a balanced and pragmatic response to resolving uncertainty about authorisation and registration processes of area agreement (Subdivision C) ILUAs.

28. However, the Commission notes that due to the complexities of native title matters that may need to be considered during the registration of ILUAs, some of these amendments may create unforeseen and/or unintentional outcomes. In particular, the Commission is concerned that replacing section 24CK with a

provision that removes the objection process for ILUAs certified by a native title representative body will mean that persons who wish to object to a certified ILUA will only be able to seek judicial review.⁹ Removing the process of independent assessment and registration by the Registrar of the National Native Title Tribunal may lead to expensive and unnecessary litigation in the courts – most likely by Aboriginal and Torres Strait Islander peoples who do not believe their native title representative body or service provider represents their native title interests. While the Commission supports amendments that simplify the registration process, this should not occur at the expense of people being able to seek an inexpensive and independent review of the registration process.

(c) *Simplify the process for amending ILUAs*

29. The Bill also provides for certain amendments to be made to ILUAs (whether body corporate, area agreement or alternative procedure) where:
- the amendment is specified in subsection 24ED(1) – amendments that can mostly be categorised as administrative amendments
 - the parties to the agreement have agreed to the amendment
 - the Registrar of the National Native Title Tribunal has been notified of the amendments in writing.
30. The Commission supports this amendment as it will provide flexibility to enable parties to make administrative amendments to ILUAs without requiring a new registration process.

4.4 *Implications of the Native Title Amendment Bill 2012 on human rights*

31. Overall, the Commission welcomes the Bill as it is compatible with the human rights to enjoy and benefit from culture and to self-determination contained in the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights* and the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).
32. While the Bill seeks to achieve a sensible balance of interests between parties involved in the native title system, it is the Commission's view that further reforms are required to achieve substantive native title outcomes for Aboriginal and Torres Strait Islander peoples. In particular, the Commission refers the Committee to Article 27 of the Declaration, which articulates that:

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.

33. The Commission outlines proposals for reform of the native title process in the next section.

5 Proposals for future reform of the native title process

34. The Commission welcomes the Committee's inquiry into future reform of the native title process. It is the Commission's view that substantial reform is required to achieve the intent set out in the Preamble of the *Native Title Act 1993*; that is:

... that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.¹⁰

35. The Commission makes recommendations for reform of the native title process to:
- ensure consistency between the native title system and human rights articulated in the Declaration
 - reverse the high standards of proof required for Aboriginal and Torres Strait Islander peoples to demonstrate their native title
 - establish procedural rights over offshore areas
 - specify that native title rights include economic rights and interests
 - provide adequate funding and resources to Prescribed Bodies Corporate.

5.1 Consistency with the Declaration

36. The *United Nations Declaration on the Rights of Indigenous Peoples* was adopted by the Australian Government in 2009. Article 1 of the Declaration affirms that it does not create new human rights but rather reflects existing rights as they apply to Indigenous peoples:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

37. The *Native Title Report 2012* examines how human rights principles contained in the Declaration are fundamental to ensuring effective, culturally relevant and legitimate governance by Aboriginal and Torres Strait Islander peoples over their lands, territories and resources.¹¹ The Commission refers the Committee to chapter 2 of this Report, which is attached at Appendix A.
38. The Commission urges the Australian Government to work with Aboriginal and Torres Strait Islander peoples to implement the Declaration.
39. It is the Commission's view that all legislation should be consistent with the Declaration. The Commission recommends that the Committee consider the following recommendations in relation to the Declaration in the *Native Title Report 2012*:
 - That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect.
 - That the Australian Government ensures that the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*.¹²

5.2 Onus of proof

40. The Commission notes that the Committee on the Elimination of Racial Discrimination and the Human Rights Committee has criticised the Australian Government in relation to the onerous standards of proof required for Aboriginal and Torres Strait Islander peoples to prove native title over their traditional lands, territories and resources.¹³
41. The Commission observes that the high standards for proving continuity, which have been derived from the High Court decision in *Yorta Yorta v Victoria*,¹⁴ have had a detrimental effect on native title claims.¹⁵ For example, the Larrakia people were unable to prove their native title claim over vacant Crown land in 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'.¹⁶
42. Chief Justice French AC of the High Court of Australia has suggested that the *Native Title Act 1993* 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'.¹⁷

43. The Commission supports amending the *Native Title Act 1993* to establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test set out at section 190A of the *Native Title Act 1993*.¹⁸
44. The onus would then shift onto the respondent, usually state or territory governments, to demonstrate that there is evidence of ‘substantial interruption’ in the acknowledgment of traditional laws or the observation of traditional customs that sets aside the presumption. This will clarify that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity.
45. The Commission recommends that the Committee consider the following outstanding recommendations in the *Native Title Report 2009* in relation to shifting the burden of proof for native title:
 - That the *Native Title Act 1993* be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test.
 - That the *Native Title Act 1993* provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.¹⁹

5.3 Procedural rights over offshore areas

46. Section 26(3) of the *Native Title Act 1993* limits the right to negotiate to acts that relate ‘to a place that is on the landward side of the mean high-water mark of the sea’. However, the High Court’s decision in *Commonwealth v Yarmirr* recognised that non-exclusive native title rights and interests can exist over offshore areas.²⁰
47. The Social Justice Commissioner has highlighted the anomaly between section 26(3) and the courts’ recognition that non-exclusive native title rights and interests can exist in relation to offshore areas.²¹ The Commission also notes that an amendment to repeal section 26(3) was included in the *Native Title Amendment (Reform) Bill*, which was introduced into Parliament by Senator Siewert in May 2011 and the subject of inquiry and report by the Senate Legal and Constitutional Affairs Legislation Committee.²²
48. The Commission recommends that the Committee consider repealing section 26(3) of the *Native Title Act 1993* to allow procedural rights in relation to offshore areas.

5.4 Economic rights and interests

49. The *Native Title Act 1993* does not clearly specify that native title rights and interests can be of an economic nature.
50. The Commission notes that Article 3 of the Declaration affirms the right of Aboriginal and Torres Strait Islander peoples to self-determination and, 'by virtue of that right, [to] freely determine their political status and freely pursue their economic, social and cultural development'.
51. The Commission recommends amending section 223(2) of the *Native Title Act 1993* to specify that native title rights and interests include 'the right to trade and other rights and interests of an economic nature'.

5.5 Prescribed Bodies Corporate

52. Supporting and enabling Prescribed Bodies Corporate to hold, protect and manage determined native title is fundamental for native title groups to achieve their cultural, social and economic objectives and aspirations.
53. In the *Native Title Report 2012*, the Social Justice Commissioner outlines the factors that assist Prescribed Bodies Corporate to effectively govern their native title rights and interests in their lands, territories and resources. The Commission refers the Committee to chapter 3 of this Report, which is attached at Appendix B.
54. The Commission recommends that the Committee consider the following outstanding recommendation in the *Native Title Report 2012* in relation to Prescribed Bodies Corporate:
 - That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources.²³

5.6 Independent inquiry into native title

55. The Commission notes the Senate Legal and Constitutional Affairs Legislation Committee's Report on the Native Title Amendment (Reform) Bill 2011 in November 2011, which outlined 'serious reservations about the introduction of legislation which seeks to make amendments – particularly in an area as complex and technical as native title – in a piecemeal manner'.²⁴

56. The Commission agrees with this statement by that Committee and recommends that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title reform, with a view to aligning the system with the *United Nations Declaration on the Rights of Indigenous Peoples*. The terms of reference for this inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian, State and Territory governments, and respondent stakeholders including mining and pastoral interests.

6 Appendix A – Chapter 2 Native Title Report 2012

The Declaration on the Rights of Indigenous Peoples and Indigenous governance over lands, territories and resources

Introduction

The theme of governance in this year's Native Title and Social Justice Reports reflects the priorities I set out at the beginning of my term as Social Justice Commissioner in 2010. These are to advance the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration) and to promote the development of 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.¹

Discussing the concept of governance also supports my native title priority to enhance the capacity of Aboriginal and Torres Strait Islander peoples to realise our social, cultural and economic development aspirations.²

In this year's Native Title Report, I address these priorities by setting out how governance can provide a foundation that enables us, as Aboriginal and Torres Strait Islander peoples, to achieve our aspirations.

¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010*, Australian Human Rights Commission (2011), p 2. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 6 March 2012).

² *Native Title Report 2010*, above, p 3.

In this Chapter, I examine how effective, culturally relevant and legitimate Indigenous governance over lands, territories and resources³ needs to incorporate the following principles that are set out in the Declaration:

- self-determination
- participation in decision-making, good faith, and free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

What is Indigenous governance?

Indigenous governance is about how we organise ourselves and make decisions about our lives in a culturally relevant way. The National Centre for First Nations Governance (NCFNG) in Canada describes governance for Indigenous peoples as:

...the traditions (norms, values, culture, language) and institutions (formal structures, organisation, practices) that a community uses to make decisions and accomplish its goals. At the heart of the concept of governance is the creation of effective, accountable and legitimate systems and processes where citizens articulate their interests, exercise their rights and responsibilities and reconcile their differences.⁴

While discussions and research about contemporary Indigenous governance have been occurring for some time in Australia, I believe it is critical we recognise that governance has always been at the core of our Aboriginal and Torres Strait Islander cultures and our community life.

The distinction between our traditional or customary governance and contemporary Indigenous governance means that we must now adjust our customary ways of governing to meet the expectations and regulations of non-indigenous institutions. June Oscar, in her keynote speech to the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) National Native Title Conference in June 2012, explained the importance of acknowledging:

...the challenging and complex operating environment which we are all continuing to live in, seeking justice and trying to raise families, and holding onto the lived practices of our beliefs. We as Indigenous People live out our lives in two worlds according to our custom and tradition and the modern reality. Yet this acknowledgement has never

³ 'Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*.

⁴ National Centre for First Nations Governance, *Governance Best Practices Report* (2009), p vii. At <http://www.newrelationshiptrust.ca/downloads/governance-report.pdf> (viewed 16 March 2012).

ever been forthcoming. Because the western lens is applied to everything we encounter.⁵

The inherent tension between the ‘two worlds’ in which we live and to which we are forced to adapt is also recognised in the Indigenous Community Governance Project’s description of Indigenous governance as:

...relationships between and among Australian governments and Indigenous groups, and as contestation and negotiation over the appropriateness and application of policy, institutional and funding frameworks within Indigenous affairs.⁶

While I concede that contemporary Indigenous governance is most likely to require us to negotiate with the wider non-indigenous world, in this Chapter I want to explore how we can govern ourselves in ways that enables and empowers, rather than disables and disempowers.

Why talk about Indigenous governance?

So, why do we need to talk about Indigenous governance? And why do we need to think about how we make decisions and what we make decisions about?

Firstly, governance and the ways that we, as Aboriginal and Torres Strait Islander peoples, organise ourselves and make decisions is central to our ability to influence the outcomes we want to achieve and how we want to achieve them.

I note that the governance of our lands, territories and resources – looking after our cultural heritage, dealing with our native title claims and processing our land rights claims – consumes a significant amount of time and resources for Aboriginal and Torres Strait Islander peoples.

There is substantial evidence that shows effective governance is fundamental to ensuring culturally relevant and sustainable outcomes for our peoples. This is recognised by the Council of Australian Governments (COAG) in its National Indigenous Reform Agreement (Closing the Gap), which acknowledges the importance of governance and leadership to support the reforms aimed at closing the gap for Indigenous peoples on health, education and employment targets.⁷ A recent paper by the Closing the Gap Clearinghouse also observes that long-term outcomes

⁵ J Oscar, ‘Recognising and encouraging honour and determination’ (keynote address presented at pre-workshop, AIATSIS Native Title Conference, Townsville, 4 June 2012). At http://www.aiatsis.gov.au/ntru/documents/JuneOscarSpeech_000.pdf (viewed 24 July 2012).

⁶ D Smith and J Hunt, ‘Understanding Indigenous Australian governance – research, theory and representations’ in *Contested Governance: culture, power and institutions in Indigenous Australia*, p 4. At http://epress.anu.edu.au/titles/centre-for-aboriginal-economic-policy-research-caepr/c29_citation/pdf-download (viewed 25 May 2012).

⁷ Council of Australian Governments, *National Indigenous Reform Agreement (Closing the Gap)*, (2007), pp 5 and 8. At http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/NIRA_closing_the_gap.pdf (viewed 31 May 2012).

are achieved when there is ‘community ownership of governance improvement with organisational change led by Indigenous people using existing community capacity’.⁸

Internationally, the Harvard Project on American Indian Economic Development (the Harvard Project) contends that Indigenous governance is the key to achieving sustained and self-determined social and economic development on American Indian reservations. I discuss the Harvard Project further in section 2.2 below.

Secondly, effective, legitimate and accountable governance systems can assist us to identify the problems within our communities, understand the reasons why the critical social and economic problems facing our communities are increasing, and develop responses appropriate to each situation.⁹ In 2003, Mick Dodson and Diane Smith noted that:

For several decades now Australian commentators (both Indigenous and non-Indigenous) have been asking a series of related questions about why so many Indigenous organisations and enterprises seem to fail; what are the most effective structures for running a community and delivering services; how community assets and resources can most effectively be managed; how Indigenous organisations and leaders can become more accountable to their members; how the different rights and interests of all residents in communities can be represented and protected; and whether different communities can work together for regional development objectives.

These familiar questions share one important underlying thread—governance.¹⁰

Almost a decade later, these questions remain mostly unanswered and continue to pose challenges for our peoples and communities.

Thirdly, we need to consider how we can most effectively balance the inherent tension between our customary obligation to govern our traditional lands, territories and resources, and the governance requirements of government and external stakeholders.

Finally, governance is a mechanism that enables us to address lateral violence. As I discussed in last year’s Social Justice and Native Title Reports, governance within our communities – in particular, the way we make decisions and the structures that operate within our communities – can affect the extent to which lateral violence plays

⁸ K Tsey, J McCalman, R Bainbridge and C Brown, *Improving Indigenous community governance through strengthening Indigenous and government organizational capacity*. Resource Sheet No. 10. Produced for the Closing the Gap Clearinghouse. Canberra: Australian Institute of Health and Welfare and Melbourne: Australian Institute of Family Studies. At http://www.aihw.gov.au/closingthegap/documents/resource_sheets/ctgc-rs10.pdf (viewed 23 March 2012).

⁹ M Dodson and DE Smith, *Governance for Sustainable Development: strategic issues and principles for Indigenous Australian communities*, Centre for Aboriginal Economic Policy Research Discussion Paper 250/2003, p 2. At http://caepr.anu.edu.au/sites/default/files/Publications/DP/2003_DP250.pdf (viewed 23 March 2012).

¹⁰ Dodson and Smith, above, pp 2–3.

out in our communities.¹¹ And just as importantly, the governance of governments and external stakeholders can either contribute to or minimise the effect of lateral violence in our Aboriginal and Torres Strait Islander communities.

Indigenous governance and sovereignty over lands, territories and resources

This Chapter on Indigenous governance must be premised by acknowledging our colonised history and its impact on sovereignty over our traditional lands, territories and resources.

It is our history of colonisation post-1788 that sanctions the Australian Government to assume sovereignty over our lands, territories and resources. Unlike the United States of America (USA), Canada and New Zealand, the British did not sign a treaty with our ancestors when they arrived on our lands. Indeed, until the Mabo High Court decision in 1992, the jurisprudence reflected the clearly-erroneous view that no one lived in Australia prior to 1788.

For many Aboriginal and Torres Strait Islander peoples, this absence of a treaty recognising our sovereignty over our lands, territories and resources remains unfinished business.

We have *never* ceded sovereignty over our lands, territories and resources, and our governance and control of our traditional lands, territories and resources was taken without our consent and without our agreement.

We must also separate the question of territorial sovereignty from cultural sovereignty. Our cultural sovereignty has always been and continues to be maintained by Aboriginal and Torres Strait Islander peoples. While some may find this statement contentious, it simply recognises what we all know – that Aboriginal and Torres Strait Islander peoples have lived in Australia for over 70 000 years and despite being subjected to a process of colonisation for more than 220 years, our culture continues to adapt, thrive and be the foundation for every aspect of our lives.

There are some legal frameworks that recognise our ability to engage and coexist with people who have come to this country since 1788. For example, the Native Title Act provides a framework for acknowledging our traditional rights and interests and the coexistence of these rights with other people's interests over our lands, territories and resources. The Declaration also sets out principles for our engagement with government and external stakeholders. The capacity for the Declaration to do this is

¹¹ See M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/sj_report/sjreport11/index.html (viewed 10 July 2012) and M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2011*, Australian Human Rights Commission (2011). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport11/index.html (viewed 10 July 2012).

reinforced in its Preamble, where the General Assembly of the United Nations says that:

...this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples, based on principles of justice, democracy, respect for human rights, non-discrimination and good faith.¹²

It is these legal frameworks – and in particular, the Declaration – that can provide a foundation for us to establish a common understanding about how our Indigenous governance can be effective, legitimate and culturally relevant.

Indigenous governance

While the literature on Indigenous governance largely focuses on identifying key characteristics of ‘effective’ or ‘good’ governance, human rights standards as expressed in international treaties and conventions ratified by the Australian Government highlight the principles that underpin culturally safe and legitimate governance for Indigenous peoples.

In this section, I outline some of the key themes in the international and Australian literature on Indigenous governance and set out international human rights standards in order to identify the critical factors that enable effective governance for Aboriginal and Torres Strait Islander peoples. A more detailed analysis and discussion of the literature on Indigenous governance is provided in the *Social Justice Report 2012*.

The literature on Indigenous governance

Internationally, Indigenous governance has been extensively researched by the Harvard Project and the Native Nations Institute in the United States of America (USA) and the NCFNG in Canada.

While we need to be cautious about adopting overseas Indigenous governance successes without acknowledging and considering their different legal and constitutional frameworks,¹³ these international projects can provide useful insights into what enables effective governance for Indigenous peoples.

¹² *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular paragraph 18.

¹³ Australian Institute of Aboriginal and Torres Strait Islander Studies and the Australian Collaboration, *Organising for Success: policy report, successful strategies in Indigenous organisations* (2007), p 2. At <http://www.aiatsis.gov.au/research/success.html> (viewed 11 May 2012).

The Harvard Project on American Indian Economic Development

Since 1987, the Harvard Project has researched a ‘nation building’ approach to economic development on Indian reservations in the USA.¹⁴ This approach focuses on the governance ‘building blocks’ that enable sustained social and economic development for Indigenous peoples: see Text Box 2.1.

Text Box 2.1: The Harvard Project on American Indian Economic Development: the conditions under which sustained, self-determined social and economic development is achieved among American Indian nations¹⁵

- **Sovereignty Matters.** When Native nations make their own decisions about what development approaches to take, they consistently out-perform external decision makers on matters as diverse as governmental form, natural resource management, economic development, health care, and social service provision.
- **Institutions Matter.** For development to take hold, assertions of sovereignty must be backed by capable institutions of governance. Nations do this as they adopt stable decision rules, establish fair and independent mechanisms for dispute resolution, and separate politics from day-to-day business and program management.
- **Culture Matters.** Successful economies stand on the shoulders of legitimate, culturally grounded institutions of self-government. Indigenous societies are diverse; each nation must equip itself with a governing structure, economic system, policies, and procedures that fit its own contemporary culture.
- **Leadership Matters.** Nation building requires leaders who introduce new knowledge and experiences, challenge assumptions, and propose change. Such leaders, whether elected, community, or spiritual, convince people that things can be different and inspire them to take action.

In summary, the Harvard Project argues that Indigenous peoples must be enabled to make our own decisions, supported by our institutions that are grounded in our cultures and guided by our leadership.

National Centre for First Nations Governance

In Canada, the NCFNG sets out a hierarchy of 17 principles focused on five components of governance:

¹⁴ S Cornell and JP Kalt, ‘Sovereignty and Nation-Building: the development challenge in Indian country today’ in *American Indian Culture and Research Journal* (2003), pp 187–214. At http://nni.arizona.edu/resources/inpp/2003_CORNELL.kalt_JOPNA_sovereignty.nation-building.pdf (viewed 10 July 2012).

¹⁵ The Harvard Project on American Indian Economic Development, *Overview*. At <http://hpaied.org/about-hpaied/overview> (viewed 22 May 2012).

- people
- land
- laws and jurisdictions
- institutions
- resources.¹⁶

The NCFNG explains the relationship between these five governance components as follows:

Effective governance begins with the People. It is only through *the People* that we can begin to shape the strategic vision that serves as the signpost for the work that those communities and their organisations engage in. When the People have shared information, collectively made decisions and determined the strategic vision, their attention moves to where they sit – *to the Land*. Aboriginal title is an exclusive interest in the Land and the right to choose how that Land can be used. It is then through *Laws and Jurisdictions* that the rights of the Land are made clear. Following from and consistent with the Laws and Jurisdictions is the emergence of *Institutions* and the identification of the *Resources* required to realise and to ensure the continuity of effective governance [italics in original].¹⁷

This approach to Indigenous governance provides a comprehensive insight to the interaction of the components that affect governance for Indigenous peoples.

Australian research and literature

In Australia, the research on Indigenous governance has built upon the international empirical literature. In 2003, Mick Dodson and Diane Smith extracted principles of effective governance from the Harvard Project and applied them to the domestic Australian context to determine principles of effective governance for Aboriginal and Torres Strait Islander peoples.¹⁸

As I discuss the Australian literature on Indigenous governance extensively in the *Social Justice Report 2012*, in this Chapter I only highlight some of the key findings from the Indigenous Community Governance Project that was undertaken by Reconciliation Australia and the Centre for Aboriginal Economic Policy Research (CAEPR) from 2004 to 2008: see Text Box 2.2.

¹⁶ National Centre for First Nations Governance, note 4, pp vii-viii.

¹⁷ National Centre for First Nations Governance, above.

¹⁸ Dodson and Smith, note 9, pp 13–19.

Text Box 2.2: The factors that enable effective governance for Aboriginal and Torres Strait Islander peoples identified by the Indigenous Community Governance Project¹⁹

- Indigenous relationships and systems of representation provide the basis for working out organisational structures and processes.
- Legislative, policy and funding frameworks need to adapt to different governance arrangements that are based on local realities. Equally, Indigenous communities need to consider what governance arrangements are likely to enable them to achieve their goals.
- Culturally legitimate representation and leadership requires governance structures to reflect contemporary values and conceptions about the organisation of authority and exercise of leadership.
- Building the capacity of institutions of governance (such as policies, rules and constitutions) increases the effectiveness and legitimacy of community governance arrangements.
- Effective leadership, which enables consensus-making within communities, is critical to developing strong community governance.
- Governance capacity is a fundamental factor to generate sustainable economic development and social outcomes.
- The wider federal, state, regional and community governance environment can either enable or disable the governance of Indigenous communities.
- The criteria for evaluating effective governance is different for Indigenous peoples and governments: Indigenous peoples value internal accountability and communication; governments emphasise 'upwards' accountability, financial micro-management and compliance reporting.

This research highlights the importance of recognising the unique arrangements that must be in place for our governance processes and structures to be effective. This includes the need to integrate our culture and traditional systems of governance, and recognise our limited capacity to deal with the wider governance environment of federal, state/territory and local governments and other external stakeholders.

¹⁹ J Hunt and DE Smith, *Ten key messages from the preliminary findings of the Indigenous Community Governance Project* (2005). At <http://caepr.anu.edu.au/sites/default/files/Publications/WP/10key.pdf> (viewed 22 May 2012).

A human rights approach to Indigenous governance

Human rights standards, as set out in international treaties and conventions ratified by the Australian Government, guide our understanding of the principles that support effective, culturally relevant and legitimate Indigenous governance. The following outlines Australia's human rights obligations as set out in the Australian Human Rights Framework and the Declaration, and then articulates a human rights approach to Indigenous governance.

International human rights standards and the Australian Human Rights Framework

As a party to international human rights treaties, Australia's obligations under international law were reaffirmed by the Australian Human Rights Framework that is based on five key principles:

- reaffirming a commitment to our human rights obligations
- the importance of human rights education
- enhancing our domestic and international engagement on human rights issues
- improving human rights protections including greater parliamentary scrutiny
- achieving greater respect for human rights principles within the community.²⁰

Australia's human rights obligations arise as a result of the ratification of seven core international human rights treaties: see Text Box 2.3.

Text Box 2.3: International human rights treaties ratified by Australia

- *International Covenant on Civil and Political Rights (ICCPR)*
- *International Covenant on Economic, Social and Cultural Rights (ICESCR)*
- *International Convention on the Elimination of all forms of Racial Discrimination (ICERD)*
- *Convention on the Elimination of all forms of Discrimination Against Women (CEDAW)*

²⁰ Australian Government, Attorney-General's Department, *Australian Human Rights Framework* (2010). At <http://www.ag.gov.au/Humanrightsandantidiscrimination/Australiahumanrightsframework/Pages/default.aspx> (viewed 10 July 2012).

- *Convention on the Rights of the Child (CRC)*
- *Convention on the Rights of Persons with Disabilities (CRPD)*
- *Convention Against Torture and other Cruel, Inhuman or Degrading Treatment and Punishment (CAT).*

The ratification of these treaties requires the Australian Government to implement them domestically. However, as highlighted in the Australian Human Rights Framework, all members of the community have a responsibility to recognise and respect each other's human rights.

The United Nations Declaration on the Rights of Indigenous Peoples

The Declaration was adopted by the Australian Government in 2009. As the Declaration affirms in Article 1, it does not create new human rights but rather reflects existing rights as they apply to our peoples:

Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights and international human rights law.

Article 17(1) also establishes the relationship between our human rights and international and domestic law:

Indigenous individuals and peoples have the right to enjoy fully all rights established under applicable international and domestic law.

The Australian Government recently wrote that it will interpret the Declaration:

...in accordance with Article 46 which clarifies that the Declaration cannot be used to impair territorial integrity or political unity, and that it is subject to the 'limitations as are determined by law and in accordance with international human rights obligations'. The Declaration is not legally binding in nature. There is no legal obligation upon States to implement the Declaration domestically, or to ensure that its laws and policies are consistent with the Declaration.²¹

However, I note that this statement is inconsistent with the Minister for Families, Community Services and Indigenous Affairs' speech when the Government adopted the Declaration on 3 April 2009. Minister Macklin stated:

The Declaration gives us new impetus to work together in trust and good faith to advance human rights and close the gap between Indigenous and non-Indigenous Australians. The Declaration recognises the legitimate entitlement of Indigenous

²¹ Australian Government, *Australian Government and Non-Government Organisations Forum on Human Rights: background paper*, Canberra (14 and 15 August 2012), p 8.

people to all human rights – based on principles of equality, partnership, good faith and mutual benefit... Today Australia takes another important step to make sure that the flawed policies of the past will never be re-visited... Australia's existing obligations under international human rights treaties are mirrored in the Declaration's fundamental principles. The Declaration needs to be considered in its totality – each provision as part of the whole. Through the Article on self-determination, the Declaration recognises the entitlement of Indigenous peoples to have control over their destiny and to be treated respectfully.²²

It is also contrary to the view of the United Nations Special Rapporteur on the rights of indigenous peoples (Special Rapporteur), James Anaya, who states that the 'implementation of the Declaration should be regarded as a political, moral and, yes, legal imperative'.²³ In particular, he notes that:

...even though the Declaration itself is not legally binding in the same way that a treaty is, the Declaration reflects legal obligations that are related to the human rights provisions of the Charter of the United Nations, various multilateral human rights treaties and customary international law. The Declaration builds upon the general human rights obligations of States and is grounded in fundamental human rights principles such as non-discrimination, self-determination and cultural integrity, which are incorporated into widely ratified human rights treaties, as evident in the work of United Nations treaty bodies. In addition, core principles of the Declaration can be seen to connect to a consistent pattern of international and State practice, and hence, to that extent, they reflect customary international law.²⁴

Given that each of the articles in the Declaration is sourced in international law, I urge the Australian Government to accept its' obligations and to work with Aboriginal and Torres Strait Islander peoples to implement the Declaration.

In last year's Social Justice and Native Title Reports, I discussed how the Declaration incorporates four fundamental human rights principles that can be categorised as:

- self-determination
- participation in decision-making and free, prior and informed consent
- respect for and protection of culture
- non-discrimination and equality.

²² J Macklin, Minister for Families, 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/node/1711> (viewed 13 August 2012).

²³ United Nations General Assembly, *Rights of indigenous peoples*, UN Doc A/66/288 (2011), para 70. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/449/42/PDF/N1144942.pdf?OpenElement> (viewed 1 June 2012).

²⁴ United Nations General Assembly, above, para 68.

These principles are inextricably linked and indivisible, and our Indigenous governance must be underpinned by all of these principles if we are to realise our human rights. However, as each of these human rights principles has different implications for Indigenous governance, I consider them separately below.

Self-determination

Self-determination is about us deciding our own economic, social, cultural and political futures. At its core, 'self-determination is concerned with the fundamental right of people to shape their own lives.'²⁵

The right of self-determination is protected in Article 1 of the ICCPR, which states:

- (1) All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
- (2) All peoples may, for their own ends, freely dispose of their natural wealth and resources...In no case may a people be deprived of its own means of subsistence.

Our right to self-determination is also enshrined in the Declaration. Articles 3 and 4 explain that our right to self-determination includes our right to freely determine our political status and economic, social and cultural development, and our right to autonomy or self-government in matters relating to our internal and local affairs.

Article 5 considers how our governance within our own institutions co-exists with our participation in the governance of governments. This involves our right to maintain and strengthen our distinct political, legal, economic, social and cultural institutions while retaining our right to participate fully in the political, economic, social and cultural life of the state. In the words of the Special Rapporteur, this:

...reflects the common understanding that indigenous peoples' self-determination ordinarily involves not only the exercise of autonomy but also a participatory engagement and interaction with the larger societal structures in the countries in which indigenous peoples live.²⁶

Therefore, Indigenous governance structures and processes should enable self-determination and must reflect that we are 'equally entitled' to be in control of our own destinies and to participate in the activities of our governing institutions.²⁷ In practice, this could occur through a range of governance mechanisms for Aboriginal and Torres Strait Islander peoples including:

²⁵ C Fletcher (ed), *Aboriginal Self-Determination in Australia*, Aboriginal Studies Press, Canberra (1994), p xi.

²⁶ United Nations General Assembly, note 23, para 65.

²⁷ J Anaya 'The Right of Indigenous Peoples to Self-Determination in the Post-Declaration Era' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous Peoples* (2009), p 187.

- creating our own representative bodies
- creating our own schools, justice systems, health systems
- having control over our lives
- being able to participate in decisions that affect us
- being subject to our own laws
- establishing our own government
- establishing our own sovereign state.

These options were set out in the *UN Declaration on the Rights of Indigenous Peoples Commission Network Survey* undertaken by the Australian Human Rights Commission in June–July 2012.

Participation in decision-making, good faith, and free, prior and informed consent

As with the principle of self-determination, our participation in decision-making, good faith and free, prior and informed consent reinforces each of our rights contained in the Declaration. This has been affirmed by the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP):

The right to full and effective participation in external decision-making is of fundamental importance to indigenous peoples' enjoyment of other human rights. For instance, the right of indigenous peoples to identify their own educational priorities and to participate effectively in the formulation, implementation and evaluation of education plans, programmes and services is crucial for their enjoyment of the right to education.²⁸

The Declaration establishes the rights of Indigenous peoples to participate in decision-making in matters that affect us, and to develop and maintain our own decision-making systems and institutions (see Articles 18, 20 and 23).

Indigenous participation in decision-making has two distinct parts, internal participation and external participation:

- Internal participation includes Indigenous governance, legal systems, institutions and internal decision-making structures and processes.²⁹

²⁸ Office of the High Commissioner for Human Rights, *Expert Mechanism Advice No. 2 (2011): Indigenous peoples and the right to participate in decision-making* (2011), para 13. At http://www.ohchr.org/Documents/Issues/IPeoples/EMRIP/Advice2_Oct2011.pdf (viewed 28 November 2011).

²⁹ Human Rights Council, *Final study on indigenous peoples and the right to participate*

- External participation includes participation in electoral politics, participation in parliamentary processes, and direct participation in governance amongst others.³⁰

It is essential that external decision-making processes and institutions both recognise and support the internal participation in decision-making of our peoples.

There are three key elements that enable our effective participation in decision-making. These are:

- a duty to consult
- good faith
- free, prior and informed consent.

The obligation for governments to uphold each of these elements is outlined in Article 19 of the Declaration, which requires governments to consult in good faith with Indigenous peoples in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

A duty to consult

The Special Rapporteur has outlined that governments have a duty to consult with Indigenous peoples ‘whenever a State decision may affect indigenous people in ways not felt by others in society’, even if their rights have not been recognised in domestic law.³¹ Furthermore, the objective of consultations ‘should be to obtain the consent of the indigenous peoples concerned’.³²

In practice, a duty to consult requires that:

- consultation processes should ‘make every effort to build consensus on the part of all concerned’³³

in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples, UN Doc A/HRC/18/42, paras 42–66. At <http://www.un.org/Docs/journal/asp/ws.asp?m=A/HRC/18/42> (viewed 10 August 2012).

³⁰ Human Rights Council, *Progress report on indigenous peoples and the right to participate in decision-making: Report of the Expert Mechanism on the Rights of Indigenous Peoples*, UN Doc A/HRC/EMRIP/2010/2, paras 67–101. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/134/39/PDF/G1013439.pdf?OpenElement> (viewed 10 August 2012).

³¹ J Anaya, Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, *Report to the Human Rights Council*, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/145/82/PDF/G0914582.pdf?OpenElement> (viewed 16 August 2012).

³² Anaya, above, para 65.

³³ Anaya, above, para 48.

- traditional and contemporary forms of Indigenous peoples' governance – including collective decision-making structures and practices – should be promoted and respected
- Indigenous peoples' right to participate in all levels of decision-making – including external decision-making – should be promoted and respected.³⁴

This means that Indigenous peoples must be recognised and treated as substantive stakeholders in the development, design, implementation, monitoring and evaluation of all policies and legislation that impact on our well-being.

Good faith

There are two aspects of good faith; cooperation and fairness:

Good faith as cooperation requires cooperation from contracting parties in order to facilitate successful performance of the contract. Good faith as fairness qualifies the decision of a party to exercise her or his contractual powers in order to ensure some level of consideration for the interests of the other party to the contract.³⁵

The EMRIP suggests that consultations incorporating good faith require that:

...consultations be carried out in a climate of mutual trust and transparency. Indigenous peoples must be given sufficient time to engage in their own decision-making process, and participate in decisions taken in a manner consistent with their cultural and social practices. Finally, the objective of consultations should be to achieve agreement or consensus.³⁶

Thus, good faith ensures that decision-making processes are fair, cooperative and consistent with our cultural practices. This means that all parties – Indigenous and non-Indigenous – involved in the decision-making need to be respectful of each other's needs and priorities, and be prepared to engage with the intent of reaching an agreed outcome.

Free, prior and informed consent

Our participation in decision-making must be underpinned by the principle of free, prior and informed consent. Free, prior and informed consent is explained as:

- *Free* means there must be no force, intimidation, manipulation, coercion or pressure by any government or company.
- *Prior* means we must be given enough time to consider all the information and make a decision.

³⁴ Human Rights Council, note 29, annex paras 29–30.

³⁵ J Paterson, A Robertson, and P Heffey (eds), *Principles of Contract Law* (2nd edition), p 305.

³⁶ Human Rights Council, note 29, annex para 9.

- *Informed* means we must be given all the relevant information to make a decision. This information must be in a language that people can easily understand. We must also have access to independent information and experts on law and technical issues.
- *Consent* means that we must be allowed to say ‘yes’ or ‘no’ according to our own decision-making process.³⁷

The issue of consent and whether this includes allowing Indigenous people to say ‘no’ has been contentious for a number of countries including Australia. This concern reflects the view that saying ‘no’ could amount to a right of veto for Indigenous peoples, which could threaten the ‘territorial integrity’ of the Australian Government.³⁸

Kenneth Deer explains that the right to free, prior and informed consent is:

...not automatically a veto, since our human rights exist relative to the rights of other. Nor is there any reference to a veto in the *Declaration*. Free, prior and informed consent is a means of participating on an equal footing in decisions that affect us.³⁹

The Special Rapporteur asserts that a:

...significant, direct impact on indigenous peoples’ lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples’ consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.⁴⁰

The International Law Association clarifies that the principle of free, prior and informed consent must be examined within the context of the object and purpose of the *Declaration*:

...although States are not obliged to obtain the consent of indigenous peoples before engaging in *whatever kind* of activities which may affect them – this obligation exists any time that the lack of such a consent would translate into a violation of the rights of indigenous peoples that States are bound to guarantee and respect [*italics in original*].⁴¹

³⁷ Adapted from C Hill, S Lillywhite and M Simon, *Guide to Free, Prior and Informed Consent*, Oxfam Australia (2010), p 9. At http://www.culturalsurvival.org/files/guidetofreepriorinformedconsent_0.pdf (viewed 10 August 2012).

³⁸ See Article 46 of the *United Nations Declaration on the Rights of Indigenous Peoples* and the Australian Government, note 21, p 8.

³⁹ K Deer, ‘Reflections on the Development, Adoption, and Implementation of the UN Declaration on the Rights of Indigenous Peoples’ in J Hartley, P Joffe and J Preston (eds) *Realising the UN Declaration on the Rights of Indigenous Peoples: triumph, hope and action*, Purich Publishing Canada, (2010), p 27.

⁴⁰ Anaya, note 31, para 47.

⁴¹ International Law Association, *Sofia Conference: Rights of Indigenous Peoples Final Report* (2012), p 7. At <http://www.ila-hq.org/en/committees/index.cfm/cid/1024> (viewed 16 August 2012).

So, how are the elements of a duty to consult, good faith, and free, prior and informed consent reflected in Indigenous governance? And what does participation in decision-making look like in practice?

For us to exercise our right to free, prior and informed consent and participate in decision-making regarding the terms of projects, policies and laws that affect us, governments and external stakeholders need to:

- respect and support our representative and decision-making processes and structures
- provide us with complete access to all relevant information in a culturally appropriate manner, including our own languages
- engage with our peoples and our representative organisations in a cooperative and fair manner that is respectful of our needs and priorities
- provide us with adequate timeframes to make a decision
- allow us to say no.

Respect for and protection of culture

Culture incorporates our ways of being, knowing and doing – it is the foundation of our individual and collective identity. Culture can be thought of as:

...a complex and diverse system of shared and interrelated knowledge, practices and signifiers of a society, providing structure and significance to groups within that society... Shared knowledge including collectively held norms, values, attitudes, beliefs...while cultural practices are evidenced in the language, law and kin relationship practices of a society.⁴²

In Australia, we must recognise that we have hundreds of nations of Aboriginal and Torres Strait Islander peoples, each of which has its own distinct cultural norms, law, language and identity.

While our culture can manifest in many forms, the survival of our culture is passed on to our future generations through our art, dance, song, language and knowledge. We maintain our culture by asserting and reinforcing:

- our physical and spiritual relationships to each other, and to our lands, territories and natural resources

⁴² M J Hallaran, 'Cultural maintenance and trauma in Indigenous Australia' (paper presented at the 23rd Annual Australia and New Zealand Law and History Society Conference, Perth, Western Australia 2-4 July 2004), p 2. At <http://www.murdoch.edu.au/elaw/issues/v11n4/halloran114.html> (viewed 8 August 2012).

- our distinct identities, languages and laws
- our knowledge
- our common responsibilities to promote, maintain and protect each of these elements, now and into the future.

The imperative for us to protect our culture and the wisdom we have inherited from our ancestors has been described by Mick Dodson:

We cannot survive as distinct peoples, nor can we exercise our fundamental rights as peoples unless we are able to conserve, revive, develop and teach that wisdom. Without the connection with our cultural heart, the enjoyment of all other rights is a superficial shell.⁴³

Respecting and protecting our culture also impacts on other human rights principles in the Declaration. David Cooper from the Aboriginal Medical Services Alliance in the Northern Territory (AMSANT) describes how culture can ameliorate the impact of racism and discrimination:

Culture and language, and occupation and customary use of traditional lands (and its individual and community manifestation as cultural identity) provide powerful moderating effects on the impacts of racism and discrimination, and can provide a foundation for stronger communities and healthier lives.⁴⁴

The Declaration articulates our right to culture in Articles 8(1), 11(1), 15(1) and 31(1), and includes our right to maintain, protect and practice our cultural traditions and cultural heritage.

The responsibility of governments to respect and protect our culture is also set out in Articles 8(2)(a), 11(2) and 14(3) of the Declaration. This includes the requirement to provide effective mechanisms to protect:

- our integrity as distinct peoples
- our cultural values
- our cultural, intellectual, religious and spiritual property

⁴³ M Dodson, *Cultural Rights and Educational Responsibilities* (The Frank Archibald Memorial Lecture, 5 September 1994). At http://www.humanrights.gov.au/about/media/speeches/social_justice/educational_responsibilities.html (viewed 9 August 2012).

⁴⁴ D Cooper, *Closing the Gap in Cultural Understanding: social determinants of health in Indigenous policy in Australia*, Aboriginal Medical Services Alliance, Darwin (2011), p 13. At <http://www.amsant.org.au/documents/article/61/2011-Closing%20the%20Gap%20and%20Indigenous%20social%20determinants-Final.pdf> (viewed 11 July 2012).

- our children's access to an education in our own language.

Importantly, governments must provide redress if this protection is violated.

These articles in the Declaration reinforce our rights to have governance structures and processes that are compatible with respecting and protecting our culture. Culture within the context of our Indigenous governance is about enabling us, as Aboriginal and Torres Strait Islander peoples, to continue our customary and historical – as well as our contemporary – ways of organising ourselves and making decisions about matters that affect us.

The respect for and protection of our culture also underpins and informs the requirement for governments to increase their cultural competency and engage with Aboriginal and Torres Strait Islander peoples in a culturally safe and culturally secure manner.

Non-discrimination and equality

Our right to non-discrimination and equality is outlined in Articles 2 and 9 of the Declaration, which articulates the right for us to be 'free and equal to all others' and to be 'free from any kind of discrimination'. The principles of discrimination and equality are also set out in Article 26 of the ICCPR, which reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Racial discrimination is defined in Article 1(1) of the ICERD as:

...any distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

Equality as a human rights principle affirms that:

- all human beings are born free and equal
- all individuals have the same rights and deserve the same level of respect
- all people have the right to be treated equally.

These characteristics are based on two models of equality; namely, formal and substantive equality:

- Formal equality relies on the concept that all people should be treated identically regardless of difference.
- Substantive equality acknowledges that rights, opportunities and access are not equally distributed throughout society and a 'one size fits all' approach will not achieve equality.

The Human Rights Committee, which oversees the implementation of the ICCPR, has adopted a substantive equality approach and indicated that equality 'does not mean identical treatment in every instance'.⁴⁵ Substantive equality can be created by policies that provide redress for racially specific aspects of discrimination such as cultural difference, historical subordination and socio-economic disadvantage.

Governments have a responsibility to protect our right to non-discrimination and equality. Articles 8(2)(e), 15(2) and 22(2) of the Declaration outline the obligation of governments to take effective measures to prevent racial discrimination, and promote tolerance and good relations among Indigenous peoples and other segments of society.

Broadly, the principles of non-discrimination and equality mean that we should be able to govern ourselves without discrimination from individuals, governments and/or external stakeholders, while acknowledging that a substantive equality approach may be required. These principles need to be enshrined in our Indigenous governance institutions, constitutions and laws/rules *and* in the legislation and policy frameworks of governments and external stakeholders that engage with our communities.

Are these human right principles reflected in governance for Aboriginal and Torres Strait Islander peoples in Australia?

There are consistent themes in the literature and international human rights standards that identify the factors that enable effective, legitimate and culturally safe governance for Indigenous peoples. For example, the Indigenous Community Governance Project and its' associated Indigenous Governance Toolkit⁴⁶, the Harvard Project and the NCFNG acknowledge the essential roles of self-determination and culture in our governance.

However, despite the substantial empirical research that shows strengthening the governance of our Indigenous organisations and governments is critical to improving the well-being of our Aboriginal and Torres Strait Islander peoples,⁴⁷ there have been few changes 'on the ground' for our peoples and communities. While we may have

⁴⁵ Human Rights Committee, *General Comment XVIII, Non-discrimination* (1989), paras 8, 9 in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, UN Doc HRI/GEN/1/ Rev. 1, p 26.

⁴⁶ See Reconciliation Australia, *Indigenous Governance Toolkit*. At <http://www.reconciliation.org.au/governance/home> (viewed 10 August 2012).

⁴⁷ Tsey et al, note 8.

legislative frameworks that establish governance mechanisms for our communities, our ability to be in control of our lives is often regulated by government 'red-tape'.

I am extremely concerned that there continues to be significant disparity between human rights standards which are supported in government rhetoric and the impact of government policies and legislation that continue to disempower our Aboriginal and Torres Strait Islander peoples and communities. I discuss this in detail in the *Social Justice Report 2012*.

What enables effective Indigenous governance?

It is my view that effective governance for Aboriginal and Torres Strait Islander peoples needs to start with us – with our peoples and with our communities.

We must draw on our unique history of traditions, law, knowledge and wisdom to guide how we make decisions about our lives in a way that is relevant for us. But we also need to be given the space to decide how we organise ourselves and make decisions, and we need to acknowledge that this will differ between our communities. This underpins our fundamental human right of self-determination.

If we want to achieve effective Indigenous governance that enables us to realise our aspirations, we must embrace the principles in the Declaration and acknowledge that our governance is an interrelationship between our peoples and communities, our organisations and governments.

Enabling effective Indigenous governance must consider:

- how we make decisions
- how we resolve disputes
- how we negotiate with governments and external stakeholders
- how we exercise our authority and rights
- how we design our governing institutions
- what we need to do to look after our peoples and our lands, territories and resources.⁴⁸

In last year's Social Justice Report, I explained the concepts of cultural safety and cultural security, and made the following recommendations:

⁴⁸ S Cornell, Co-Director of the Harvard Project on American Economic Development, Email to L Gunn, Senior Policy Officer in the Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 23 July 2012.

- that governments, working with Aboriginal and Torres Strait Islander peoples, conduct an audit of cultural safety and security in relation to their policies and programs that impact on Aboriginal and Torres Strait Islander communities
- that all governments, working with Aboriginal and Torres Strait Islander peoples, based on the audit of cultural safety and security, develop action plans to increase cultural competence across their government.⁴⁹

I reaffirm it is essential that governments implement these recommendations if our governance is to be effective, culturally safe and legitimate.

Roadblocks to Indigenous governance

The Australian Government has invested in improving ‘corporate’ governance for our communities by providing training on how to run meetings, set up management boards and establish transparent financial management systems.

But while I believe that it is essential that our organisations are transparent and accountable to their members and their funders, government agencies focusing *solely* on the administration of our organisations and creating ‘checklists’ for management structures and systems does not assist us to achieve our social, economic, cultural and political aspirations. Rather, these attitudes have the opposite effect of reinforcing outside influence and control.

Talking with Aboriginal and Torres Strait Islander peoples across the country, I regularly hear stories of governments acting as a ‘roadblock’ to our communities. If we are to address the critical issues in our communities, governments need to create *less* bureaucratic burden for our communities and do *more* to enable Aboriginal and Torres Strait Islander peoples to realise their unique aspirations.

The current focus of the Government on the administration of our organisations addresses only the organisational governance for our peoples. It does not accurately reflect the principles in the Declaration nor recognise the interrelationship between our community’s governance, the requirements of our organisations and institutions to comply with government regulations/legislation, and the ways in which governments govern with respect to Aboriginal and Torres Strait Islander peoples.

Indigenous governance framework

Our contemporary models of Indigenous governance are required to exist within the policies and legislation of governments. This means there are requirements for our organisations to meet particular conditions of government and obligations to our peoples.

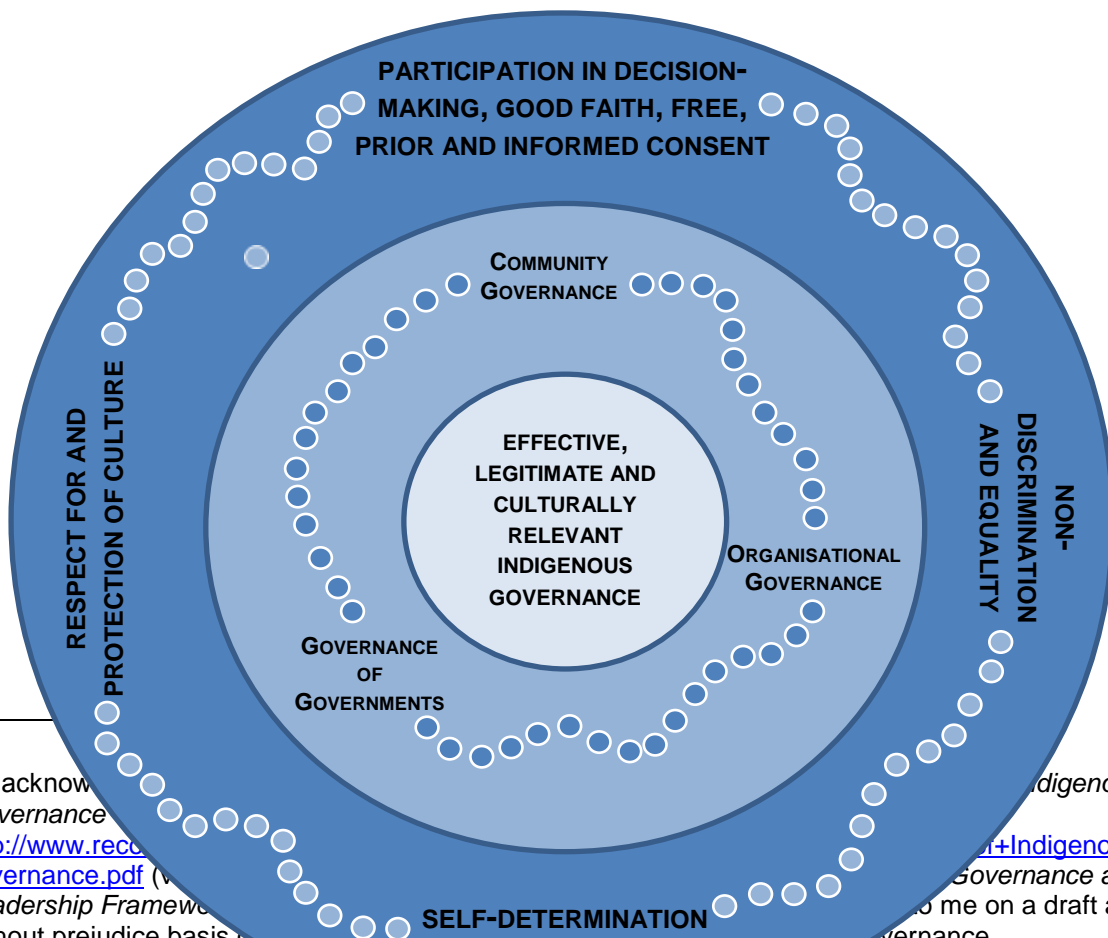
⁴⁹ See *Social Justice Report 2011*, note 11, p 167.

To illustrate these concepts, I have set out a framework that has three components of Indigenous governance:

- community governance
- organisational governance
- the governance of governments.

The interrelationship between these three components of Indigenous governance is shown in Diagram 2.1.⁵⁰ Each of these components must be grounded in the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality.

Diagram 2.1: Facilitating effective, legitimate and culturally relevant Indigenous governance⁵¹



⁵⁰ I acknowledge the assistance of the Australian Human Rights Commission in the development of this diagram. See <http://www.records.gov.au/AG/DocDetail;id=53816865-3170-4745-9352-302972192550;docId=53816865-3170-4745-9352-302972192550;page=1> (see also <http://www.records.gov.au/AG/DocDetail;id=53816865-3170-4745-9352-302972192550;docId=53816865-3170-4745-9352-302972192550;page=1> for a draft and final version of the diagram).
⁵¹ This diagram illustrates how the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality underpin our Indigenous governance. The dots represent the relationships between these principles and between the three components of community governance, organisational governance and the governance of governments.

The guiding standards for each of these components of Indigenous governance are outlined below.

Community governance

Community governance should be grounded in our right to self-determination which addresses 'who we are', 'who we represent', 'what we speak for' and 'how we make decisions'. Effective community governance must:

- be the foundation for organisational governance and provide guidance to governments
- begin with and be underpinned by respect for and protection of our culture
- determine what constitutes legitimacy for us (that is, who can speak when, for whom, to whom and regarding what)
- ensure our participation (particularly of those who are the most vulnerable in our communities) in decision-making through complete access to all relevant information and appropriate timeframes
- enable us to identify our short-term priorities and long-term economic, social, political and cultural aspirations.

Organisational governance

Organisational governance is reflected in our institutions, our processes and the resources we can access. Effective organisational governance:

- aligns with our community governance and is consistent with effective inter-governmental relations
- enables our participation in decision-making in matters that affect us based on our right to give or not to give our free, prior and informed consent

- ensures our participation in decision-making in a cooperative and fair manner
- incorporates respect for and protection of our culture, including culturally legitimate representation and leadership
- supports the principles of non-discrimination and equality
- ensures transparency and fairness for all members of our communities
- ensures accountability to the community governance structures.

These values can be enshrined in our organisations’:

- rules, laws and/or constitution
- dispute resolution mechanisms
- limitation and separation of powers
- human resource management, information management and financial management systems, including performance evaluation, accountability and reporting systems.

Governance of governments

The role of governments is to enable governance by our peoples and within our communities and to enhance our economic and social development by:

- ensuring that government policies, legislation and structures facilitate strong community governance and organisational governance
- coordinating and reconciling different legislative, policy, programs and administrative arrangements within and between governments
- respecting and supporting our representative and decision-making processes and structures
- reforming funding and reporting processes so that they are proportionate to the amount granted and provide our organisations with long-term funding certainty
- investing in our institutional capacity building⁵²

⁵² S Cornell, C Curtis and M Jorgensen, *The Concept of Governance and its Implications for First Nations*, Joint Occasional Papers on Native Affairs No 2004-02 (2004), pp 23– 28.

- providing us with complete access to all relevant information in a culturally appropriate manner, including our own languages
- ensuring appropriate levels of cultural competency and skills in all staff working in our communities
- providing us with adequate timeframes to make a decision.

These standards must be met if we are to achieve effective governance for our peoples. A broader framework of Indigenous governance is set out in the *Social Justice Report 2012*.

Governing our lands, territories and resources

This section builds on and applies the three components of Indigenous governance – community governance, organisational governance and the governance of governments – to our governance over lands, territories and resources. I firstly consider our Indigenous rights to our lands, territories and resources as established in the Declaration; and secondly, address how we can facilitate effective Indigenous governance in relation to our lands, territories and resources.

For Indigenous peoples throughout the world, 'land is not only a means of production and survival but is central to how they define their identity'.⁵³ Consequently, effective Indigenous governance over our lands, territories and resources is fundamental to achieving our social, economic, political and cultural aspirations.

Indigenous rights to lands, territories and resources

Our rights to lands, territories and resources are described in Articles 25–32 of the Declaration: see Text Box 2.4.

Text Box 2.4: Indigenous rights to lands, territories and resources articulated in the Declaration

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

⁵³ CK Roy, 'Indigenous Peoples in Asia: rights and development challenges' in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous People*, (2009), p 226.

- (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.

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.

The Declaration acknowledges ‘the spiritual relationship that indigenous peoples have with their lands, territories and resources, along with their right to own, use, develop and manage them by means of their own laws and land tenure systems’.⁵⁴

Our governance over our traditional lands, territories and resources is framed by the Declaration. For example:

- our right to self-determination and participation in decision-making that is established in Article 32(1), which sets out our right to ‘determine and develop priorities and strategies for the development or use of’ our lands, territories and resources
- our right to free, prior and informed consent over projects on our lands, territories and resources that is articulated in Article 32(2)
- our right to maintain and protect our cultural heritage on and traditional knowledge about our lands, territories and resources that is expressed in Article 31(1)
- our right to conserve and protect the environment of our lands, territories and resources without discrimination that is acknowledged in Article 29(1).

The obligations of governments to support our governance over our lands, territories and resources are also set out in the Declaration. These include the requirement to:

- recognise our right to self-determination (see Articles 3 and 4)

⁵⁴ A Montes and G Cisneros, ‘The United Nations Declaration on the Rights of Indigenous People: the foundation of a new relationship between indigenous peoples, states and societies’ in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous People*, (2009), p 152.

- recognise and protect our lands, territories and resources (see Article 26(3))
- in conjunction with us, establish a process to recognise and adjudicate our rights pertaining to our traditionally owned and occupied lands, territories and resources (see Article 27)
- seek our free, prior and informed consent for projects on our lands, territories and resources (see Article 32(2))
- provide effective redress to mitigate adverse impacts on our lands, territories and resources (see Article 32(3)).

Substantive and procedural rights to lands, territories and resources

As Indigenous peoples, our unique relationships with and responsibilities to our lands, territories and resources also give rise to primary substantive rights. These rights include:

...rights to property, culture, religion, and non-discrimination in relation to lands, territories and resources, including sacred places and objects; rights to health and physical well-being in relation to a clean and healthy environment; and rights to set and pursue their own priorities for development...as part of their fundamental right to self-determination.⁵⁵

Decisions that we make about developments such as extractive industries occurring on or near our lands, territories and resources should consider the impact of these projects on our substantive rights.

The Human Rights Council notes that when we participate in decisions about our lands, 'indigenous peoples' procedural rights must not have priority over indigenous peoples' substantive rights'.⁵⁶ This is because 'the procedural aspects of the right (such as consultation) exist to promote the substantive right' such as the right to our lands and our culture.⁵⁷

⁵⁵ J Anaya, Report of the Special Rapporteur on the rights of indigenous people, *Report to the Human Rights Council*, 21st session, UN Doc A/HRC/21/47 (2012), para 50. At http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-47-Add2_en.pdf (viewed 31 August 2012).

⁵⁶ Human Rights Council, *Follow-up report on indigenous peoples and the right to participate in decision-making, with a focus on extractive industries*, UN Doc A/HRC/21/55 (2012), para 36. At http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session21/A-HRC-21-55_en.pdf (viewed 3 September 2012).

⁵⁷ Human Rights Council, above.

The effect of territorial sovereignty on our rights to and governance over lands, territories and resources

I discussed briefly in section 2.1 how the history of our colonisation has sanctioned the Australian Government to assume territorial sovereignty over our traditional lands, territories and resources.

This history of colonisation creates an inherent tension for Aboriginal and Torres Strait Islander peoples and the Australian Government in relation to Article 26 of the Declaration. This is because Article 26 affirms our rights to lands, territories and resources that we have traditionally owned and occupied, and requires governments to give recognition and protection of this right. While much of this tension originates from the British asserting their territorial sovereignty over our lands and territories without our agreement, the tension is exacerbated by current legislation that seeks to accommodate our substantive property rights in relation to native title, land rights and cultural heritage in fragmented processes across the country.

In last year's Native Title Report, I outlined 36 Acts legislated by the Commonwealth, state and territory governments that establish our rights to our lands, territories and resources.⁵⁸ This body of legislation is characterised by its sheer volume and the different mechanisms set out in various states and territories to recognise some aspects of our rights to our lands, territories and resources. Further, because legislation is usually drafted without the involvement of Aboriginal and Torres Strait Islander peoples and is agreed to by non-indigenous institutions, it does not reflect our traditional mechanisms for inheriting, holding and looking after our lands, territories and resources.⁵⁹ This creates 'highly variable'⁶⁰ and inconsistent outcomes for the recognition of our rights to our lands and territories, which in turn have implications for our governance over our traditional lands, territories and resources.

I believe that it is the duty of governments – as part of their support of Indigenous governance of our lands, territories and resources – to reconcile this maze of legislation so that these variable and inconsistent outcomes are minimised. I cover this in further detail in the following section when I discuss the governance of governments.

It is within these legislative frameworks that we are required to negotiate with governments and external stakeholders over the use of our traditional lands, territories and natural resources. In Chapter 3, I discuss this further in relation to the Native Title Act.

⁵⁸ *Native Title Report 2011*, note 11, pp 103–104.

⁵⁹ Arguably, sections of the Native Title Act and associated case law acknowledges – and requires us to prove – our continuing traditional connection to our lands, territories and resources.

⁶⁰ Dodson and Smith, note 9, p 6.

Facilitating effective Indigenous governance over lands, territories and resources

I now consider how the standards of effective community governance, organisational governance and the governance of governments can provide a framework for our negotiations with governments and external stakeholders in relation to developing and using our traditional lands, territories and resources.

As with the framework of effective Indigenous governance outlined in section 2.3, each of these components of governance must be underpinned by the principles of self-determination, participation in decision-making, good faith, and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality.

I particularly highlight our right to free, prior and informed consent in relation to projects occurring on our lands, territories and resources. Article 32(2) and (3) of the Declaration states that the use and enjoyment of lands, territories and resources by third parties requires the free, prior and informed consent of Indigenous peoples and, if this is not forthcoming, must be accompanied by redress.⁶¹

The International Law Association remarks that when ‘the essence of their cultural integrity is at significant risk, obtaining the free, prior and informed consent of the indigenous peoples concerned becomes mandatory’.⁶² In particular, it notes the Declaration highlights four situations where our consent is required. These are:

- where Indigenous peoples might be relocated from their lands or territories (see Article 10)
- when taking Indigenous peoples’ cultural, intellectual, religious and spiritual property (see Article 11(2))
- when confiscating, taking, occupying, using or damaging lands, territories and resources that are traditionally owned or otherwise occupied or used by Indigenous peoples (see Article 28(1))
- when storing or disposing of hazardous material on the lands or territories of Indigenous peoples (see Article 29(2)).⁶³

This suggests that the principle of free, prior and informed consent provides for us to say ‘yes’ or ‘no’ – with or without conditions – when making decisions in relation to these matters occurring on our lands, territories and resources.

⁶¹ A Montes and G Cisneros, ‘The United Nations Declaration on the Rights of Indigenous People: the foundation of a new relationship between indigenous peoples, states and societies’ in C Charters and R Stavenhagen (eds), *Making the Declaration Work: the United Nations Declaration on the Rights of Indigenous People*, (2009), p 152.

⁶² International Law Association, note 41.

⁶³ International Law Association, above.

Community governance

Our community governance over lands, territories and resources must ensure that:

- we have territorial integrity over our lands, territories and resources
- we can participate in decisions about our lands, territories and resources
- we can determine the development and use of our lands, territories and resources.

Territorial integrity

Our community governance over lands, territories and resources must clearly articulate ‘who we are’, ‘where we are from’ and ‘what we speak for’.

The NCFNG outlines the concept of ‘territorial integrity’ in the land component of its Indigenous governance model. Territorial integrity:

- recognises the ‘irrevocable link’ between our connection to land and governance
- acknowledges the significant challenge resulting from land alienation and destruction
- realises the process of asserting rights over land that ‘must be supported by land use mapping and stewardship planning that permit the reclamation of responsibility for decision-making’.⁶⁴

That is, territorial integrity acknowledges the effect of colonisation on our territorial sovereignty, but also provides a mechanism to address this impact and outlines a process to enable our decision-making over lands, territories and resources.

Participating in decisions about our lands, territories and resources

The Human Rights Council states that Indigenous peoples need to participate in decision-making in relation to the following activities occurring on their lands, territories and resources:

- (a) oil and gas, (b) forestry, (c) hydro development, (d) mining, (e) other forms of energy development (for example, oil palm and soya plantations), (f) bitumen (heavy oil), and (g) pipeline developments.⁶⁵

The rationale for our participation in decision-making about these activities:

⁶⁴ National Centre for First Nations Governance, note 4, p 11.

⁶⁵ Human Rights Council, note 56, para 40.

...is sourced not only in human rights and pragmatism. It is also derived from an historical understanding of indigenous peoples' experiences of oppression and colonization including, in many cases, forced assimilation, theft of their lands, territories and resources, profound discrimination and illegitimate, often including force, assertions of political control over them. The potential for extractive activities to continue to exacerbate those historical disadvantages is very real given the often very significant power imbalances, such as in financial resources, as has been borne out by indigenous peoples' sometimes negative experience of extractive activities. The human rights risks associated with extractive activities in or near indigenous peoples' territories are aggravated by the ongoing marginalization of indigenous peoples in many States.⁶⁶

While I agree that it is critical that we participate in decisions about major projects and extractive industries occurring on and in relation to our lands, territories and resources, it is my view that we need to be able to participate in decisions about *all* activities occurring on our lands and territories, whether it is exploring for minerals, building a bridge or constructing a public building.

To effectively participate in decisions about our lands, territories and resources, we need to:

- make customary decision-making processes integral to our internal community governance (where this is possible)
- have complete access to all relevant information
- be given appropriate timeframes to understand the information and participate in decisions
- ensure governments and external stakeholders engage with our representative bodies for lands, territories and resources, including land councils, Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs)⁶⁷ and Prescribed Bodies Corporate (PBCs).

Determining the development and use of our lands, territories and resources

Our community governance must be able to determine how we want to develop and use our lands, territories and resources. This requires us to:

- be given the time and space to identify our priorities and long-term aspirations about how we want to develop and use our lands, territories and resources

⁶⁶ Human Rights Council, note 56, para 29.

⁶⁷ NTRBs are funded by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) to undertake particular functions and powers that are set out in Division 3, section 203B of the Native Title Act. Where there is no NTRB for a region, NTSPs may be funded by FaHCSIA to perform these functions.

- participate in decision-making and fair and cooperative consultation processes to provide or not to provide our consent to projects
- have complete information about the project in a culturally appropriate way and be given adequate timeframes to make decisions.

Organisational governance

Indigenous peoples' right to 'promote, develop and maintain their institutional structures and their distinctive customs, spirituality, traditions, procedures, practices...and juridical systems or customs' is set out in Article 34 of the Declaration. This means that our organisational governance needs to be consistent with our cultural practices, and our institutions and decision-making processes must incorporate culturally legitimate representation, leadership and accountability.

Our organisational governance structures for our lands, territories and resources can realise these objectives by:

- aligning with and facilitating our community governance
- enabling communities to:
 - make considered decisions about lands, territories and resources
 - undertake culturally safe negotiations with governments and external stakeholders
- enshrining rules about:
 - dispute resolution
 - conflicts of interests
 - non-discrimination
 - equality and fairness
 - financial transparency and accountability
 - the limitation and separation of powers
- being adequately resourced.

I am aware that in some areas of Australia, it may be difficult to distinguish between community governance and organisational governance in relation to lands, territories and resources. For example, community governance may overlap with (or indeed comprise) our organisational governance in situations where a PBC represents a native title group, an Aboriginal Association represents the traditional owners of a land claim, or a Land Trust represent the interests of Aboriginal and Torres Strait

Islander peoples in accordance with other state legislation. I discuss this further in Chapter 3.

I also note that there may be times when our community governance is inconsistent with our organisational governance because of different priorities or responsibilities, such as protection of cultural heritage versus service delivery. This potential for inconsistency highlights the need for strong conflict resolution mechanisms.

Governance of governments

While our ability to realise our Indigenous rights to lands, territories and resources relies on Aboriginal and Torres Strait Islander peoples asserting these rights, governments also play a critical role in supporting, facilitating and enabling our capacity to assert these rights.

Governments need to acknowledge the inherent imbalance of power that exists between Indigenous peoples and governments/external stakeholders in relation to our lands, territories and resources. This is in part because governments and external stakeholders have access to resources, expertise and information that are not available to our peoples, but also because access to and enjoyment of our substantive rights to our lands, territories and resources are controlled by government legislation and policy.

Governments must therefore prioritise:

- building the capacity of our communities and organisations to make decisions through providing adequate resources, relevant expertise and appropriate information
- ensuring that government policies, legislation and structures facilitate and enable our communities and organisations to make decisions about the development and use of our lands, territories and resources.

The *Guiding Principles on Business and Human Rights*, which was endorsed by the Human Rights Council in 2011, establishes principles for governments and external stakeholders in relation to undertaking developments on our lands, territories and resources: see Text Box 2.5. (The complete *Guiding Principles on Business and Human Rights* is set out in Appendix 3.)

Text Box 2.5: Extracts from *Guiding Principles on Business and Human Rights*⁶⁸

⁶⁸ J Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Doc

The State duty to protect human rights

- States must protect against human rights abuse within their territory and/or jurisdiction by third parties, including business enterprises. This requires taking appropriate steps to prevent, investigate, punish and redress such abuse through effective policies, legislation, regulations and adjudication.
- States should set out clearly the expectation that all business enterprises domiciled in their territory and/or jurisdiction respect human rights throughout their operations.

The corporate responsibility to respect human rights

- Business enterprises should respect human rights. This means that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.
- The responsibility of business enterprises to respect human rights refers to internationally recognized human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization’s Declaration on Fundamental Principles and Rights at Work.
- The responsibility to respect human rights requires that business enterprises:
 - a. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
 - b. Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.
- The responsibility of business enterprises to respect human rights applies to all enterprises regardless of their size, sector, operational context, ownership and structure. Nevertheless, the scale and complexity of the means through which enterprises meet that responsibility may vary according to these factors and with the severity of the enterprise’s adverse human rights impacts.
- In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:
 - a. A policy commitment to meet their responsibility to respect human rights;
 - b. A human rights due-diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;

- c. Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

Access to remedy

- As part of their duty to protect against business-related human rights abuse, States must take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that when such abuses occur within their territory and/or jurisdiction those affected have access to effective remedy.

There are four critical actions that the Australian federal, state and territory governments and external stakeholders can undertake that will facilitate Aboriginal and Torres Strait Islander peoples' participation in decisions over our lands, territories and resources.

First, governments must reduce the substantial legislative and administrative burden that is constantly placed on our Aboriginal and Torres Strait Islander communities and organisations.

Second, federal, state and territory, and local governments need to assess the development of legislation and policies affecting our rights to our lands, territories and resources against our human rights set out in the Declaration.

Third, as I note in section 2.3, it is crucial that governments and external stakeholders engage with our communities in a culturally safe and culturally secure manner. This requires governments and external stakeholders to incorporate the principles of self-determination, participation in decision-making, good faith and free, prior and informed consent, respect for and protection of culture, and non-discrimination and equality when engaging with Aboriginal and Torres Strait Islander peoples, communities and organisations.

And finally, governments need to coordinate their legislation, policies, programs and administrative processes to reduce the administrative burden of 'red-tape' on our communities and organisations, particularly in relation to looking after our lands, territories and resources.

Conclusion

Indigenous governance is an essential ingredient for Aboriginal and Torres Strait Islander peoples' empowerment to address the challenges currently confronting us. The three components of community governance, organisational governance and government governance each play a role and need to work together if this empowerment is to be effective.

Governments should recognise our right to self-determination and work in ways that operationalize the principles of the Declaration. Sometimes this simply means getting out of the way, removing the swathes of 'red-tape' and giving our communities the

time and space to take stock, make decisions and take control. Sometimes it means providing support and building capacity.

Our organisations need to be transparent, accountable and robust in their support of the community. In the words of the Harvard Project, we need ‘capable institutions of self-governance...that keep politics in its place, deliver on promises, administer programs and manage resources efficiently’.⁶⁹

Finally, community governance is where self-determination is exercised. While Government and our organisations should support this, as I say in section 2.3: ‘effective governance for Aboriginal and Torres Strait Islander peoples needs to start with us – with our peoples and with our communities’.

I believe that to exercise true self-determination we need to apply the principles of the Declaration internally in our own decision-making. For instance, the right to participation in decisions that affect us applies as much, if not more, to us to ensure all voices in our communities are heard. To quote Marcia Langton, ‘*big bunga* politics’⁷⁰ must be confronted and challenged whenever it arises.

For me, real self-determination means that we take control of the issues confronting our communities and do not wait for the Government to take action. For our lands, territories and resources, we can achieve self-determination in relation to our native title through our PBCs. I discuss this further in Chapter 3.

7 Appendix B – Chapter 3 *Native Title Report 2012*

Prescribed Bodies Corporate – an example of effective Indigenous governance over lands, territories and resources?

Introduction

This Chapter examines Indigenous governance within the Native Title Act, focusing on our governance following a native title determination.⁷¹ As such, I consider

⁶⁹ S Cornell, M Jorgensen, J Kalt and K Spilde, *Seizing the Future: why some Native nations do and others don't*, Joint Occasional Papers on Native Affairs, No 2005-01 (2005), pp 4–5.

⁷⁰ M Langton, ‘The end of “big men” politics’ (2008) 22 Griffith Review 11, p 1. At https://griffithreview.com/images/stories/edition_articles/ed22_pdfs/langton_ed22.pdf (viewed 2 October 2012).

⁷¹ A native title determination in accordance with the *Native Title Act 1993* (Cth) specifies particular rights and interests in lands and waters that are held by native title holders in accordance with their traditional laws and customs. In contrast to some state/territory land rights legislation, a native title determination does not provide tenure-based rights to lands, territories and resources.

whether Prescribed Bodies Corporate (PBCs)⁷² set up to hold and manage our determined native title rights and interests can meet the standards of effective, legitimate and culturally relevant Indigenous governance over our lands, territories and resources⁷³ outlined in Chapter 2.

As I report in Chapter 1, an increasing number of native title applications are being successfully determined across Australia. It is therefore timely to discuss how PBCs can establish a structure that intersects both our community governance and our organisational governance, and provide a unique opportunity for us to realise our human rights principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (the Declaration).

In this Chapter, I briefly outline the legislative and organisational frameworks that affect the governance of PBCs, and then address the factors that enable PBCs to effectively govern their native title rights and interests in their lands, territories and resources. I also consider changes that can be made to assist PBCs to achieve the social, cultural and economic aspirations of native title holders in relation to these lands, territories and resources.

Legislative and organisational frameworks affecting the governance of PBCs

PBCs do not operate in a legislative and organisational vacuum. Rather, PBCs:

- are established in accordance with the *Native Title Act 1993* (Native Title Act)
- have set functions under the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (PBC Regulations)
- undertake corporate responsibilities that are set out in the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

As the organisation that holds and manages determined native title rights and interests, PBCs are also required to engage with and rely on a number of other organisations and external stakeholders.

To explain the legislative and organisational frameworks within which PBCs function, I briefly set out the legislation that establishes and oversees PBCs, and list the organisations that operate in the native title environment.

⁷² A Prescribed Body Corporate may also be referred to as a Registered Native Title Body Corporate (RNTBC), which is described in s 253 of the *Native Title Act 1993* (Cth).

⁷³ 'Lands, territories and resources' is the term used in the *United Nations Declaration on the Rights of Indigenous Peoples*.

The legislative framework

The Native Title Act 1993

Following a positive determination of native title by the Federal Court of Australia (Federal Court), the Native Title Act requires a PBC to be established that represents the whole native title group and holds (as their trustee) or manages (as their agent) their native title rights and interests.⁷⁴

While the Native Title Act itself does not set out a framework for governance to manage the outcomes of a determination, it outlines the prescribed functions of PBCs to:

- hold, protect and manage determined native title in accordance with the objectives of the native title holding group
- ensure certainty for governments and other parties interested in accessing or regulating native title lands and waters by providing a legal entity to manage and conduct the affairs of the native title holders.

This means that PBCs can be involved in a range of activities including:

- mining and resource sector agreements
- land and water conservation partnerships
- pastoral, agricultural and farming activities
- research partnerships
- return to country programs
- recording and archiving cultural information
- cultural tourism
- education and employment
- heritage and conservation programs
- economic and business development.⁷⁵

⁷⁴ See Part 2, Division 6 of the *Native Title Act 1993* (Cth).

⁷⁵ Australian Institute of Aboriginal and Torres Strait Islander Affairs (Native Title Research Unit), *Native Title Bodies Corporate*. At http://nativetitle.org.au/what_do_we_do.html (viewed 18 September 2012).

Native Title (Prescribed Bodies Corporate) Regulations 1999

Further to the Native Title Act, the PBC Regulations⁷⁶ set out their statutory functions, which include:

- managing or holding the native title rights and interests of the native title holders
- holding money (including payments received as compensation or otherwise related to the native title rights and interests) in trust
- investing or otherwise applying money held in trust as directed by the native title holders
- consulting with the native title holders regarding particular decisions⁷⁷
- performing any other function relating to the native title rights and interests as directed by the native title holders.

In order to perform these functions, the PBC may:

- consult with other persons or organisations
- enter into agreements
- exercise procedural rights
- accept notices required by law to be given to the native title holders.

Corporations (Aboriginal and Torres Strait Islander) Act 2006

In addition to the functions outlined in the Native Title Act and the PBC Regulations, a PBC is required to fulfil corporate governance obligations in accordance with the CATSI Act. This is because all PBCs holding or managing native title under the Native Title Act and the PBC Regulations must be incorporated under the CATSI Act.⁷⁸

The CATSI Act has particular governance requirements including that a majority of PBC members and directors need to be Indigenous, and the PBC's constitution must

⁷⁶ See Part 2 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999*.

⁷⁷ Regulation 8 of the *Native Title (Prescribed Bodies Corporate) Regulations 1999* requires the PBC to consult with and seek the consent of native title holders in relation to decisions about native title, entering into an Indigenous Land Use Agreement, allowing a person who is not a native title holder to become a member of the PBC, and consenting to consultation processes in the PBC constitution.

⁷⁸ Office of the Registrar of Indigenous Corporations, *Comparative table of Commonwealth, state and territory incorporation legislation* (2008), p 3. At <http://www.oric.gov.au/Content.aspx?content=CATSI-Act/default.htm> (viewed 8 October 2012).

meet minimum standards of governance. Under the CATSI Act, the Office of the Registrar for Indigenous Corporations (ORIC) can provide assistance to corporations about matters relating to registration, rules of a corporation, dispute resolution, and undertaking research and policy proposals.⁷⁹

PBCs registered under the CATSI Act may also have the following governance features:

- the members can choose not to be liable for the debts of the corporation
- the rules of the corporation can take into account Aboriginal or Torres Strait Islander customs and traditions
- Aboriginal and Torres Strait Islander corporations can operate nationally
- it is free to register as an Aboriginal and Torres Strait Islander corporation
- the Registrar may sometimes exempt corporations from lodging annual reports
- profits of the corporation can be distributed to members if the rules allow
- Aboriginal and Torres Strait Islander corporations can get assistance and support from ORIC.⁸⁰

The statutory differences between PBCs established under the Native Title Act and administered in accordance with the CATSI Act, and other corporations established under alternative legislation are set out in Text Box 3.1.

Text Box 3.1: Statutory differences between PBCs and other corporations⁸¹

- PBCs are special types of Aboriginal and Torres Strait Islander corporations because they are created especially for native title holders to hold or manage native title.
- PBCs must have the words 'registered native title body corporate' or 'RNTBC' in their name to signify this and must be registered with ORIC as required by the Native Title Act, whilst other Aboriginal and Torres Strait Islander corporations can choose to register under other state or territory associations law or under the *Corporations Act 2001* (Cth).
- PBCs have obligations under the Native Title Act, such as the requirement to consult with and obtain consent from native title holders in relation to any decisions which surrender or affect native title rights and interests.

⁷⁹ Office of the Registrar of Indigenous Corporations, above.

⁸⁰ Office of the Registrar of Indigenous Corporations, above, p 4.

⁸¹ Australian Institute of Aboriginal and Torres Strait Islander Affairs (Native Title Research Unit), note 5.

- If an Aboriginal and Torres Strait Islander corporation becomes or ceases to be a PBC, it must notify ORIC within 28 days.
- PBC directors and officers are protected from a range of criminal and civil penalties for breach of duties as long as they have acted in good faith in complying with obligations under native title legislation (not including the duty to trade while insolvent).
- PBCs are not required to value their native title rights and interests as part of their assets, for the purpose of determining their size classification under the CATSI Act.
- PBCs must ensure that their constitution is consistent with native title legislation.
- ORIC must not change the PBC's constitution on the basis of an act done in good faith and with the belief that the corporation or its officers are complying with native title legislation.
- ORIC is not able to de-register a PBC as long as it remains a PBC and manages or holds native title interests.

The organisational framework

There are a number of organisations operating in the native title environment that PBCs may engage with and rely on in terms of how they are organised and make decisions. These include:

- Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs), funded to undertake particular functions in accordance with the Native Title Act.⁸²
- The National Native Title Tribunal (the Tribunal) and the Federal Court, funded to undertake statutory functions in accordance with the Native Title Act.⁸³
- ORIC, which was established to administer the CATSI Act.
- Federal and state/territory governments including:
 - the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
 - the Attorney-General's Department (AGD)
 - state/territory and local governments and associated agencies.

⁸² See Part 11, Division 3 of the *Native Title Act 1993* (Cth). I note that NTRBs are funded by FaHCSIA to undertake particular functions and powers that are set out in s 203B of the *Native Title Act 1993*. Where there is no NTRB for a region, NTSPs may be funded by FaHCSIA to perform these functions.

⁸³ For example, see Parts 4 and 6 of the *Native Title Act 1993* (Cth).

- External stakeholders wanting to undertake activities that may affect the determined native title rights and interests (for example, mining and resource companies).

In performing their functions, PBCs may be required to engage with any or all of these organisations.

Changes to the organisational framework

I am aware that recently there has been and will continue to be changes in organisations operating in the native title environment. As I report in Chapter 1, since July 2012 there have been institutional reforms regarding the roles of the Tribunal and the Federal Court.

I also note the Australian Charities and Not-For-Profits Commission (ACNC) has been recently established to regulate the not-for-profit sector. I am aware that there is currently some uncertainty about how the ACNC will interact with ORIC in relation to monitoring the compliance of PBCs under the CATSI Act, which I note further in section 3.4 below.

The Minister for Families, Community Services and Indigenous Affairs has also initiated a review of the role and functions of native title organisations, particularly the functions and role of NTRBs and NTSPs. I welcome this review given that it will also address the capacity of PBCs 'to complete corporate compliance, perform future act related activities and pursue economic, social and cultural development'.⁸⁴

These reviews and changes to the organisational framework are on-going and I premise the discussion in section 3.4 by noting the potential impacts of these changes on the governance of PBCs are still to be seen.

The governance of PBCs in accordance with the Declaration on the Rights of Indigenous Peoples

In the Preamble to the Declaration, the General Assembly of the United Nations says that it is:

Convinced that the recognition of the rights of indigenous peoples in this Declaration will enhance harmonious and cooperative relations between the State and indigenous peoples...⁸⁵

⁸⁴ Department of Families, Housing, Community Services and Indigenous Affairs, *Native Title Organisations Review*. At <http://www.fahcsia.gov.au/our-responsibilities/indigenous-australians/programs-services/native-title-organisations-review> (viewed 19 September 2012).

⁸⁵ *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), preambular paragraph 18.

For me this paragraph captures the essence of the Declaration, that is, to enhance the relationship between governments and Aboriginal and Torres Strait Islander peoples.

I am similarly convinced that the Declaration can be used to enhance and strengthen the relationships within Aboriginal and Torres Strait Islander communities and within our organisations.

This view is gaining momentum at the international level. At the Expert Mechanism on the Rights of Indigenous Peoples (Expert Mechanism) held in Geneva in July 2012, I recommended that the Expert Mechanism conduct a 'study with Indigenous peoples with regard to their approaches to implementing the Declaration within their communities'.⁸⁶

With PBCs now emerging as a critical player in the landscape of Aboriginal and Torres Strait Islander affairs, we have an opportunity to embed the Declaration in the governance of our lands, territories and resources.

As I discuss in Chapter 2, PBCs may intersect our community governance and our organisational governance because they may both comprise and represent the native title group. The role of PBCs to 'hold, protect and manage determined native title rights in accordance with the objectives of the native title holders' therefore provides a mechanism to potentially realise our self-determination, and to respect and protect our culture in relation to our lands, territories and resources.

We need to ensure PBCs can effectively govern their traditional lands, territories and resources in a way that is consistent with the principles set out in the Declaration. In Chapter 2, I note that this includes:

- our right to self-determination and participation in decision-making (see Article 32(1))
- our right to free, prior and informed consent over projects on our lands, territories and resources (see Article 32(2))
- our right to maintain and protect our cultural heritage on and traditional knowledge about our lands, territories and resources (see Article 31(1))
- our right to conserve and protect the environment of our lands, territories and resources without discrimination (see Article 29(1)).

Likewise, the Declaration provides guidance on the obligations of governments to support our governance over our lands, territories and resources, which include the requirements to:

⁸⁶ M Gooda, Statement by the Aboriginal and Torres Strait Islander Social Justice Commissioner (Delivered at the fifth session of the Expert Mechanism on the Rights of Indigenous Peoples, Geneva, 9–13 July 2012).

- recognise our right to self-determination (see Articles 3 and 4)
- recognise and protect our lands, territories and resources (see Article 26(3))
- in conjunction with us, establish a process to recognise and adjudicate our rights pertaining to our traditionally owned and occupied lands, territories and resources (see Article 27)
- seek our free, prior and informed consent for projects on our lands, territories and resources (see Article 32(2))
- provide effective redress to mitigate adverse impacts on our lands, territories and resources (see Article 32(3)).

The potential for PBCs to realise some of these principles, such as:

- self-determination over our lands, territories and resources
- recognition and protection of our lands, territories and resources
- maintenance and protection of cultural heritage and traditional knowledge
- consultation and participation in decision-making about projects occurring on our lands, territories and resources,

is available to native title holders in the legislative framework that I outline in section 3.2 above. However, I note that the principle of free, prior and informed consent as required by Article 32(2) of the Declaration is not currently acknowledged or protected in legislation. It is also arguable whether any mechanism exists to provide effective redress to mitigate adverse impacts on our lands, territories and resources as articulated in Article 32(3) of the Declaration.

I therefore recommend the Government strengthens the legislative framework within which PBCs are established and operate by ensuring the Native Title Act, the PBC Regulations and the CATSI Act are consistent with the Declaration. I also recommend the Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the Declaration.⁸⁷

I recommend that:

- The Australian Government reviews the *Native Title Act 1993* (Cth), *the Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes

⁸⁷ K Smith, 'Indigenous peoples' access to remedies', (Speech delivered at First Peoples and Extractive Industries: Good Practices Roundtable, Melbourne, 21 August 2012).

are consistent with the *United Nations Declaration on the Rights of Indigenous Peoples*. [Recommendation 3]

- The Australian Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*. [Recommendation 4]

The factors that enable PBCs to effectively govern lands, territories and resources

In considering the factors that enable effective Indigenous governance in relation to native title rights and interests in our lands, territories and resources, I wrote to many organisations operating in the native title environment to seek their response to the following questions:

- What are the factors that enable native title groups and/or Aboriginal and Torres Strait Islander organisations to achieve effective governance?
- What are the factors that impede native title groups from achieving the outcomes they want from their native title rights and interests (e.g. economic development, exercising their native title rights and interests)?
- Do alternative land/resource management and cultural heritage governance processes affect the governance of native title groups? If yes, in what way?
- What could be changed in the native title system to enable the effective governance of native title groups and/or Prescribed Bodies Corporate?

The following discussion is informed by the responses I received from nine NTRBs and NTSPs, the National Native Title Council (NNTC), seven state/territory departments, the Minerals Council of Australia (MCA), ORIC, the Attorney-General and FaHCSIA. I thank all of these organisations for their contributions.

I also acknowledge the Kalkadoon Community Pty Ltd, the Kimberley Institute, Nyamba Buru Yawuru PBC, the Lingiari Foundation, the MCA, the NNTC, Cape York Natural Resource Management, the Oyala Thumotang Land Trust and the Chuulangun Aboriginal Corporation for providing information for the case studies and thank them for agreeing to share their stories with us in this Report.

The case studies demonstrate some of the innovative governance frameworks being established to enable our peoples and organisations to achieve their aspirations, and meet their cultural obligations in relation to their lands, territories and resources while addressing the statutory requirements of governments. My hope is that these case studies will provide a practical resource for Aboriginal and Torres Strait Islander peoples to potentially use or adapt when developing their own contemporary governance frameworks for their lands, territories and resources.

In the following section, I consider what factors enable PBCs to effectively govern their native title rights and interests in lands, territories and resources. I also make recommendations that I believe will assist PBCs to govern their determined native title rights and interests in an effective, legitimate and culturally relevant way.

Aligning community governance and PBC organisational governance

Because PBCs intersect our community governance and our organisational governance, it is critical that the organisational governance of PBCs align with, reflect and support the governance of the native title group.

As I discuss below, aligning the PBC organisational governance and community governance requires that:

- organisational governance standards reflect the unique circumstances of PBCs
- communication of information and decision-making processes is culturally appropriate
- PBCs are accountable to community leadership and native title holders
- PBCs identify and pursue the aspirations of native title holders.

Organisational governance standards reflect the unique circumstances of PBCs

Organisational governance standards need to align with the unique circumstances of PBCs and have the flexibility to tailor their arrangements to suit their circumstances.⁸⁸ These include:

...situations where community members live in remote and isolated locations with limited access to telephone, internet, email or fax... Instances where native title members have English as a second or third language, which in turn creates further difficulties particularly where consultation with external parties is required... Differences in cultural understandings, values and protocols that native title groups need to often 'negotiate' in communicating with external parties.⁸⁹

⁸⁸ H Bokelund, Chief Executive Officer, Goldfields Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 20 July 2012.

⁸⁹ K Thomas, Chief Executive Officer, South Australian Native Title Services, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 10 August 2012.

The Goldfields Land and Sea Council (GLSC) observes that PBC governance structures and processes need to match traditional values and practices to ensure legitimacy and secure the mandate of community members.⁹⁰

While the incorporation of PBCs in accordance with the CATSI Act provides the potential for ‘incorporation models that meet the specific cultural needs of a group and community’,⁹¹ several NTRBs and NTSPs raise concerns about how this occurs in practice. For example, the South West Aboriginal Land and Sea Council (SWALSC) comments that the CATSI Act is not ‘particularly well designed to manage conflicting interests between groups’, which is a particular issue for PBCs with a large membership.⁹² The Central Desert Native Title Services (CDNTS) also raises concerns that ‘the processes imposed by the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* can be incompatible with traditional decision-making and governance processes.’⁹³

The case study on Indigenous governance over lands, territories and resources in Cape York outlined later in this section illustrates the complexity of issues that PBCs may need to negotiate to ensure their governance structures meet both traditional decision-making obligations and statutory requirements.

Communication of information and decision-making processes is culturally appropriate

Communication of information, both within the native title group *and* between native title holders and governments/external stakeholders, needs to be culturally appropriate and assist the PBC to make informed decisions. Again, this provides an opportunity to embed the Declaration in this process by ensuring the way PBCs communicate information gives full effect to the right to participate in decision-making underpinned by the right to give or not to give our free, prior and informed consent. CDNTS states that:

...effective governance is achieved by ensuring that structures established, implemented or utilised allow native title groups and Aboriginal organisations to adhere to decision-making processes that are based on traditional law and custom. Effective governance is achieved through supporting and implementing culturally appropriate governance structures.⁹⁴

⁹⁰ Bokelund, note 18.

⁹¹ Registrar of Indigenous Corporations, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 6 September 2012.

⁹² M Firth, Corporate Services Manager, South West Aboriginal Land and Sea Council, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 July 2012.

⁹³ I Rawlings, Chief Executive Officer, Central Desert Native Title Services, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 30 July 2012.

⁹⁴ Rawlings, above.

South Australian Native Title Services (SANTS) explains:

Given the dynamic nature of native title business, native title groups will often interact with external stakeholders such as local governments and mining companies. The development of this relationship and the capacity of native title groups to communicate effectively with third parties are fundamental in demonstrating accountability from an external perspective. Similarly, internal communication within the native title group itself is also paramount in ensuring the continued transparency and validity of the group from a community perspective. Importantly, this includes communication across the Board members in addition to the membership in general.⁹⁵

In order for a PBC to make decisions on behalf of the native title holders, Yamatji Marlpa Aboriginal Corporation (YMAC) observes that:

- Adequate time and resources are required to properly inform community members and build consensus before major decisions need to be made.
- Appropriate decision-making processes need to take into account intra-group dynamics and allow all voices to be heard and properly represented. This is particularly important in regards to steering committees and other advisory groups that are established to liaise between land developers (including government) and the broader community.⁹⁶

PBCs are accountable to community leadership and native title holders

PBCs need to be accountable to and reflect the interests of their native title group; to do this effectively there needs to be positive engagement between native title holders and their PBC. This is particularly relevant given that native title rights and interests are held collectively rather than by individuals.⁹⁷

SANTS contends that:

...where there is a willingness to engage in native title business in addition to strong leadership, [PBCs] are more likely to steer their respective native title group and in turn hold it to account. Importantly, these attributes will be far more effective where there is open and clear communication throughout the native title group, and similarly, financial and administrative capacity to support this.⁹⁸

⁹⁵ Thomas, note 19.

⁹⁶ S Hawkins, Chief Executive Officer, Yamatji Marlpa Aboriginal Corporation, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 13 August 2012.

⁹⁷ Hawkins, above.

⁹⁸ Thomas, note 19.

Effective accountability mechanisms also assist to remove representational politics out of the roles of directors and board members, and minimise the potential for community disputes.⁹⁹ CDNTS suggests that there:

...needs to be a process whereby members of PBCs can properly hold PBCs to account for breaches of the NTA [Native Title Act] and PBC Regulations. At the moment, if a PBC does not comply with its obligations, the only remedy is for members to take legal action against the PBC. This course of action is often outside the capacity and resources of affected members. The result is that native title rights and interests can be severely impacted upon and affected through the actions of a PBC without the mandate of the common law [native title] holders and the common law [native title] holders have little or no recourse to easily accessible legal advice or other relevant assistance.¹⁰⁰

ORIC highlights the following key factors that can strengthen the organisational governance and accountability of PBCs:

Independent directors. There is a growing recognition among corporations that the appointment of independent directors with expertise in finance, law or corporate governance can greatly benefit the standards of governance and management of a corporation, and also serve to enhance the knowledge and skills of the member directors.

Board composition, roles and powers. This requires differentiation between the roles and responsibilities of the board and management as set out in the rule book of the corporation, with clear accountability to the members or stakeholders. Members should elect the majority of the board. There should be a clear distinction between the roles of the CEO [Chief Executive Officer] and the chairperson and the same person should not perform both roles. The CEO should also not be a director of the board. The board should undertake a documented performance review of the CEO.

Board processes and governance. The board of the corporation should have documented policies and processes about board and member/shareholder meetings (agendas, preparation and distribution of board papers, regular financial reports, minutes, meeting frequency) as well as current strategic and costed business plans for the corporation.

Relationship with members/stakeholders. The board of directors should act in the best interests of the corporation as a whole and its rule book should provide transparency and accountability to its members. The members should have the power (stipulated in the rule book) to remove directors and hold an annual general meeting every year. The board should provide a comprehensive annual report at the annual general meeting.¹⁰¹

⁹⁹ Firth, note 22 and Thomas, note 19.

¹⁰⁰ Rawlings, note 23.

¹⁰¹ Registrar of Indigenous Corporations, note 21.

Many of these factors are demonstrated in the case study of the Kalkadoon Constitution Indigenous Land Use Agreement, which sets out clear mechanisms for accountability and transparency: see Text Box 3.2.

Text Box 3.2: The Kalkadoon Constitution Indigenous Land Use Agreement

Kalkadoon Peoples native title consent determination

On 12 December 2011, the Kalkadoon Peoples' native title rights and interests were recognised over approximately 40 000 square kilometres around Mount Isa in North West Queensland. This included exclusive native title rights to use and enjoy 4 000 square kilometres of the native title determined area and non-exclusive rights over the remaining lands and waters.¹⁰²

I congratulate the Kalkadoon Peoples and the many organisations and individuals who were involved in the consent determination of the native title claim.

Kalkadoon Constitution Indigenous Land Use Agreement

The Kalkadoon Constitution Indigenous Land Use Agreement (Kalkadoon Constitution ILUA) establishes a transparent governance framework for the Kalkadoon Peoples post-native title determination. It is a binding legal document setting out 'the management and conduct of the collective affairs of the Kalkadoon People in relation to the ILUA Area'.¹⁰³

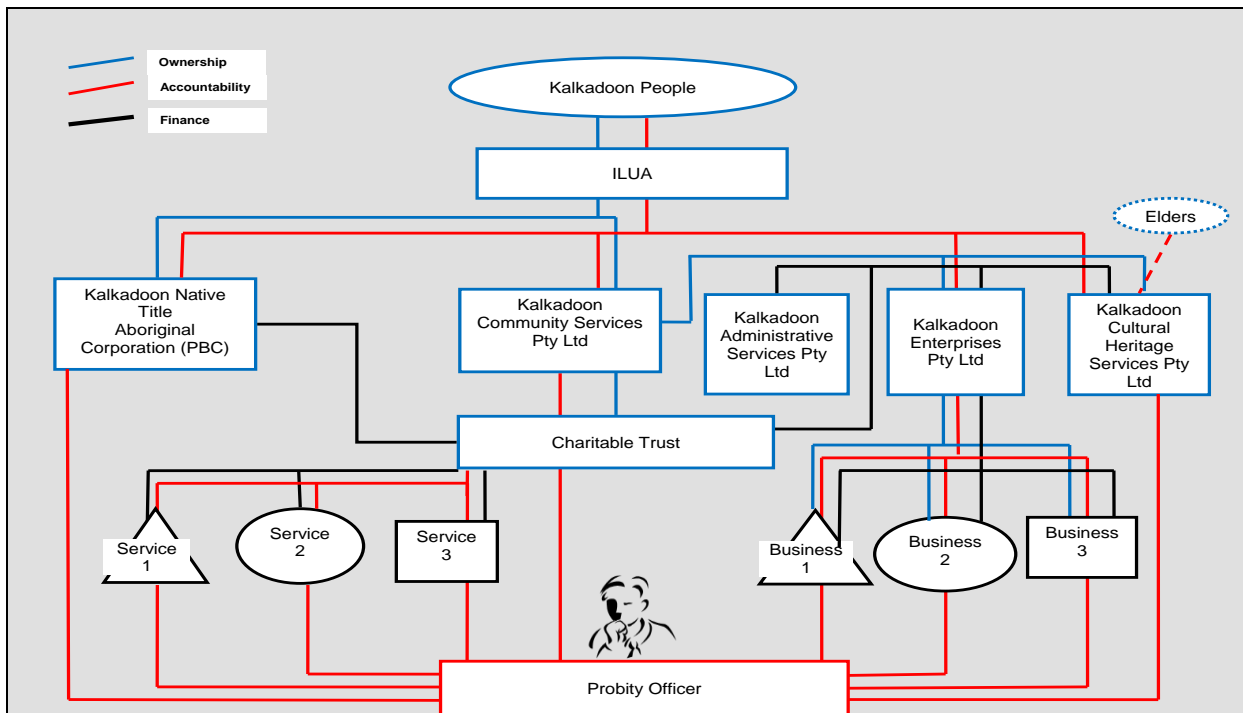
Kalkadoon organisations

As required by the Native Title Act, the Kalkadoon Peoples have established the Kalkadoon Native Title Aboriginal Corporation (Kalkadoon PBC) to be the registered native title body corporate for their native title.¹⁰⁴ Kalkadoon Community Services, Kalkadoon Enterprises, Kalkadoon Cultural Heritage Services and Kalkadoon Administrative Services have also been created as separate Kalkadoon organisations to enable the Kalkadoon Peoples to realise social, economic, educational, business, employment and training opportunities as the traditional owners of the Mount Isa region. The roles, values, principles and rules that govern each of these organisations are described in the Kalkadoon Constitution ILUA and the relationships between these organisations are illustrated in the following diagram.

¹⁰² National Native Title Tribunal, 'Native Title recognition for the Kalkadoon People', (Media Release, 12 December 2012). At <http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/NativeTitlerecognitionfortheKalkadoonPeople.aspx>.

¹⁰³ The Kalkadoon People, *Kalkadoon Constitution Indigenous Land Use Agreement*, Chalk and Fitzgerald (2011), Agreed Terms, Clause 3.1.

¹⁰⁴ The Kalkadoon People, above, Background paragraph C.



Transparency and accountability mechanisms within the Kalkadoon Constitution ILUA

The Kalkadoon Constitution ILUA sets out the transparency and accountability mechanisms that support the Kalkadoon Peoples to have effective, culturally relevant and legitimate governance over their country. This has two benefits:

1. The ILUA enshrines the values and principles of the Kalkadoon Peoples and provides a process for the Kalkadoon Peoples to determine and achieve their aspirations.
2. By articulating the operations and entities of the Kalkadoon Peoples, the ILUA assists the Kalkadoon Peoples to meet the legislative and regulatory requirements of the Government.

The transparency and accountability mechanisms in the Kalkadoon Constitution ILUA include:

Role of the probity officer

The role of the probity officer ensures compliance with the Kalkadoon Constitution. This requires the probity officer to receive reports, receive and investigate complaints, refer complaints to authorities, report on investigations and compliance generally, assist in improving compliance, help resolve disputes and undertake any other functions as required.¹⁰⁵ To enable these functions to be carried out, the probity officer has the power to

¹⁰⁵ The Kalkadoon People, above, Clause 2(a)–(j).

attend meetings and obtain records, acquire information and have access to and interview people.¹⁰⁶

The probity officer cannot be a Kalkadoon person or an officer of a Kalkadoon organisation or a person that has a contractual agreement with a Kalkadoon organisation. This is to ensure the separation of powers within the governance structure and prevent the potential for conflict between a person's duties as the probity officer and a person's interests under the Kalkadoon Constitution ILUA.¹⁰⁷

Decision-making processes

The Constitution requires the Kalkadoon Peoples to make collective decisions, which means that they must make decisions at a Kalkadoon meeting. Only decisions made at a Kalkadoon meeting (including land decisions) can be relied upon by a Kalkadoon organisation as an authoritative decision of the Kalkadoon Peoples.¹⁰⁸

Rules about Kalkadoon meetings such as who can attend, timeframes for and notifications of meetings, quorum requirements, decision-making processes, and recording discussions and decisions are set out in the Constitution. A Kalkadoon meeting may consist of all Kalkadoon Peoples who have attained the age of 15 years and who wish to attend, participate in and vote at the meeting – regardless of whether the Kalkadoon person is a member of any of the Kalkadoon organisations or not.¹⁰⁹ This accessibility to attend Kalkadoon meetings facilitates community participation in decision-making processes that affect all Kalkadoon Peoples.

The decision-making process at a Kalkadoon meeting involves proposed resolutions to be made in writing and put forward to the meeting verbally. There must be an opportunity for discussion on the resolution, during which 'the Kalkadoon People present will...attempt to reach consensus about the matter'.¹¹⁰

Although directors of Kalkadoon organisations and the probity officer may attend and participate in a Kalkadoon meeting, they are not entitled to vote on any resolution.¹¹¹ The Kalkadoon Peoples have a significant role in the management and conduct of their collective affairs, with the separation of powers between the Kalkadoon People and Kalkadoon organisations acting as a 'check and balance'. This is demonstrated by the requirement for Kalkadoon Peoples to set the strategic direction of Kalkadoon organisations by approving and reviewing their Strategic Plans.¹¹²

Role of elders within the Kalkadoon governance framework

The significant role of elders under traditional law and custom and as custodians of Kalkadoon traditional knowledge, custom and law is acknowledged in the Constitution.¹¹³ For

¹⁰⁶ The Kalkadoon People, above, Schedule 2, Clause 3.

¹⁰⁷ The Kalkadoon People, above, Schedule 2, Clause 4.2.

¹⁰⁸ The Kalkadoon People, above, Schedule 3, Clause 1.

¹⁰⁹ The Kalkadoon People, above, Schedule 3, Clause 5.1.

¹¹⁰ The Kalkadoon People, above, Schedule 3, Clause 5.10.

¹¹¹ The Kalkadoon People, above, Schedule 3, Clause 5.1.

¹¹² The Kalkadoon People, above, Schedule 3, Clause 2.

¹¹³ The Kalkadoon People, above, Schedule 9, Clause 1.

example, Kalkadoon elders may be consulted by any Kalkadoon Person, any Kalkadoon organisation and any officer or staff member of a Kalkadoon organisation about any matter relating to traditional knowledge, law or custom.¹¹⁴

PBCs identify and pursue the aspirations of native title holders

I observe in Chapter 2 that Aboriginal and Torres Strait Islander peoples need to be given the space and resources to develop our governance so that we can achieve our aspirations. This requires PBCs to undertake strategic planning to identify opportunities and develop policies that reflect the social, cultural and economic aspirations of the native title holders. SANTS comments that:

Without this stewardship [of a clear strategy and policies], an overwhelming focus on compliance can result in the group becoming weighed down in processes which in itself has a tendency to undermine governance. In driving towards a common goal or strategy, the native title group also has greater potential to gradually develop into more complex issues once the fundamental responsibilities with respect to native title business are mastered.¹¹⁵

The critical role of planning is illustrated in the case study of the Yawuru Peoples' 'Four Pillar Knowledge Vision' strategy that informs and guides their community governance: see Text Box 3.3.

Text Box 3.3: The Yawuru Peoples 'Four Pillar Knowledge Vision': informing community governance

The 'Four Pillar Knowledge Vision'

The Yawuru Peoples have developed the 'Four Pillar Knowledge Vision', which is a strategy designed to inform and guide their community governance. This strategy establishes a foundation for the Yawuru Peoples' aspirations following their native title determination over the township of Broome and surrounding areas in 2008 and the registration of the Global Agreement (comprising two Indigenous Land Use Agreements) in 2010.¹¹⁶

The 'Four Pillar Knowledge Vision' focuses on gathering information about the Yawuru

¹¹⁴ The Kalkadoon People, above, Schedule 9, Clause 3.

¹¹⁵ Thomas, note 19.

¹¹⁶ The native title determination of the Yawuru Peoples was reported in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2008* (2009), pp 58–63. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/chapter3.html#3 (viewed 17 September 2012). The Yawuru Peoples Global Agreement was reported in M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2010* (2011), pp 25–27. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/chapter2.html (viewed 17 September 2012).

Peoples native title group and the broader Indigenous community residing in the Broome region to ensure that ‘governance arrangements in the post-native title determination era... [are] informed by locally controlled and customised information’.¹¹⁷ Notably,

...as an incorporated land-holding group, the Yawuru people of Broome are among the first in Australia to move in this area of information gathering, certainly in terms of the degree of local control, participation and conceptual thinking around the logistics and rationale for such an exercise.¹¹⁸

The strategy is based on:

Knowing Our People and Community

The process for ‘Knowing our People and Community’ began in 2011 with a comprehensive household survey undertaken to acquire statistical and demographic information about the Indigenous population in Broome.¹¹⁹ The survey recognised the limitations of previous census data collected by the Australian Bureau of Statistics (ABS), which significantly under-represented the Indigenous population residing in Broome as well as ignoring cultural complexity and therefore had limited use in providing information that assists to identify the objectives of the contemporary Broome Indigenous community.

The survey was carried out by a team of local Broome Aboriginal people who surveyed every Indigenous household in Broome ‘door to door’. They collected information on population size, including by dwelling category and age distribution, socio-economic composition, and cultural identity and language. The key to its success was local knowledge working in tandem with academic expertise from the Australian National University’s (ANU) Centre for Aboriginal Economic Policy Research (CAEPR).

The information from the survey is now being used to inform Yawuru investment decisions and policy and program development as well as engagement with government and industry. For example, the Yawuru Language Revitalisation Project has been identified as a priority, with the engagement of Yawuru language workers and senior people in the community working together to record Yawuru language to teach in schools and for other applications such as publications, art work and geographic place names.

The survey assists governance processes by:

- providing Yawuru leaders with an informed basis for decision-making
- assisting to provide a dialogue between different native title groups in the Broome and West Kimberley regions
- providing a baseline to measure impacts of economic and social change on Aboriginal society

¹¹⁷ J Taylor, B Doran, M Parriman and E Yu, *Statistics for Community Governance: the Yawuru indigenous population survey of Broome*, CAEPR Working Paper No. 82/2012 Australian National University (2012), p 7. At <http://caepr.anu.edu.au/Publications/WP/2012WP82.php> (viewed 24 August 2012).

¹¹⁸ Taylor et al, above, p 3.

¹¹⁹ Taylor et al, above.

- providing a basis for informed dialogue with Aboriginal interests, government and industry
- providing a basis for accountability for public policy and investment for Aboriginal development in the region.¹²⁰

Knowing Our Country

In partnership with the Fenner School of Environment and Society and CAEPR at ANU, the Yawuru Peoples are using Geographic Information System (GIS) mapping technology to digitally map Yawuru Country. This process informs the geographic aspects of Yawuru Country and maps places of cultural and social significance for Yawuru Peoples. This work will also enable Yawuru Peoples to map and monitor historical, current and future use of Yawuru terrestrial and marine environments and provide Yawuru with evidence – both from a Yawuru cultural perspective and from western science – to assess the actual and potential impacts of the various activities which occur on Yawuru Country.

A Yawuru Cultural Management Plan has been produced to inform future research projects and activities on Yawuru Country as well as guide the joint Park Management Agreements that Yawuru Peoples have entered into with the Shire of Broome and the Department of Environment (Western Australia). The Cultural Management Plan also seeks to ensure that other people walk, work on and enjoy Yawuru Country with respect for Yawuru Peoples and their Country.

Knowing Our Story

Knowing Our Story focuses on a process of identifying and consolidating the research, commentary and photography that was produced prior to and during the native title process. This includes the transcripts from the native title court cases, the affidavits produced during the preparation of the court cases, the Common Gate Exhibition produced by the Lingiari Foundation, and oral histories from Yawuru People. This material will be catalogued and placed into a Yawuru Centre for Knowledge to inform future generations about the Yawuru Peoples and their Country.

Building Our Economic Prosperity

The Global Agreement settling native title with the Western Australian Government resulted in the Yawuru Peoples being the largest single landowners in Broome. This means the Yawuru Peoples have significant responsibilities both to manage these land holdings and to ensure the land holdings are used to establish the economic foundation for the Yawuru into the future. This requires building economic capacity within the community and careful planning so that the unique position of the Yawuru Peoples is not lost in town planning and development policies undertaken in Broome.

¹²⁰ P Yu, *The Power of Data in Aboriginal Hands* (Paper presented at Social Science Perspectives on the 2008 National Aboriginal and Torres Strait Islander Social Survey Conference, 11-12 April 2011), The Australian National University, Canberra, p 7. At <http://caepr.anu.edu.au/sites/default/files/Seminars/presentations/Peter%20Yu%20-%20The%20Power%20of%20Data%20in%20Aboriginal%20Hands2.pdf> (viewed 5 September 2012).

The 'Four Pillar Knowledge Vision' strategy encompasses the principle of self-determination for the Yawuru Peoples. By informing themselves about their community, their country, their stories and potential economic opportunities, the Yawuru Peoples are building their capacity to make informed decisions about achieving their objectives.

PBCs have adequate funding and resources

All NTRBs and NTSPs that responded stressed significant concerns about the funding and resources available for PBCs to undertake their statutory functions. PBCs must be provided with adequate funding if they are to fulfil their statutory obligations and achieve their objectives. The issue of funding is especially critical where a determination of native title is not accompanied by agreements with external stakeholders – such as mining companies and/or state/territory/local governments – that provide an on-going and substantial source of income for the PBC.

The administrative and legal capacity of a PBC is dependent upon adequate funding and resources. Funding amounts must recognise that many PBCs operate in remote regions and have members who live in dispersed areas. This means that undertaking statutory functions such as holding annual general meetings is expensive. SANTS states that:

From a practical perspective, the [native title] group must have financial capacity. This basic funding requirement is essential to ensure that the governing bodies are in a position to satisfy not only the relevant statutory requirements, but furthermore, demonstrate accountability to the wider community. Financial capacity enables essential activities such as meetings and provides for the ongoing administrative costs associated with the day to day management of the native title group. ...

...It is important to note that for many native title groups there are often significant costs for holding such meetings given logistical difficulties where members are spread across large or remote areas. This is particularly the case where a consent determination has been successfully achieved without any form of financial settlement to go in conjunction with the determination.¹²¹

The lack of funding and resources for PBCs has resulted in NTRBs and NTSPs assisting PBCs to fulfil their functions. Some NTRBs and NTSPs note that they are well placed to assist PBCs and provide a resource and knowledge base for PBCs, while others urge more funding to be allocated to PBCs. For example, the Torres Strait Regional Authority (TSRA) notes that to achieve effective governance in the Torres Strait, PBCs need to be properly established with core funding:

...while PBCs are able to access some funding through TSRA administered grants, this is limited and non-ongoing. Not all PBCs in the region have the capacity to apply

¹²¹ Thomas, note 19.

for or manage grant funding. This is being addressed through the TSRA Governance and Leadership PBC Capacity Building project.¹²²

FaHCSIA reports that in 2011–2012, almost \$1.7 million was given to eight NTRBs/NTSPs to provide basic support to all PBCs throughout the country.¹²³ In addition, FaHCSIA funds programs – such as leadership workshops, the Aurora Project and the AIATSIS Native Title Unit – that aim to build the capacity of PBCs.¹²⁴

I note, however, that the level of support funding for PBCs only comprises approximately 2% of the total funding for NTRBs and NTSPs. Given the increasing numbers of native title determinations and PBCs, this level of funding is inadequate for PBCs and native title holders to achieve economic independence and, as I discuss below, limits their ability to build their administrative, legal and business capacity.

I recommend that the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources. [Recommendation 5]

The administrative capacity of PBCs

PBCs require the administrative capacity to meet their statutory obligations. The TSRA notes that although native title has been determined over most of the Torres Strait region:

Many PBCs in the Torres Strait still lack the resources and administrative capacity (i.e. office space, computer, reliable email access, phone access or printers) to achieve effective governance. These PBCs rely on the resources available at the local council offices or through their employers.¹²⁵

Administrative capacity needs to be addressed ‘at different levels, both at the individual level of directors and community members and at an institutional level in terms of business systems, infrastructure and human resources.’¹²⁶

¹²² J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 18 July 2012.

¹²³ F Pratt, Secretary, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 October 2012.

¹²⁴ Pratt, above.

¹²⁵ Kris, note 52.

¹²⁶ Thomas, note 19.

The GLSC acknowledges that the administrative capacity of PBCs can be affected by constraints such as the:

- remote geographical locations of some native title determinations, which impacts on the cost of organising meetings and/or hiring staff
- level and type of future act activity, which can generate funding but also place pressure on the administrative capacity of the PBC
- requirement to operate in a rapidly changing external environment, including responding to regulators, government departments and external stakeholders.¹²⁷

The administrative capacity of PBCs can be increased through training and mentoring programs. A number of organisations commented positively on support programs provided by NTRBs and NTSPs, the FaHCSIA Indigenous Leadership Program, the Aurora Project, ORIC and the Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS). While there is demand for these programs to be expanded, it is critical that these programs are undertaken in a way that provides support and builds the capacity of PBCs and native title holders.

The TSRA suggests that:

Training and mentoring should focus on the specific needs of a PBC when it is first established. While the Office of the Registrar of Indigenous Corporations provides initial governance training, the purpose of this training is to ensure that all PBC members are aware of the roles, obligations and responsibilities of PBCs... An on-going mentoring program would assist with further capacity building and better governance.¹²⁸

SANTS also notes that key areas to improve the administrative capacity of PBCs include 'increased access to governance and business training with a heightened focus on corporation specific service delivery, and also mentoring and leadership programs'.¹²⁹

I am aware that there is some uncertainty about how the role of the newly-established ACNC will interact with ORIC in terms of PBCs complying with statutory requirements under the CATSI Act, but acknowledge that these processes are continuing as this Report is being finalised. SWALSC notes:

...at this stage, we are rather concerned that a proposed co-operative arrangement between ORIC and the ACNC has not been concluded, and that leaving this

¹²⁷ Bokelund, note 18.

¹²⁸ Kris, note 52.

¹²⁹ Thomas, note 19.

unresolved will result in many CATSI Corporations having a dual reporting obligation which will not do much more than just put extra strain on administrative systems.¹³⁰

I reiterate the importance of Government ensuring that PBCs are not subject to unnecessary 'red-tape' and bureaucratic burden.

The legal capacity of PBCs

Given the complex legislative frameworks within which PBCs operate, it is essential that PBCs have the legal capacity to comply with their statutory obligations. This includes the 'ability to identify when external advice on legal or governance issues is required'.¹³¹

SANTS outlines the need for PBCs to have access to legal support:

...readily accessible and consistent legal support is also an important factor in ensuring good governance. This may also extend to financial, business and administrative support depending on the size of the native title group and the nature of their dealings... Whilst a number of the Boards for native title groups currently rely on legal advisors, in the long run it is hoped that these groups will be in a position to operate independently with respect to good governance practices. In the interim, it is important that NTRBs/NTSPs are funded to continue to provide native title groups with readily accessible legal support services.¹³²

The business capacity of PBCs

Almost 20 years after the implementation of the Native Title Act, we are starting to reap some significant benefits from the settlements emerging out of native title determinations and Indigenous Land Use Agreements (ILUAs). In Chapter 1, I reported on the dramatic increase in the number of registered ILUAs, with 150 ILUAs registered in the last year alone. I believe that many of these agreements, settlements and determinations provide native title holders with the best opportunity to build sustainable outcomes that have the potential to deliver intergenerational benefit.

PBCs are central to the realisation these opportunities. However, as well as adequate funding and resources, administrative and legal capacity, it is essential that PBCs are able to access the necessary expertise in areas such as business development, finance and venture capital. YMAC observes that:

...once an agreement is reached, good corporate governance alone is not sufficient for native title groups to successfully achieve the outcomes they want from native title, particularly in relation to economic development. They also require reliable,

¹³⁰ Firth, note 22.

¹³¹ Thomas, note 19.

¹³² Thomas, above.

affordable support to develop commercial governance and acumen. For example, a native title group may have a number of ideas about how they would like to invest in the care of their elders and young people; however, they need support and opportunities to translate concepts into practical projects and, importantly, have access to finance in order to make them viable over the longer term.¹³³

A lack of business development capacity can result in PBCs becoming dependent on external financial expertise:

Likewise, a lack of business acumen, or more specifically, a limited understanding of how the private sector operates can also restrict the capacity for a native title group to develop its own business and identity independently. One common feature of this situation is the undue reliance of some groups on external ‘consultants’. In becoming dependent on external support, the native title group is then unable to progress business without this support, exposing the group to collapse as soon as this support becomes unavailable for any reason. Short term, project based consultancies supported by Commonwealth funding makes groups particularly vulnerable to a scenario.¹³⁴

The MCA, NNTC and several NTRBs and NTSPs highlight the need to explore policy and governance reforms to maximise economic benefits arising from native title and mining development opportunities.

As reported in Chapter 1, I welcome the Government’s recent amendment of tax legislation to clarify that native title benefits are not subject to income tax. However, there is concern that the Government to date has not been keen to institute a new form of tax registration for PBCs that want to undertake economic development activities. The MCA explains that:

...there is no current class of exempt entity that specifically addresses the systemic and interrelated social-economic challenges faced by Indigenous communities to assist them to reach individual and community economic independence, particularly in the context of maximising the benefits of resource agreements. Indigenous trusts are forced to rely upon the concept of charitable trusts and institutions as the only path to exempt status.

Charity in relation to philanthropy...is difficult to reconcile for Indigenous communities seeking to take responsibility for their own well-being in the absence of any extensive not-for-profit or charity sector operating in many remote and regional areas. Their community values will comprise values of altruisms, poverty relief and charitable purposes but must also extend towards economic independence, self-reliance, recognition of family networks, traditional law and custom and self-preservation.¹³⁵

¹³³ Hawkins, note 26.

¹³⁴ Thomas, note 19.

¹³⁵ M Hooke, CEO, Minerals Council of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 24 July 2012.

The unwillingness of Government to address this concern appears inconsistent with the aims of the Government's Indigenous Economic Development Strategy 2011–2018 (the IEDS), which I report on in Chapter 1. The IEDS recognises that 'Indigenous enterprises are in a unique position to capitalise on business opportunities arising from native title settlements and...payments under native title agreements'.¹³⁶

One option that aims to maximise economic benefits and reduce the administrative, legal and financial burden on PBCs is the Indigenous Community Development Corporation (ICDC) model that has been developed by the MCA and the NNTC: see Text Box 3.4.

Text Box 3.4: Indigenous Community Development Corporation: a model for managing native title and other payments

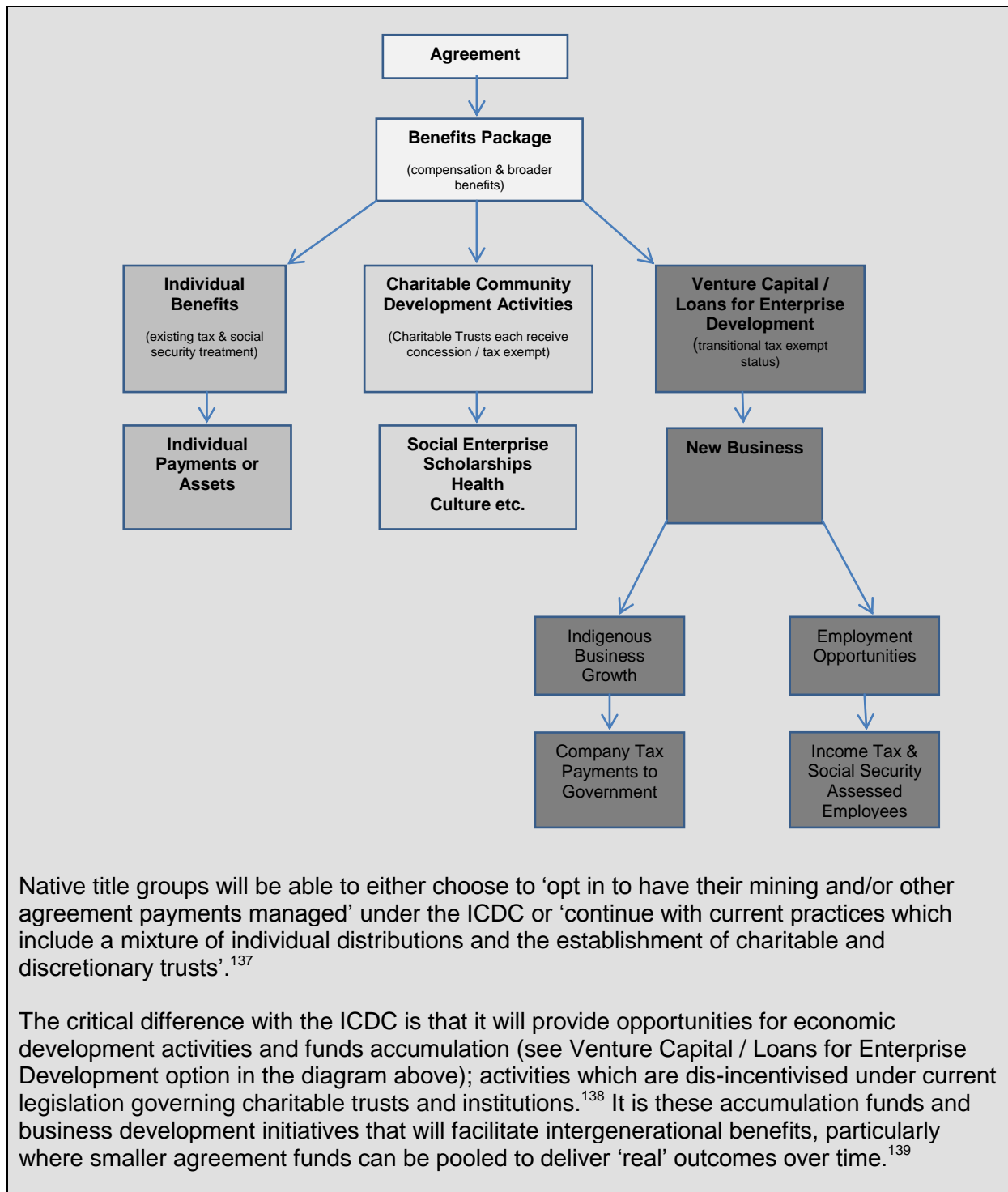
The Minerals Council of Australia (MCA) and the National Native Title Council (NNTC) have developed the Indigenous Community Development Corporation (ICDC) as a model for managing native title and other payments negotiated by Aboriginal and Torres Strait Islander peoples.

The objective of the ICDC is to accept and distribute payments on a tax-free basis so as to:

- maximise the economic and social benefits for current and future generations of native title groups
- reduce administration for native title groups that have minimal governance capacity
- improve governance arrangements.

The ICDC is a single entity that will facilitate funds accumulation, economic development, environment and land management, housing, education and learning, culture and community development as shown in the following diagram.

¹³⁶ Australian Government, *Indigenous Economic Development Strategy 2011–2018* (2011), p 52. At http://www.fahcsia.gov.au/sites/default/files/documents/09_2012/ieds_2011_2018.pdf (viewed 8 October 2012).



Native title groups will be able to either choose to ‘opt in to have their mining and/or other agreement payments managed’ under the ICDC or ‘continue with current practices which include a mixture of individual distributions and the establishment of charitable and discretionary trusts’.¹³⁷

The critical difference with the ICDC is that it will provide opportunities for economic development activities and funds accumulation (see Venture Capital / Loans for Enterprise Development option in the diagram above); activities which are dis-incentivised under current legislation governing charitable trusts and institutions.¹³⁸ It is these accumulation funds and business development initiatives that will facilitate intergenerational benefits, particularly where smaller agreement funds can be pooled to deliver ‘real’ outcomes over time.¹³⁹

¹³⁷ Hooke, note 65.
¹³⁸ Minerals Council of Australia and National Native Title Council, *Indigenous Community Development Corporation Communiqué* (April 2012).
¹³⁹ T Postma, Assistant Director – Social Policy, Minerals Council of Australia, Email to Louise Bygrave, Senior Policy Officer Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 11 October 2012.

The ICDC intends to incorporate 'best practice' governance and management processes by implementing the following principles:

- the majority of Directors will be traditional owners and will be appointed through an approved and transparent regime
- the Board will be compliant with, and have the competencies as required by, a relevant corporate regime
- the appointment of independent and experienced Directors will be encouraged
- there will be limited terms for Directors, however a maximum number of years a Director can serve will not be limited
- audits and reviews will be undertaken by independent and qualified auditors
- there will be public disclosure requirements
- approved accumulation investment and accumulation distribution plans will be mandatory for assets and income over a predetermined threshold
- a qualified and independent Trustee will be appointed to provide advice and/or manage the accumulation fund
- the separation of investment and operational management processes will be encouraged
- the development of capacity building and succession plans as well as an internal dispute resolution process will be required.¹⁴⁰

I understand that consultations between the NNTC, MCA and Treasury indicate that implementing the ICDC will require new legislation as the 'scope for economic development and accumulation funds will...be too limited under existing legislation'.¹⁴¹ I encourage the Government to explore options such as the ICDC that enable native title holders to achieve their social, economic and cultural development aspirations.

Native title rights and interests

The nature and content of determined native title rights and interests can impede or enable native title holders to achieve their economic, social and cultural aspirations. Although native title outcomes have been limited by common law decisions, governments still have a role to facilitate constructive native title outcomes. Native Title Services Victoria (NTSV) notes that:

¹⁴⁰ Hooke, note 65.

¹⁴¹ Minerals Council of Australia and National Native Title Council, note 68.

...non-exclusive rights on public land that amount to little more than the rights enjoyed by the general public or the embellishment of existing statutory rights on third party owned pastoral leases is not a useful foundation for building economic development or showcasing self-determination... The challenge is for State, Territory and particularly the Commonwealth Government to recognise this fact and work with claimants to craft settlements that will facilitate such change. Such settlements will not come about through 'bare' consent determinations.¹⁴²

SANTS also observes that:

A lack of understanding or unrealistic views on what respective native title rights or interests have been recognised also has the potential to limit the ability for native title groups to achieve long term outcomes... Quite often the disappointment in the wake of realising the lack of real power that is translated through these native title rights and interests can distract and defeat the drive of a native title group to successfully function.¹⁴³

If federal and state/territory governments view the native title system as providing economic, social and cultural opportunities for Aboriginal and Torres Strait Islander peoples, they need to be realistic about negotiating native title rights and interests that enable these opportunities. As SANTS suggests:

...There is also the opportunity to refocus existing government programs and initiatives toward native title corporations. For example, the programs of DEEWR [Department of Education, Employment and Workplace Relations], IBA [Indigenous Business Australia], ILC [Indigenous Land Corporation], DSEWPaC [Department of Sustainability, Environment, Water, Population and Communities] and others could better service native title groups through stronger engagement and opening a dialogue around needs, opportunities and service/program delivery options.¹⁴⁴

In this way, the governance of governments can support and build the capacity of native title holders to achieve their social, cultural and economic development aspirations.

The capacity of PBCs to manage native title and engage with alternative land/resource management and cultural heritage processes

In addition to the statutory requirements of the Native Title Act, the PBC Regulations and the CATSI Act, PBCs may also be required to undertake statutory functions in accordance with state/territory legislation in relation to alternative land/resource management and cultural heritage processes. This can be a double-edged sword as, on the one hand, these alternative processes can lead to a disjuncture between

¹⁴² M Storey, Chief Executive Officer, Native Title Services Victoria, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 26 July 2012.

¹⁴³ Thomas, note 19.

¹⁴⁴ Thomas, above.

cultural heritage processes and native title governance¹⁴⁵ but on the other hand, these processes can provide opportunities for native title holders. For example, SANTS notes that:

The interaction between land/resource management, cultural heritage processes and the governance of native title groups will ultimately depend on the nature of those processes and the native title group itself... In some instances these processes could prove to be a distraction and add a layer of complexity if the native title group is not ready to get to that stage. Alternatively, these processes could deliver a range of advantages for example, provide financial capacity for the group's development, deliver a positive tangible outcome from the group's hard work in addition to a level of 'control' or 'power' that the native title group anticipated from the native title process.¹⁴⁶

In last year's Native Title Report, I outlined the *Right People for Country* Project in Victoria, which creates a process for resolving disputes between Aboriginal peoples over land ownership and cultural heritage.¹⁴⁷

Alternate governance processes for managing our lands, territories and resources are also outlined in the case study on establishing effective Indigenous governance over lands, territories and resources in Cape York: see Text Box 3.5.

Text Box 3.5: Establishing effective Indigenous governance over lands, territories and resources in Cape York Peninsula, Queensland

Background

Establishing effective Indigenous governance over lands, territories and resources in the Cape York Peninsula region of far north Queensland has been a long-term and on-going conversation between various Aboriginal language, clan and tribal groups; the Queensland and Federal Governments; and numerous external stakeholders including pastoralists, tourism operators, recreational and commercial fishers, mineral and resource companies, and Indigenous and non-Indigenous service providers.

Indigenous governance that incorporates community governance and organisational governance, and responds to the governance of governments, has focused on organisational governance structures over lands, territories and resources. For example, the Cape York Land Council – now the NTRB for the region – was established in 1990 to work with and fight on behalf of traditional owner groups for the return of their lands, territories and resources.

[The legislative and policy framework over lands, territories and resources in Cape York](#)

¹⁴⁵ Bokelund, note 18 and Storey note 72.

¹⁴⁶ Thomas, note 19.

¹⁴⁷ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2011* (2011), pp 111–114. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport11/chapter2.html (viewed 24 September 2012).

The legislative and policy framework that Aboriginal peoples are required to navigate in Cape York in relation to their lands, territories and resources includes the:

- *Aboriginal Land Act 1991 (Qld) (ALA)*¹⁴⁸
- *Cape York Heads of Agreement 1996*¹⁴⁹
- *Cape York Peninsula Land Use Strategy*¹⁵⁰
- *Land Act 1994 (Qld)*
- *Nature Conservation Act 1992 (Qld) (NCA)*
- *Native Title Act 1993 (Cth)*
- *Water Act 2000 (Qld)*
- *Wild Rivers Act 2005 (Qld)*
- *Cape York Peninsula Heritage Act 2007 (Qld) (Heritage Act)*.¹⁵¹

Few of these acts, however, have involved traditional owners from the Cape in their design and development:

Very little legislation, especially regarding land tenure, and natural and cultural resource management, is shaped with input from Traditional Owner Custodians, and it rarely reflects their rights and interests or their governance, autonomy and Indigenous social structures.¹⁵²

Rather, legislation and policies have largely aimed to regulate the use of and access to country and/or resources by traditional owners, and prioritise the needs of non-Indigenous interests over the interests of traditional owners.

These legislative and policy frameworks also consider lands, territories and resources from a non-Indigenous world-view. This means that resources such as water and biodiversity are considered to be the property of the Queensland Government. In addition, lands and territories are delineated according to non-Indigenous boundaries rather than traditional Aboriginal clan estate or language group boundaries. Many of these legislative processes also cover large areas of land that incorporate the traditional lands and territories of more

¹⁴⁸ The *Aboriginal Land Act 1991 (Qld)* provides for the grant, and the claim and grant, of land as Aboriginal land, and for other purposes.

¹⁴⁹ The Cape York Heads of Agreement was signed in 1996 by the Cape York Land Council, the Peninsula Regional Council of the Aboriginal and Torres Strait Islander Commission, the Cattlemen's Union of Australia, the Australian Conservation Foundation and the Wilderness Society, and in 2001 by the Queensland Government. It addressed issues of economic development, native title, Indigenous advancement and conservation in the Cape York region.

¹⁵⁰ The Cape York Peninsula Land Use Strategy involves the Queensland and Federal Governments and the local community, and gives consideration to land tenure reform and discussions regarding World Heritage cultural and environmental value in Cape York.

¹⁵¹ The *Cape York Peninsula Heritage Act 2007* facilitates the region's World Heritage values, outlines the capacity to undertake sustainable economic activities in support of Indigenous development including identifying Indigenous Community Use Areas, confirms the protection of native title rights in Wild River declaration areas, and facilitates special Indigenous water reserves. A breakthrough reform enabled by the Heritage Act (through amendments to the NCA and the ALA) is the negotiation and creation of a new form of National Park – one with underlying Aboriginal land tenure and a guarantee of joint management arrangements between the relevant traditional owners and the Queensland Government.

¹⁵² Chuulangun Aboriginal Corporation, *Submission to Inquiry into the Future and Continued Relevance of Government Land Tenures across Queensland*, 2 August 2012, p 3.

than one language group.

Traditional governance and customary tenure is very different to the tenure arrangements of the Government. Lines on the Government's maps do not correlate to the Traditional Owners' customary boundaries. This can lead to confusion in relation to who is speaking for what country, incorrect modelling for land trust and issues of representation on land trusts. This has ramifications for the transfer of land to Aboriginal people (e.g. under the ALA) in regard to boundaries of transferred land, contested boundaries and where boundaries of lands are relocated. It is important that the correct Traditional Owners are involved in this process.¹⁵³

The forced relocation of many Aboriginal and Torres Strait Islander peoples around the Cape York region also means that the needs and well-being of those moved from their own traditional lands to the traditional lands of others must be considered in land dealings.

While the need to create effective governance over traditional lands naturally creates tensions among Aboriginal groups, this is often further exacerbated by legislation such as the Native Title Act and the ALA determining what Indigenous governance should look like – for example, PBCs registered under the CATSI Act or Land Trusts. This can lead to governance structures reflecting non-Indigenous governance processes, such as one chairperson heading an organisation, rather than Indigenous governance processes that ensure the right people make decisions about their country.

A particular challenge for Aboriginal peoples across Cape York is how to balance their responsibilities under their traditional laws and customs with their legislative obligations. For example, the Chairperson of the Oyala Thumotang Land Trust has stressed the critical relationship between the responsibilities of Land Trust representatives to their families to ensure they are fully informed about decision-making processes concerning their lands, territories and resources; and their obligation to ensure sound organisational governance as a Land Trust established under legislation with statutory responsibilities.¹⁵⁴

Contemporary Indigenous governance in Cape York

The barrage of legislation and policies introduced by Queensland and Federal Governments has impacted on the relationship of traditional owners to their lands, territories and resources. The following highlights the effect and evolution of three statutes on Indigenous governance over lands, territories and resources in Cape York.

Land Trusts under the Aboriginal Land Act 1991

A number of national parks have been transferred back to traditional owners under the ALA with an underlying tenure of inalienable Aboriginal freehold. Some of these areas include the lands and territories of up to four different traditional owner groups and more than 75 extended families.

Land Trusts established under the ALA tend to reflect legislative governance requirements rather than community governance models; the Trusts have a constitution, a board of

¹⁵³ Chuulangun Aboriginal Corporation, above, p 5.

¹⁵⁴ R Burke, Chairperson, Oyala Thumotang Land Trust, Telephone interview with K Kiss, Principal Advisor Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 5 October 2012.

directors (usually made up of representatives from each group but also possibly including historical people) and a chairperson. These are referred to as 'Hybrid Land Trusts'.

This model has resulted in challenges in situations where the Land Trust is required to manage lands and territories on behalf of more than one group, but there is a cultural requirement to ensure that the right people are speaking for the right country.

A land trust chair...may make a decision on behalf of the whole land parcel... The implications of this for the transfer of land to Traditional Owners are that a trustee (e.g. a land trust under the ALA) might grant a lease for commercial purposes without obtaining the approval of the particular Traditional Owners for a given area.¹⁵⁵

In order for this governance framework to work effectively, clear rules must be established and included in the constitution of the Land Trust to ensure that:

- the right people are making decisions about developments occurring on their lands and territories
- there are appropriate dispute resolution processes between traditional owner groups.

Land Trusts and the Cape York Peninsula Heritage Act 2007

Recent legislative developments – such as the Heritage Act, which (through amendments to the ALA and NCA) allows traditional owner groups to negotiate joint management of national parks¹⁵⁶ – include greater flexibility to establish governance structures that incorporate traditional Indigenous governance into an organisational governance structure.

This model allows traditional owners to have a higher level of participation and engagement in park management. In some instances parcels of land have been handed back to traditional owners as inalienable freehold, which means that traditional owners can use these lands for residential purposes or to pursue economic development opportunities such as eco-tourism. These outcomes are confirmed in Indigenous Management Agreements and/or Use and Access Agreements.

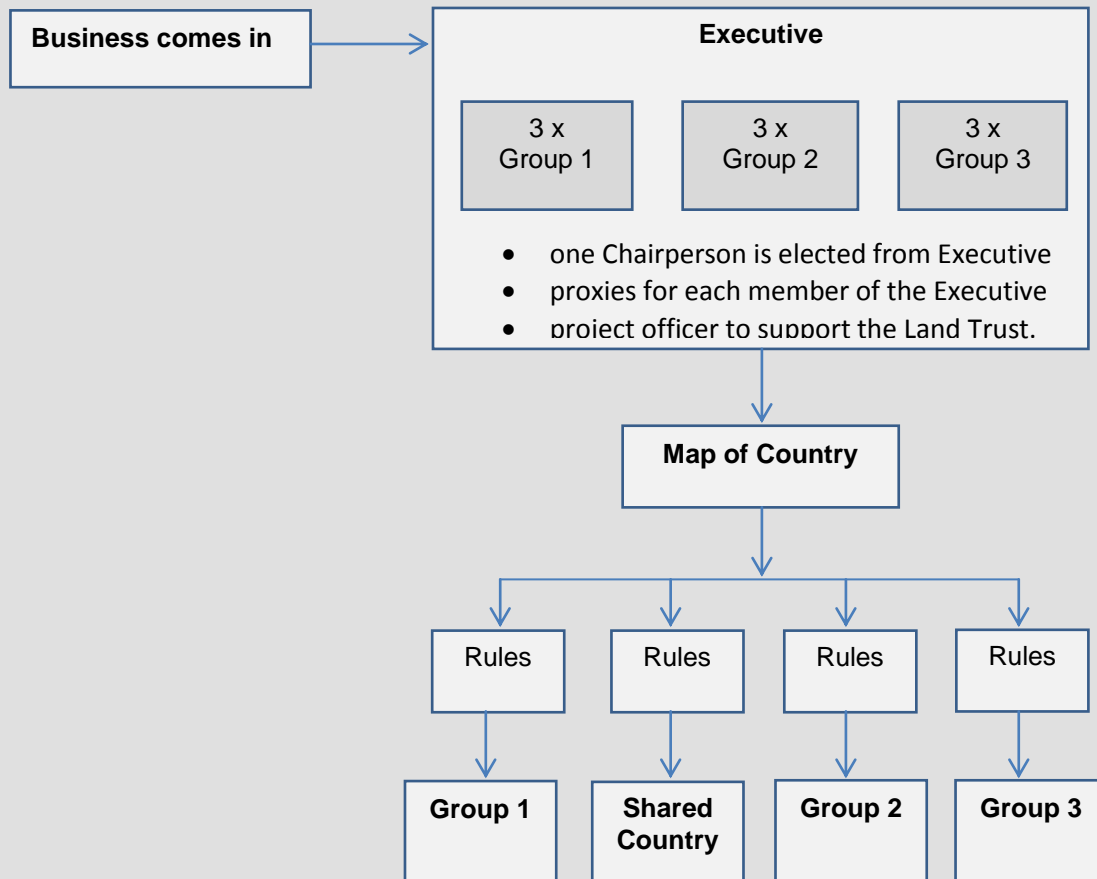
Traditional owner groups who have been involved in land dealings under the ALA-NCA-Heritage Act framework have developed governance frameworks that incorporate the elements of community governance, organisational governance and governance of governments. In particular, they have developed governance structures that reflect traditional models of decision-making, while ensuring that their organisational governance is consistent with the legislative requirements for managing their lands, territories and resources.

For example, the following model was developed to ensure transparent organisational governance and prioritise clear community governance processes for three traditional owner groups involved in their national park handover. The decision-making processes that incorporate and reconcile the relationships between the language groups, and the legal

¹⁵⁵ Chulungun Aboriginal Corporation, note 82.

¹⁵⁶ Department of National Parks, Recreation, Sport and Racing, Queensland Government, *Joint Management of Cape York Peninsula National Parks*. At: http://www.nprsr.qld.gov.au/managing/joint_management_of_cape_york_peninsula_national_parks.html#a_new_move_joint_management (viewed 5 October 2012).

obligations of the Land Trust are outlined in the Land Trust Constitution and illustrated in the diagram below.



In accordance with this model, when a development or project is proposed in the national park, it is communicated to the Executive, who is charged with managing and controlling the affairs of the Land Trust in accordance with its Constitution, the NCA (including any relevant statutory management plan) and the park's Indigenous Management Agreement.¹⁵⁷ This involves the Executive deciding how the project needs to be addressed and who needs to be involved in the decision-making. This then is fed down to the appropriate traditional owner group/s for action through the group's representatives.

In terms of community governance, the flexibility in this model enables traditional owner groups to establish rules for internal decision-making that are relevant to the impact of projects and developments on their country. For example, if a project only affects traditional owner group 1, then groups 2 and 3 do not need to be involved in the decision-making. This

¹⁵⁷ An Indigenous Management Agreement is required to be developed between the Queensland Government and the Land Trust prior to the grant of Aboriginal freehold and the dedication of the joint management national park. It is a legally binding agreement that underpins the new joint management partnership.

information is then fed back up to the Executive through the three representatives from group 1, and the Chairperson on behalf of the Land Trust communicates that to the relevant project proponent.

This model also enables communication and information sharing between groups about the potential impacts of developments and projects. For example, if activities on the lands of group 1 affect the lands of group 3, discussions are able to take place at the traditional owner group level to appropriately inform the Executive about their decision-making. Similarly, rules can be established concerning proposed projects on country that has shared responsibility between the groups, such as water ways.

This process allows for the mapping of country to ensure that traditional boundaries are agreed and understood between the traditional owner groups. It can also provide for decision-making and consultation rules for land identified as ‘shared country’.

The establishment of Indigenous Reference Groups in Cape York

The Queensland Government’s Department of Environment and Heritage Protection is currently working with Cape York traditional owner groups ‘to develop a regional governance framework that supports improved engagement between the traditional owners of Cape York Peninsula and the Queensland Government around natural resource management matters.’¹⁵⁸ This framework is supported by the establishment of Indigenous Reference Groups (IRGs).

This is a constructive approach given land tenure management across Cape York is extremely complex, operates within a wide range of statutes (outlined above) and often involves conflicting or inconsistent governance requirements. There is also a large number of existing local and regional Aboriginal and Torres Strait Islander organisations in Cape York that manage the rights and interests of land rights holders. The complexity of effectively navigating this landscape has been described as follows:

The field of governance...involves three sets of contested relationships that are constitutive of this field and its inherent complexities. Firstly, this field involved the articulation of homelands-based, ‘sub-regional’ and ‘regional’ Aboriginal organisations, in addition to the role played by the State and Federal government agencies. Secondly, the regions field of governance involves both putative and enacted relationships between contemporary forms of traditional Aboriginal law and custom, and ‘intercultural’ and ‘mainstream’ governance processes. Lastly, the regions field of governance is marked by various forms of conjoint Aboriginal identity, articulated at different social scales.¹⁵⁹

This regional governance framework reflects the way traditional owners make decisions and empowers them in decisions about their country. For example, the development of this regional framework has to date been based on river basins. The intent is that IRGs, while not a decision-making body:

¹⁵⁸ Department of Environment and Resource Management, *Terms of Reference for Developing Long-Term Sustainable Governance on the Cape (Draft)*, April 2010.

¹⁵⁹ B R Smith, ‘Regenerating governance on Kaanju homelands’ (2008) as cited in Wik Projects Ltd, *Developing Long-Term Sustainable Indigenous Governance on the Cape Report*, Prepared for the Department of Environment and Resource Management (October 2010), p 10.

...would provide advice to the [then] Minister for the Department of Environment and Resource Management relating to the wild rivers declaration proposal for their specific river basin, including any aspirations for future economic development opportunities in the basin.¹⁶⁰

It is anticipated that the membership of the IRGs would:

...reflect the relative place based indigenous entities and institutions that service the related rights and interests of the people of the relevant river basin, e.g. Native Title PBC, Land Trusts, cultural heritage bodies, Local Councils, ORIC organisations, Homelands, Land and Sea Centres, Indigenous business, clan families, gender groups etc.¹⁶¹

While these are important considerations in constituting IRGs, consultations have revealed a preference for the 'clan estate' as the primary focus of the engagement strategy.¹⁶² This is to improve engagement and decision-making by those who are from that country. The people in an IRG are individuals who have the authority from the Elders (or are Elders themselves) to speak for country and pass on information to their clan estates. Don De Busch, Indigenous Engagement Co-ordinator with Cape York Natural Resource Management notes that 'the IRG process is a repatriation of traditional governance arrangements that have always existed in the governance of the landscape through our law.'¹⁶³

Proposed foundational principles for the establishment of the regional governance framework include:

- connection to country is the essential foundation of legitimacy and authority – acknowledging that there may not always be agreement about the nature and extent of the connection of particular individuals, families and groups
- autonomy and respect for individuals needs to be recognised and balanced with collectivism and kinship
- so far as organisations representing traditional owners are concerned, authority is diverse, plural and flows from the bottom up
- while organisations achieve their authority and mandate by being representative of traditional owners, they also need to be equitable in how they deal with people and distribute resources
- Indigenous people should accept responsibility for resolving conflict and/or uncertainty about, among other things, who speaks for country – acknowledging that, among Indigenous people, there are often 'competing norms which would sanction

¹⁶⁰ Cape York Natural Resource Management Ltd, *Establishing Wild Rivers Indigenous Reference Groups, Interim Report on the Grant Agreement Between the State of Queensland as represented by the Department of Environment and Resource Management and Cape York National Resource Management Ltd*, (undated), p 3.

¹⁶¹ Cape York Natural Resource Management Ltd, above, p 4.

¹⁶² Cape York Natural Resource Management Ltd, above.

¹⁶³ D De Busch, Indigenous Engagement Co-ordinator, Cape York Natural Resource Management, Personal Communication to L Bygrave, Senior Policy Officer, Aboriginal and Torres Strait Islander Social Justice Team, Australian Human Rights Commission, 12 October 2012.

significantly different and rival codifications of land tenure’ and that, accordingly, such resolution may be difficult, fragile and will require ongoing focus and commitment.¹⁶⁴

Conclusion

PBCs provide native title holders with an opportunity to achieve the standards of effective, culturally relevant and legitimate Indigenous governance that I outlined in Chapter 2. As the interface between native title holders and a large number of external organisations and stakeholders, PBCs are required to deal with a multitude of issues and competing interests.

As can be seen from this Chapter, PBCs face significant challenges in realising their potential. They struggle for necessary resources across a range of areas such as adequate funding, administrative and legal capacity, and business development.

PBCs also have to reconcile the rights of Aboriginal and Torres Strait Islander peoples, including native title holders, ‘to maintain and develop their own indigenous decision-making institutions’ as articulated in Article 18 of the Declaration with the governance requirements of the Native Title Act, PBC Regulations and the CATSI Act.

However, for PBCs to confront these challenges, the three components of community governance, organisational governance and the governance of government must be grounded in the human rights principles set out in the Declaration.

This means that we as Aboriginal and Torres Strait Islander peoples must take control of our governance, with the support of our organisations; and governments must remove unnecessary bureaucratic burden from our communities and build our capacity to realise our economic, social and cultural development aspirations.

As this Report illustrates, the Declaration provides a guide – to Aboriginal and Torres Strait Islander peoples and to governments – about what we each need to do to achieve these outcomes.

Recommendations

I recommend that:

3. The Australian Government reviews the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes

¹⁶⁴ Wik Projects Ltd, *Developing Long-Term Sustainable Indigenous Governance on the Cape Report*, Prepared for the Department of Environment and Resource Management (October 2010) pp 14–15.

are consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

4. The Australian Government amends the *Acts Interpretation Act 1901* (Cth) to ensure all legislation is interpreted in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.
5. The Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources.

¹ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 3.

² See section 209 of the *Native Title Act 1993* (Cth).

³ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Reports* (2009, 2010, 2011, 2012). At http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 10 January 2013).

⁴ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012), p 14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 10 January 2013).

⁵ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p xv. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 15 January 2013).

⁶ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 16.

⁷ *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141. This decision was profiled in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009*, (2009), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 4 January 2013).

⁸ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 20.

⁹ Hon N Roxon, Attorney-General, *Explanatory Memorandum to the Native Title Amendment Bill 2012*, p 22, para 97.

¹⁰ Preamble, *Native Title Act 1993* (Cth).

¹¹ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012), pp 58–127. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 10 January 2013).

¹² M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012), p 14. At

http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 10 January 2013).

¹³ 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), paras 16–17. At <http://www2.ohchr.org/english/bodies/cerd/cerds66.htm> (viewed 15 January 2013); 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/hracs95.htm> (viewed 15 January 2013).

¹⁴ *Yorta Yorta v Victoria* (2002) 214 CLR 422.

¹⁵ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p 84. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 15 January 2013).

¹⁶ *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.

¹⁷ 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), [29].

¹⁸ Section 190A of the *Native Title Act 1993* (Cth). Also see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p xv. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 15 January 2013).

¹⁹ T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p xv. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 15 January 2013).

²⁰ *Commonwealth v Yarmirr* [2001] HCA 56.

²¹ See W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2000* (2001), pp 85–115; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2009* (2009), p 106. At http://www.humanrights.gov.au/social_justice/nt_report/index.html (viewed 25 January 2012).

²² Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Reform) Bill 2011* (Parliament of Australia). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/native_title_three/index.htm (viewed 25 January 2012).

²³ M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, *Native Title Report 2012* (2012), p 14. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport12/index.html (viewed 10 January 2013).

²⁴ Commonwealth of Australia, The Senate Legal and Constitutional Affairs Legislation Committee, *Native Title Amendment (Reform) Bill 2011 Report*, (2011). At http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/completed_inquiries/2010-13/native_title_three/report/index.htm (viewed 14 January 2013).