Native Title Report

2003

Human Rights and
Equal Opportunity Commission

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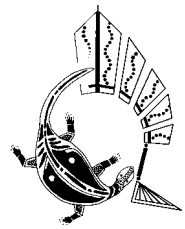
About the Social Justice Commission logo



The right section of the design is a contemporary view of a traditional Dari or head-dress, a symbol of the Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commission. The dots placed in the Dari represent a brighter outlook for the future provided by the Commission's visions, black representing people, green representing islands and blue representing the seas surrounding the islands. The Goanna is a general symbol of the Aboriginal people.

The combination of these two symbols represents the coming together of two distinct cultures through the Aboriginal and Torres Strait Islander Social Justice Commission and the support, strength and unity which it can provide through the pursuit of Social Justice and Human Rights. It also represents an outlook for the future of Aboriginal and Torres Strait Islander Social Justice expressing the hope and expectation that one day we will be treated with full respect and understanding.

Human Rights and Equal Opportunity Commission

30 January 2004

The Hon Philip Ruddock MP
Attorney-General
Parliament House
Canberra ACT 2600

Dear Attorney

I am pleased to present to you the *Native Title Report 2003*.

The report is provided in accordance with section 209 of the *Native Title Act 1993*, which provides that the Aboriginal and Torres Strait Islander Social Justice Commissioner submit a report regarding the operation of the *Native Title Act* and its effect on the exercise and enjoyment of human rights of Aboriginal peoples and Torres Strait Islanders.

This year's report discusses the right to development and its implications for the native title system. The report examines whether the native title negotiation process at a State and Commonwealth level contributes to sustainable development for Indigenous people.

Yours sincerely

W. Jonas

Dr William Jonas AM
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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Introduction

This is my fifth report to the Australian parliament on the effect of the *Native Title Act 1993* on the human rights of Aboriginal and Torres Strait Islander Peoples. In these five years of reporting my main focus has been on the legislative and judicial developments in native title law and the effect of these developments on the recognition of Indigenous rights to land. I have also followed the dynamic relationship between the common law and the legislature in defining and then re-defining the principles that have come to govern the recognition of native title as a legal concept. Last year my report focused on the final developments in this process with the High Court handing down two significant decisions, the *Miriuwung Gajerrong*[1] decision and the *Yorta Yorta*[2] decision, which clarified the principles upon which the recognition and extinguishment of native title are determined.

My response to these decisions in last year's *Native Title Report* noted that the concept of native title emerging from the High Court is one not simply of the law providing a vehicle for Indigenous people to enjoy their cultural and property rights, but rather where the law has become a barrier to this enjoyment. I also argued that the extinguishment of native title, as it occurs under Australian law, is racially discriminatory both under domestic law and at international law. To these High Court decisions there has been no legislative response, thus ushering a period of stability and consolidation as far as the law of native title is concerned.

However, native title is more than a legal process. It is also a political process whereby Indigenous people enter a relationship with the state on the basis of their identity as the traditional owner group of an area of land. In some cases native title has provided the first opportunity since British sovereignty for a relationship of this type to be formed. In building its newly formed relationship with traditional owner groups there is an opportunity for the state to move beyond its role as respondents to native title claims and direct its efforts towards achieving what is generally accepted as a critical policy goal of transforming the economic and social conditions in which many Indigenous people live in

1 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002) ('Miriuwung Gajerrong').
2 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002) ('Yorta Yorta').

Australia. This year's report explores native title as a vehicle for social transformation rather than a vehicle for the recognition of legal rights.

This is not to deny that the way in which the legal system defines native title rights and interests provides an important basis for traditional owners' relationship with the state. Where the legal system ensures that the protection given to native title rights is the same as that given to non-Indigenous rights, this equality will be reflected in the traditional owners' relationship with government. For instance, traditional owners are more likely to negotiate agreements with governments in which they can derive benefits from developments that occur on their land and in which they can control the impact of development on their social and cultural capital where the legal construction of the recognition and protection of native title is firmly rooted in the principles of equality and non-discrimination.

However, at present within Australia, the legal system has not constructed native title in this way. Consequently the lever to mobilise governments into building strong and constructive relationships with traditional owner groups directed to economic and social development must come from somewhere else. This year's *Native Title Report* looks at the way in which governments, particularly state and territory governments, are moving beyond the limitations presented by the legal system to lay a foundation for native title claimant groups that enable economic and social development to take place.

In **Chapter 1**, I provide a framework for sustainable economic and social development for Indigenous people based on the right to development defined in the Declaration on the Right to Development and the international discourse on sustainable development. These discourses seek to integrate the ethical principles of equality and respect with the economic and social conditions that dominate our lives. Applying these rights Indigenous peoples are entitled to development that is non-discriminatory in its impact and in its distribution of benefits; involves the effective participation of Indigenous peoples in defining its objectives and the methods used to achieve these objectives; facilitates the enjoyment of Indigenous peoples' cultural identity, and respects the economic, social and political systems through which Indigenous decision-making occurs.

Having discussed a foundation for the economic and social development of Indigenous peoples based on the realisation of their human rights I proceed to explore this notion of development in the context of native title by asking: 'What would a government and a native title claimant group discuss if the agreed aim of the native title process was the realisation of the group's right to sustainable development?'. How would native title negotiations and agreement-making be structured so as to achieve this agreed goal? A central element of my response to these questions is directed to ways in which the capacity of the claimant group can be developed to take control of the development process. The purpose of this approach is to enable traditional owner groups who aspire to achieve sustainable development to determine the process for themselves. This requires that the group establish its own objectives and strategies for achieving them. The government's role in this process is to facilitate the group to achieve its development goals through a partnership approach.

In **Chapters 2 and 3** of the report I examine native title policies at the state and federal levels and their capacity to contribute to Indigenous peoples' sustainable development. A common theme of state native title policies as they currently exist is a willingness to negotiate rather than litigate. A preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title determinations respond as far as possible to the development needs of the native title claimant group rather than just the demands of the legal system.

Unclear in most native title policies, however, are the objectives of the negotiation process. This gap in states' native title policies means that native title negotiations have no consistent goals but change depending on the circumstances of the case. It also means that there has been little policy development around defining the elements of a native title agreement that would best contribute to the sustainable development of the traditional owner group.

Little or no use is made of policy frameworks that have already been developed outside of the native title area to address economic development in Indigenous communities. Native title continues to be positioned outside this broader policy framework.

The failure to co-ordinate the goals of native title negotiations with the State's strategies to address the economic and social development of Indigenous people generally not only isolates the native title process from broader policy objectives; it limits the capacity of those broader policies to achieve their objective of addressing the economic and social conditions of Indigenous people's lives. By disregarding native title the policy fails to understand the importance of filtering development through the cultural values and structures of the group which is the subject of this policy.

The recognition of the distinct identity of Indigenous people and the cultural, economic and political values that characterise this identity are essential to the economic and social development agenda of Indigenous people. While the legal construction of native title in Australia has diminished the extent to which the law will recognise Indigenous laws and customs and decision-making structures, a broader approach to native title can give recognition to Indigenous identity as it manifests in the way of life of a vast array of traditional owner groups throughout this country. Negotiating development within the parameters of this broader understanding of native title provides an inbuilt mechanism for ensuring that many of the elements necessary to ensure the success of development policies are present.

Despite native title providing an ideal location to foster sustainable development for Indigenous people native title negotiations are constrained by the legal tests on which the recognition of native title depends. Within the legal framework, negotiation of native title takes place under pressure of a process in which litigation is either proceeding or pending. Consequently the scope and content of those agreements become directed to addressing the legal issues that define the claim rather than contributing to the development goals of the group.

This is not to say that recognising the legal rights of native title parties is not a necessary element of a native title policy in which the sustainable development

of the group is paramount. Recognition of native title rights and interests could well provide to the group important assets on which development could be built, particularly where these native title rights and interests give the group control of access to the land and the resources that are on the land. However, the assets of the group are just one element of what is needed to achieve the group's development objectives. A broader approach to negotiations within the native title process would complement native title determinations with processes and outcomes that would contribute to sustainable development.

One way of ensuring that development is at the forefront of the native title agreement is through the effective participation of Indigenous people in the formulation of native title policy. Effective participation occurs when Indigenous people are substantially involved in formulating the policy and have given their prior and informed consent to both the policy goals adopted and the way in which these goals are implemented and evaluated.

Chapter 4 raises the question of how native title, land rights, and agreement-making with Indigenous peoples are being handled both at a juridical and policy level in other comparable common law countries. The lens through which these international comparisons are viewed is that of the human right to development and the international discourse on sustainable development. By analysing other approaches to Indigenous rights and economic development the situation in Australia is illuminated.

Sustainable development has emerged as a new paradigm of development, integrating economic growth, social development and environmental protection as interdependent and mutually supportive elements of long-term development. The concept of sustainable development recognises that economic development is not just the exploitation of resources wherever they happen to exist, but also must take account of the relationships in which development occurs, including the cultural values of the community.

The relationship of Indigenous people to their land is widely recognised as a basis for their cultural values and identity and as such must be taken into account in the policies aimed at achieving sustainable economic development. Native title provides an important frame of reference by which economic and social development can transform the conditions of Indigenous people's lives. Yet its capacity to contribute to this process has been hampered, first by the legal system that operates to restrict rather than maximise these outcomes and second by the failure of government to build a relationship with traditional owner groups in which sustainable development is the shared goal.

Chapter 1

Native title and the right to development

Australia is a wealthy nation. In 2003, Australia ranked fourth in the United Nations Human Development Index[1] indicating Australians enjoyed one of the highest qualities of life in the world. Overall, Australia ranks equal fourth with the highest life expectancy at birth (79.0 years) suggesting Australians are among the healthiest people in the world.[2]

However there exists within this wealthy nation another nation whose people are among the poorest and most materially deprived in the world. During 1999-2001 the Australian Bureau of Statistics estimated the life expectancy of Aboriginal and Torres Strait Islander newborn males to be 56.3 years and females, 62.8 years.[3] For females, this figure is lower than in India (63 years) and about the same as in sub-Saharan Africa with AIDS factored out (62 years).[4] For males, this is lower than that in Myanmar, Papua New Guinea and Cambodia, where the life expectancy is 57 years.[5]

The recognition by the High Court in 1992 of Australian Indigenous peoples' relationship to their lands, their laws and their culture through the concept of native title[6] has not affected this profile of poverty, deprivation and ill-health. Much of the time and resources of Indigenous people seeking their native title rights since the *Mabo* decision has been spent preparing claims to meet the legal tests necessary to prove it exists. The decisions of the High Court in the *Yorta Yorta case*[7] and the *Miriuwung Gajerrong case*[8] illustrate how difficult it is

1 Four indictors combined create the Human Development Index: adult literacy, enrolment in education, per capita GDP, and life expectancy at birth (the later as an indicator of physical and mental health status).

2 United Nations Development Programme, 'Human Development Index', *UN Human Development Report 2003*, Oxford University Press (2003) at 237.

3 Australian Bureau of Statistics, *Deaths* (2001), Cat no 3302.0, Commonwealth of Australia (2002) at 101 ('*Experimental Estimates of Life Expectancy at Birth, Indigenous*' – unnumbered table, Adjusted Life Expectancy).

4 World Health Organisation *World Health Report 2002* at xv.

5 United Nations Development Programme, 'Human Development Index', *UN Human Development Report 2003*, Oxford University Press (2003) at 237-240.

6 In *Mabo and others v Queensland (No. 2)* (1992) 175 CLR 1.

7 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002).

8 *Western Australia v Ward* [2002] HCA 28 (8 August 2002).

to prove native title, and once proven, to benefit from it. In *Yorta Yorta* the High Court confirmed that the applicants must show that the traditional owner community has existed as a community continuously since the acquisition of sovereignty by the British and that in all that time they have continued to observe the traditions and customs of their forebears. This evidentiary difficulty is exacerbated by the Federal Court's rules of evidence which devalue Indigenous evidence based on oral traditions because it is "hearsay".[9] Since the Miriuwung Gajerrong decision Indigenous people have been weighing up whether the time and effort taken to satisfy these tests are justified given the ease with which native title can be extinguished and the nature of the rights that remain after applying the extinguishment tests. The discriminatory nature of these legal tests is discussed in detail in my *Native Title Report 2002*.

While the evidence in native title cases is directed towards satisfying difficult legal tests, contained within it are the stories of how non-Indigenous Australia developed, first as a colony and then as a nation, and the effect of this development on Indigenous people. From the stories which unfold through the evidence it can be seen that the economic development of the Australian nation was carried out in a way which undermined the foundations of Indigenous culture – its social structures, its political structures, its economic base and its relationship with the land. This history of dispossession as it affected Indigenous peoples in the Murray-Goulburn Valley of New South Wales and Victoria was summarised by the trial judge, Justice Olney, in the *Yorta Yorta* case.

> By 1850s physical resistance to settlement had ceased. The Aboriginal population of the area had been drastically reduced in number by disease and conflict. The white population had grown dramatically, and was to grow even more rapidly following the discovery of gold. An 1857 census found only 1769 Aborigines left in Victoria. In 1858 a Select Committee was appointed to "inquire into the present condition of the Aborigines of the colony, and the best means of alleviating their absolute wants". Missions and reserves were established in several places to pursue such a course but in the claim area, only ration depots were developed notably at Echuca, Gunbower, Durham Ox, Wyuna, Toolamba, Cobram, Ulupna, and Murchison. Local squatters were appointed as "guardians".[10]

And later:

> In 1884 proposals for dispersing "half castes" from the missions and stations were circulated in Victoria and an Act to the same effect came into force in 1886. The Act had profound implications for many Aboriginal people living in Victoria. Extended families were split up, or forced to move away from places which had been their home for many years.[11]

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9 The rule against hearsay means evidence of the spoken word is not admissible unless certain conditions are met. S82(1) NTA states 'The Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise orders.' Section 82(2) states 'In conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings.'

10 *The Members of the Yorta Yorta Aboriginal Community v The State of Victoria and Others* [1998] 1606 FCA (18 December 1998), para 36.

11 *ibid,* para 39.

By the twentieth century:

> Much of the reserve land had been leased to white farmers after 1921. The irrigation system failed around 1927 and was not repaired, making it impossible to grow sufficient vegetables or even fodder for dairy cattle. Cash wages were abandoned for work on the mission in 1929 and most equipment was removed to other reserves. Employment generally became harder to find as the white work force was swelled with returned soldiers and increased settlement, and the need for labour shrunk with increasing mechanisation. In the 1930s, funding for the reserve was cut back and work became harder to find. The problem was compounded by official policies in New South Wales which provided able bodied men and their families with no options. Aboriginal people living on reserves were not eligible for State unemployment relief. Nor were able-bodied Aboriginal people eligible for rations.[12]

A similar story of development undermining Indigenous society and culture unfolds in the *Miriuwung Gajerrong* decision. The trial judge, Justice Lee, outlines the development of the Kimberley Region by Europeans. It is clear from his description that the development of the region was carried out in a way which was indifferent to the socio-economic structures and culture of the Indigenous inhabitants of the land:

> Land in the East Kimberley was not made available to settlers by the Crown until late in the 19th century when a report on an expedition to the region, prepared by explorer and Crown surveyor Alexander Forrest and published in 1879, indicated that the area would be suitable for pastoral activities. Forrest stated that the Aboriginal people were friendly and in his view they were unlikely to be hostile to settlers, although he noted that they would '*have to learn*' that the cattle that would come with settlers would not be available for hunting. As Sir Paul Hasluck commented in his work '*Black Australians*', Aboriginal people in the north of Western Australia were left to '*learn*' of the effects of European settlement in their region without guidance or protection from the Crown:
>
> *'No attempt was made in entering into this vast new region to prepare the natives for contact, to instruct them, to give them special protection or to ensure either their legal equality or their livelihood.*
>
> *As settlement spread to remote corners of the colony the difficulty of doing anything became an excuse for forgetting that it was ever hoped to do something. Official intentions shrank. The local government ignored situations that were awkward or beyond its capacity to handle and the Colonial Office also overlooked or was unaware of any need for a positive policy.'*
>
> The first grants of rights to depasture stock in the region were for land undefined by survey. Pastoral rights were applied for by marking on maps the approximate positions of the areas sought. In 1881 two speculators acquired pastoral rights to approximately 800,000 hectares by '*marking off*' an area that was assumed to follow the Ord River, on the '*understanding*' that when the course of the Ord River was eventually mapped the pastoral areas would be '*transferred*' to match the course of

12 *ibid,* para 43.

> the river. Shortly thereafter, a group of pastoralists from the eastern colonies, among them Durack, Emanuel and Kilfoyle, '*reserved*' approximately 1 million hectares, including land on the Ord River, wherever the course of that river may be shown to be by subsequent survey and mapping…
>
> By the end of 1883 approximately 20 million hectares of the Kimberley had been included in pastoral leases. Within six months of that date pastoral leases covering almost a quarter of that area had been surrendered or forfeited. Further leases were abandoned over the next two years and by the end of 1885 the core of the Kimberley pasture industry remained.[13]

While the effect of colonial development on Indigenous peoples is laid bare in these and other native title cases, the purpose of this evidence is to establish the basis for the final dispossession of surviving Indigenous culture: the denial by the legal system of its recognition as a native title right. The sad irony of native title is that where the dispossession of Indigenous people through colonial and modern development has been most thorough, brutal and systematic, the less likely it is that the traditions and customs practiced today by the descendants of those affected will be recognised and protected as native title rights. The legal tests for the recognition and extinguishment of native title ensure this result.

Australia's development as a nation has occurred at the expense of Indigenous people. The law of native title does not redress this injustice. This failure reinforces a commonly held view that development and human rights are antithetical concepts, human rights only having a role once economic development is complete. This notion of development, while still widely held, has been contested in the past 15 years through the notion of a right to development.

The right to development[14]

The right to development was recognised in 1986 with the adoption by the United Nations General Assembly of the *Declaration on the Right to Development* (DRD).[15] Article 1 of the DRD reflects a notion of development which goes beyond focusing on the growth of Gross Domestic Product of the State:

> The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

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13 *Ben Ward & Ors v State of Western Australia & Ors* (1998) 159 ALR 483 at 489-90.

14 The approach to the right to development adopted in this chapter reflects that taken by the Independent Expert on the Right to Development for the United Nations Commission on Human Rights, Professor Arjun Sengupta. These views are expressed in the numerous reports made by the Independent Expert extending from the First Report of the Independent Expert on the Right to Development in 2000, (UN Doc Ref: E/CN.4/2000/WG.18/CRP.1, September 2000) to the Fourth Report of the Independent Expert on the Right to Development, (E/CN.4/2002/WG.18/2, December 2002), and various reports by the Independent Expert to the Open-Ended Working Group on the Right to Development.

15 *Declaration on the Right to Development* found at <www.unhchr.ch/html/menu3/b/74.htm>.

This Article contains the two elements which characterise the right to development. First, development is a human right which belongs to people, not to States. This element is reinforced in Article 2(1) of the Declaration:

> The human person is the central subject of development and should be the active participant and beneficiary of the right to development.

Second, Article 1 makes it clear that the goal of development is the realisation of all human rights and fundamental freedoms. Development must be carried out in a way which respects and seeks to realise people's human rights. Thus development is not only a human right in itself, but is also defined by reference to its capacity as a process to realise all other human rights.

The rights-based approach to development marks a fundamental shift from that adopted in the 1950s and 1960s where the Gross Domestic Product (GDP) was the principal indicator of development.

One of the effects of defining development as the realisation of rights is to amalgamate what has been seen as two distinct types of rights: those concerned with civil and political rights, and those concerned with economic, social and cultural rights. Presenting the right to development as the integration of all human rights blurs this distinction. The definition of development in the second paragraph of the Preamble to the DRD recognises a comprehensive approach to rights:

> Development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.

This view of development was reaffirmed in the Vienna Declaration and Programme of Action adopted by consensus at the World Conference on Human Rights in 1993. Article 10 of the Vienna Declaration states:

> The World Conference on Human Rights reaffirms the right to development, as established in the Declaration on the Right to Development, as a universal and inablienable right and an integral part of fundamental human rights.

As a resolution of the General Assembly, with only one State (the USA) casting a vote against it, and with six abstentions, the DRD provides a basis for international custom-building and law-making, creating expectations that States will work towards the goals and through the processes contained within it.

For Indigenous peoples in Australia the rights approach to development as elaborated by the DRD provides a basis for their 'free and meaningful participation in development and in the fair distribution of benefits resulting therefrom'. Such an approach also has the potential to expand the native title process beyond merely giving legal definition to the Indigenous rights that remain after many years of unregulated development. Instead, under this approach the native title process can also be directed towards providing a vehicle for Indigenous development to occur within the cultural and political boundaries established by traditional laws and customs.

As I indicate in Chapter 3 native title is more than a legal process. It is also a political process whereby Indigenous people enter a relationship with the State on the basis of their identity as the traditional owner group of an area of land. In some cases native title has provided the first opportunity since the acquisition of sovereignty for a relationship of this type to be formed. Where the State is sincere about transforming the economic and social conditions in which Indigenous peoples live in Australia, native title can provide an opportunity to lay the foundations for development within the framework of traditional laws and customs and consistently with international human rights principles. Applying these rights Indigenous peoples are entitled to development that is non-discriminatory in its impact and in its distribution of benefits; involves the effective participation of Indigenous peoples in defining its objectives and the methods used to achieve these objectives; facilitates the enjoyment of Indigenous peoples' cultural identity, and respects the economic, social and political systems through which Indigenous decision-making occurs.

Non-discriminatory Development

In my *Native Title Report 2002* I argue that the extinguishment of native title by the creation of other rights and interests in the same land is racially discriminatory. This is made clear by the High Court's own analysis of the *Racial Discrimination Act 1975* (Cth) (RDA) and its application to the creation of non-Indigenous interests by the Crown over Indigenous land after 1975 (the date when the RDA came into effect) in the *Miriuwung Gajerrong* case. The effect of the RDA is to either render these interests invalid or to require that compensation be paid to the traditional owners of the land. Yet the creation of rights and interests by the Crown over Indigenous land without any regard to the rights of traditional owners was the way in which the colony and then the Australian nation developed. The extinguishment principle applied by the common law and then by the *Native Title Act 1993* (Cth) (NTA) together validate this discriminatory process by which non-Indigenous development occurs at the expense of Indigenous development.

The Committee on the Elimination of Racial Discrimination (the CERD Committee) has considered a State's obligation in respect of Indigenous peoples under the Convention on the Elimination of All Forms of Racial Discrimination. The way in which the Committee applies the principles of equality and non-discrimination to Indigenous peoples is evident in its review of States' reports[16] and in its General Recommendation XXIII on the Rights of Indigenous Peoples.[17] General Recommendation XXIII provides guidelines to a non-discriminatory approach to development, including the provision by State parties of conditions 'allowing for sustainable economic and social development compatible with their cultural characteristics'[18] and requiring restitution for the deprivation of Indigenous land providing for 'the right to just, fair and prompt compensation [which] should as far as possible take the form of lands and territories'.[19]

16 Recent concluding observations in which the Committee addressed Indigenous rights were in relation to Australia, Denmark, Finland, Sweden (56th and 57th sessions in 2000), Argentina, Bangladesh, Japan and Sudan (58th sessions, March 2001).
17 CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997.
18 *ibid*, para 4(c).
19 *ibid*, para 5.

It should be noted that General Recommendation XXIII addresses the rights of Indigenous peoples rather than Indigenous individuals or a collective of Indigenous people. A non-discriminatory approach to development requires that Indigenous people, as a people, are able to derive the same benefit from development on their land as that derived by non-Indigenous people.[20] On this basis the CERD Committee recommends that States recognize and protect 'the rights of indigenous *peoples* to own, develop, control and use their communal lands and territories and resources traditionally owned or otherwise inhabited or used without their free and informed consent'.[21] Indigenous peoples like other self-determining peoples should have control of resources on their land and enjoy equal protection of their property interests before the law.

The construction of native title by the Australian legal system does not lay a foundation for Indigenous development. The effect of the extinguishment test is that, over time, native title is whittled away whenever an inconsistency between Indigenous and non-Indigenous interests occurs. While the creation of a mining lease extinguishes the right of Indigenous people to utilise their resources on that land, a pastoral lease on the same land at a later time will further erode native title by extinguishing the right of Indigenous people to exclude others from the land. Gradually, over time, native title is reduced to a series of usufructuary rights which are incapable of making any significant contribution to the development of traditional owners.

The CERD Committee, considering Australia's native title legislation under its early warning procedures[22] noted that '[w]hile the original Native Title Act recognises and seeks to protect indigenous title, provisions that extinguish or impair the exercise of indigenous title rights and interests pervade the amended Act'.[23]

Locating development within a human rights framework requires a different approach to the legal recognition of Indigenous rights to land than that provided by NTA: one which ensures that the benefits of development on Indigenous land accrue to the traditional owners.

Participatory Development

The right to development is based on Indigenous peoples' free and meaningful participation[24] in the formulation, implementation, monitoring and evaluation of any policies and programmes that will affect their development. It is also a right to participate in development itself and the benefits it produces. Article 2(3) of the DRD provides:

> States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their

20 I discuss below, in the section headed '*Self-Determined Development'* why Indigenous people should be considered as a people and accordingly are entitled to the right to self-determination.

21 CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997.

22 Committee on the Elimination of Racial Discrimination, *Decision (2)54 on Australia – Concluding observations/comments,* 18 March 1999. UN Doc CERD/C/54/Misc.40/Rev.2.

23 *ibid,* para 6.

24 DRD, preamble, para 2.

> *active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.* [Italics added]

The CERD Committee's General Recommendation XXIII provides guidelines to a participatory approach to development, including the provision by State parties of conditions ensuring 'equal rights in respect of effective participation in public life and that no decision directly relating to their rights and interests are taken without their informed consent'.[25] Through the mechanism of consent, Indigenous people are brought into the decision-making processes which determine the use and development of their land. As participants in the policy process they can ensure that they benefit from the developments that occur. Article 30 of the UN *Draft Declaration on the Rights of Indigenous Peoples* articulates this approach:

> Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands, territories and other resources, including the right to require that States obtain their free and informed consent prior to the approval of any project affecting their lands, territories and other resources…

The Inter-American Court of Human Rights also requires that States obtain the consent of Indigenous people before granting approval to companies seeking access to and exploitation of Indigenous land. In the *Awas Tingni* decision the Court held:

> The State of Nicaragua is actively responsible for violations of the right to property, embodied in Article 21 of the [American Convention on Human Rights], by granting a concession to company SOLCARSA to carry out road construction work and logging exploitation of the Awas Tingni lands, without the consent of the Awas Tingni Community.[26]

Native title, as it is constructed within the Australian legal system, is not consistent with the principles of participatory development. The CERD Committee's decision on Australia noted that the formulation of the amendments to the NTA were taken without Indigenous people's informed consent and failed to 'recognise and protect the rights of indigenous peoples to own, develop, control and use their common lands territories and resources',[27] as emphasised in General Recommendation XXIII.

One set of amendments to the NTA which undermine a participatory approach to development through native title are those with respect to the right to negotiate. These amendments reduce the extent to which Indigenous people can effectively participate in mining projects on their land. Under the original NTA the full right to negotiate applied when mining was proposed on any native title land. Through the right to negotiate, native title parties were active participants in negotiating conditions such as employment on projects, contracts for ancillary work, local

25 CERD GR XXIII (51), HRI/GEN/1/Rev.5, 18 August 1997, para 4(d).

26 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua* Inter-American Court of Human Rights (31 August 2001), para 142 at <www1.umn.edu/humanrts/iachr/AwasTingnicase.html> accessed 18 December 2003.

27 Committee on the Elimination of Racial Discrimination *Decision (2)54 on Australia, op.cit,* para 9.

investment, social development programs, equity participation, infrastructure development, as well as issues specific to the native title rights being claimed. Under the 1998 amendments to the NTA, the right to negotiate is reduced where native title is coexistent with other titles, such as a pastoral lease. In these cases, instead of a right to negotiate, native title parties are given a right to be consulted on ways to minimise the impact of the development on native title rights and interests.[28] Accordingly, consultations are limited to ensuring that Indigenous people can continue to exercise their remnant rights throughout the development project rather than participating in the benefits generated by the developments on their traditional land.

While the NTA fails to guarantee Indigenous peoples' participation in developments on their land, it is argued in this report and discussed in Chapter 3 that there is scope within State and Territory native title policies for a broader approach. Where governments have announced that they wish to advance the economic and social development of Indigenous people, all developments that occur on traditional land should be seen as the basis for Indigenous participation and benefit sharing. Native title agreements can be utilised to define participatory rights for traditional owner groups, thus counteracting the limitations of the NTA and the native title determinations it produces. Such agreements could also provide for Indigenous participation in developing the policies and regimes to regulate developments that occur on traditional land. This would ensure Indigenous control at the outset.

Culture and Development

A participative approach to development ensures that developments that do take place on Indigenous land are not harmful to the cultural identity of the traditional owners of that land. Article 27 of the *International Covenant on Civil and Political Rights* (ICCPR) provides a basis for the protection of Indigenous peoples' cultural identity:

> Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

There has been significant resistance from Indigenous groups to their rights being equated with the rights of cultural minorities within a particular State. Indigenous people maintain that as the First Peoples of a territory with a specified history and relationship to that territory including one of forced colonisation, they have distinct rights in the context of cultural, social, economic and political protection.

Despite this concern however the Human Rights Committee has interpreted Article 27 in a way which protects the cultural rights of Indigenous peoples when threatened by hostile developments. Several cases alleging breaches of Article 27 as a result of the impact of development on the cultural identity of the group have been considered by the Human Rights Committee under the First Optional Protocol to the International Covenant on Civil and Political Rights. As

28 NTA, s43A.

a result the Committee has established the following principles in relation to Article 27:

- For it to be valid and not breach Article 27, a restriction upon the right of an individual member of a minority must be shown to have a reasonable and objective justification and to be necessary for the continued viability and welfare of the minority as a whole.[29]
- The right of a member of a minority group to enjoy their own culture must be considered within the relevant socio-economic context. The economic activities of the group may be protected by Article 27 where they are an essential element of the culture of the group.[30]
- In considering whether the economic activities of the minority group are being interfered with in such a way as to threaten the way of life and culture of the community, the Committee will take into account historical inequities in treatment.[31]
- The types of economic activities of the minority group that are relevant are not limited to activities that support a traditional means of livelihood. They may be adapted to modern practices.[32]
- A countervailing consideration will be the role of the State in encouraging development and economic activity.[33] In doing so, the State is under an obligation to ensure that such activity has, at most, only a 'limited impact on the way of life of persons belonging to a minority'.[34] Such a 'limited impact' would not necessarily amount to a 'denial' of the rights under Article 27.
- The Committee will consider whether the State has weighed up the interests of the Indigenous persons with the benefits of the proposed economic activity. Large scale activities, particularly those involving the exploitation of natural resources, could constitute a violation of Article 27.[35]
- In assessing activities in the light of Article 27, State parties must take into account the cumulative impact of past and current activities on the minority group in question. Whereas 'different activities in themselves may not constitute a violation of this Article, such activities, taken together, may erode the rights of (a group) to enjoy their own culture'.[36]

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29 *Kitok v. Sweden*, Communication No. 197/1985, UN Doc CCPR/C/33/D/197/1985 (1988), para 9.2.
30 *ibid*, para 9.3.
31 *Chief Ominayak and the Lubicon Lake Cree Band v Canada.* Communication No 167/1984, Report of the Human Rights Committee, UN Doc A/45/40 (1990).
32 *Lansman et al v Finland* No. 1 (24 March 1994) CCPR/C/49/D/511/1992.
33 *ibid*, para 9.4.
34 *ibid.*
35 *Lansman et al v Finland No. 2*, (25 November 1996) CCPR/C/58/D/671/1995*,* paras 10.5, 10.7.
36 *ibid*, para 10.7.

- The Committee will consider whether the State has undertaken measures to ensure the 'effective participation' of members of minority communities in decisions that affect them.[37]

This overview of the Committee's response to complaints by Indigenous people under Article 27 ICCPR makes it clear that the Committee considers Indigenous people have a unique and profound relationship to their land which extends beyond economic interests to cultural and spiritual identity. Consequently the impact of developments on Indigenous people's land is also an impact on this deeper relationship.

The Inter-American Court of Human Rights has recognized this relationship in the case of *Awas Tingi*.[38] The Court found that the right of everyone to use and enjoy their property extended to Indigenous communal ownership of land 'through an evolutionary interpretation of international instruments for the protection of human rights'. The Court continued:

> the close ties of indigenous people with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[39]

In Australia native title is derived from and exercised in accordance with the traditional laws and customs of the claimant groups. The widespread extinguishment of native title supported by the NTA and the common law constitutes a clear and pervasive denial of Indigenous peoples' cultural rights as understood in international law.

This native title legal framework fails to understand the opportunity that native title can present to governments endeavoring to break the cycle of poverty that pervades Indigenous communities. Understood as an aspect of cultural identity, native title can provide the framework for Indigenous development that integrates economic and social development into the cultural values of the group. This is the type of development envisaged in the preamble to the DRD as 'a comprehensive economic, social, cultural and political process'.

Development that realises economic, social and cultural rights

The right to development is specifically directed towards the goal of realizing the economic, social, and cultural rights of people. The preamble, paragraph 4, to the DRD specifically recalls the provisions of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Article 1(1) DRD recognizes that the goal of development is the realization of all human rights and fundamental freedoms. In addition, Article 8(1) DRD provides that:

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37 *ibid.*

38 *The Mayagna (Sumo) Awas Tingni Community v Nicaragua,* <www1.umn.edu/humanrts/iachr/AwasTingnicase.html> accessed 18 December 2003.

39 *ibid,* at para 149.

> States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, inter alia, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.

The ICESCR complements the DRD by elaborating upon the economic, social and cultural rights that are the objectives of the development process. A fundamental right under ICESCR is the right to an adequate standard of living[40] which in turn requires, as a minimum, that all people enjoy subsistence rights, i.e. adequate food, nutrition, clothing, housing and the necessary conditions of care. Linked to an adequate standard of living are economic rights, including the right to own property,[41] the right to work[42] and the right to social security.[43]

Under Article 15 of ICESCR, cultural rights include the right to take part in cultural life, the right to enjoy and benefit from scientific progress, and the right to protection of the moral, material and artistic interests from any scientific, literary or artistic production. Closely linked to these principles is the right to education, which is also a key feature of economic and social rights.[44] Education is an important tool for achieving and advancing economic and social development.

The DRD is not just about defining the right to development. Its purpose includes defining the obligations that a State has to the holders of the right to development. States have obligations in respect of both the process and the achievement of development goals. Articles 2(3), 3, 4, 5, 6, 7, 8, 10 of the DRD direct States in the goals they must strive to achieve and the way they should carry out their obligations. These can be described as obligations of conduct and result[45] and include the effective allocation and utilization of resources; representative participation, including that of women, minorities and Indigenous peoples; transparency of decision-making process; the adoption of sustainable policies and programmes that reflect the prior representative consultation; and the establishment of an enabling legal, political, economic and social environment.

These obligations entail both immediate and progressive elements to ensure the realisation of all human rights through development. Article 2 of ICESCR provides guidelines to States on how their obligations under that Covenant may be carried out. Given the close relationship between ICESCR and DRD these guidelines can also assist States in carrying out their obligations under DRD. Article 2 provides:

> (1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical to the maximum of its available resources, with a view to achieving progressively the full realization of the

40 Article 11(1) *International Covenant on Economic, Social and Cultural Rights* (ICESCR); see also Article 25 *Universal Declaration on Human Rights* (UDHR) and Article 27(1) *Convention on the Rights of the Child* (CROC).

41 UDHR Article 17(1).

42 UDHR Article 23(1), ICESCR Article 6(1).

43 UDHR Articles 22 and 25(1); ICESCR Article 9; CROC Article 26(1).

44 UDHR, Article 26(1); ICESCR, Article 13(1); CROC, Articles 28(1).

45 The identification of a State's obligations as ones of "conduct and result" is made by the Independent Expert on the Right to Development in his first four reports cited at footnote 11.

> rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.
>
> (2) The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

In sum, Article 2(1) requires that a State Party take steps:

- to the maximum of its available resources
- to progressively realize economic, social and cultural rights
- by all appropriate means, including legislation.

In relation to the first element, the Observation of the Committee on Economic, Social and Cultural Rights in relation to Australia's report in 2000 provides an instructive approach.[46] The Committee notes that while Australia had allocated $2.3 billion to Indigenous programmes, it was deeply concerned at the ongoing comparative disadvantage suffered by Indigenous Australians. This suggests that the Committee sees that a State's undertaking to take steps to the maximum of its resources can be measured against what the State is willing to expend to meet its obligations under the Covenant.

I comment in Chapter 3 on the paucity of funds available to Native Title Representative Bodies to carry out their duties and functions under the NTA. In addition, Prescribed Bodies Corporate have no funding source at all from the Commonwealth or State governments and are thus unable to provide a governing institution for the traditional owners' ongoing development. The meagre funding of Indigenous interests within the native title system puts the Commonwealth and State governments in breach of their obligations under ICESCR and the right to development under the DRD.

The second element of Article 2(1) (progressive realization of rights) recognises that a State's obligations under ICESCR are unlikely to be achieved within a short period of time. Instead, States should provide a long term commitment to achieving the goals of ICESCR. This includes monitoring the progress of the steps taken towards these goals.

I discuss below capacity development as a framework for the realization of Indigenous peoples' rights to development. This approach requires long term, progressive strategies that enable Indigenous communities to acquire the capacity, through learning and adaptation, to realize their development goals.

The third element of Article 2(1) highlights the importance of appropriate measures, including passing of beneficial legislation, for the realization of the economic, social and cultural rights enshrined in ICESCR. The appropriateness of a measure of course depends on who the specific right-holders are. Indigenous peoples are recognised in international law as having certain specific characteristics and rights. Therefore the method of meeting obligations to them will be different. Policies directed to fulfilling a State's obligations under ICESCR

46 UN Committee on Economic, Social and Cultural Rights, *Concluding Observations of the Committee on Economic, Social and Cultural Rights – Australia*, UN Doc. E/C.12/1/Add.50, 1 September 2000.

should match the cultural values of the group for whom they are designed. Achieving this match relies on the effective participation of Indigenous people in policy design and implementation.

Article 2 ICESCR recognises that appropriate measures may also include legislation. The NTA provides legislative recognition of the rights and interests of Indigenous Australians in relation to their traditional land. The Committee on Economic, Social and Cultural Rights noted with regret that:

> The amendments of the 1993 Native Title Act have affected the reconciliation process between the State party and the indigenous populations who view these amendments as regressive.[47]

The integration of the rights under ICESCR within the DRD not only directs the right to development towards specific economic, social and cultural rights, it also provides instruction on a State's obligation to realize these rights. Applying this approach to the native title process would have the effect of directing legislative approaches to native title to the recognition of Indigenous people's economic, social and cultural rights.

The most recent statistical profile of the material circumstances of Indigenous peoples' lives in Australia[48] indicates that addressing their disadvantage through policies that take no account of the unique social, political and cultural identity of Indigenous people has not proven successful. Native title would provide an effective mechanism for States to meet their obligations under ICESCR and the DRD in a way that is appropriate to this identity. Rather than the government imposing measures to address disadvantage within Indigenous communities, native title negotiations can provide a forum for Indigenous participation in the design of these measures, ensuring they are appropriate to the community's circumstances.

Self-Determined Development

The DRD not only expressly recognises the right of peoples to self-determination and full sovereignty over their resources; it also recognises the relationship between these rights and the right to development. Article 1(2) provides:

> The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The effect of integrating the right to development with the right to self-determination has been described as follows:

> Self-determination within the right to development addresses a right to 'self-determined development'[49] It is the freedom to pursue economic, social, cultural and political development, as the Covenants make clear.

47 *ibid*, para 16.
48 See Chapter 2 *Social Justice Report 2003*.
49 United Nations Development Programme, *UNDP Policy Note, UNDP and Indigenous Peoples: A policy of Engagement,* UNDP (8 August 2001) p8.

> It is a right that facilitates the enjoyment of cultural identities and their ability to determine their own economic, social and political systems through democratic institutions and actions. It is about sustainable and equitable use of resources in a manner that fully and completely integrates the range of rights provided to Indigenous peoples with regard to their land, territories and resources, their values, traditions and economic, religious and spiritual relationship to their land, and respects the rights of minorities to the traditional lands and territories they inhabit. Self-determination within the right to development is linked to the right to be recognised as minority or indigenous communities and to meaningfully participate as a group and thus influence any decisions that affect them or their regions in which they live.[50]

This indicates an approach to development that not only puts people as its main subject but also sees them as controlling its direction. For Indigenous people, a pre-requisite to their taking control of their own development is firstly that the State acknowledges that there exists within its borders a distinct group who legitimately have claims to recognition as a people; and secondly that the State agrees to enter a relationship with that group on the basis of equality and mutual respect, in order to negotiate how that group might engage and participate in society.

One obstacle to this course for Indigenous people is the contention by certain States[51] that Indigenous people are not entitled to the right of self-determination. This contention was dealt with in detail in my *Social Justice Report 2002*. I point out there that the United Nations Human Rights Committee and the United Nations Committee on Economic, Social and Cultural Rights (i.e., the two committees that operate under and interpret the standards in the two international covenants, the ICCPR and the ICESCR) clearly identify self-determination as a right held by Indigenous peoples, including those in Australia. This can be drawn from the following documents and the jurisprudence of the committees.

Human Rights Committee (HRC)

- *Concluding observations on Australia*, UN Doc: CCPR/CO/69/AUS, which states at para 10 that 'The State party should take the necessary steps in order to secure for the Indigenous inhabitants a stronger role in decision making over their traditional lands and natural resources (article 1, para 2)'. The List of Issues of the Committee (UN Doc: CCPR/C/69/L/AUS, 25/04/2000, Issue 4) had asked 'What is the policy of Australia in relation to the applicability to the Indigenous peoples in Australia of the right of self-determination of all peoples?'
- *Concluding observations on Canada*
  UN Doc: CCPR/C/79/Add. 105, 7/4/99, paras 7, 8.
- *Concluding Observations on Norway*, UN Doc: CCPR/C/79/Add.112, 05/11/99, paras 10 and 17, which note (at para 17) that 'the Committee

50 M E Salomon and A Sengupta, *The Right to Development: Obligations of States and the Rights of Minorities and Indigenous Peoples*, Issues Paper, Minority Rights Group International, 2003, p36.

51 See discussion in *Social Justice Report 2002,* Chapter 2.

expects Norway to report on the Sami people's right to self-determination under Article 1 of the Covenant, including paragraph 2 of that article'.

- *Concluding Observations on Mexico*, UN Doc:CCPR/C/79/Add.123, para 14.
- *Concluding observations on Sweden*, UN Doc: CCPR/CO/74/SWE, 24/4/2002, para 15.
- *Lubicon Lake Band v Canada* (1990), Un Doc: CCPR/C/38/D/167/1984.
- *Marshall (Mikmaq Tribal Society)* (1991), UN Doc: CCPR/C/43/D/205/1986.

Committee on Economic, Social and Cultural Rights (CESCR)

- List of Issues: Australia, UN Doc: E/C.12/Q/AUSTRAL/1, 23/05/2000, Issue 3: 'What are the issues relating to the rights of indigenous Australians to self-determination, and how have these issues impeded the full realization of their economic, social and cultural rights?'
- *Concluding observations on Canada*, UN Doc: E/C.12/1/Add.31, 10/12/98, (see also CESCR, List of issues: Canada, UN Doc: E/C.12/Q/CAN/1, 10 June 1998, Issue 23);
- *Concluding observations on Columbia*, UN Doc: E/C.12/1/Add.74, 30/11/2001, paras 12, 33.

These documents make it clear that within the jurisprudence of international law Indigenous peoples are considered to be entitled to the right to self-determination. Under Article 1(2) of the DRD, Indigenous peoples' right to development entitles them to control the direction that their development takes.

In this position of control and using their own decision-making structures, Indigenous people can participate in the design and implementation of development policies to ensure that the form of development proposed on their land meets their own objectives and is appropriate to their cultural values. The International Court of Justice notes in its Advisory Opinion on Western Sahara, the essential requirement for self-determination is that the outcome corresponds to the free and voluntary choice of the people concerned.[52]

It follows that a further essential feature of self-determined development is that *it does not have a prescribed or pre-determined outcome*. Each community must develop its own agenda for development. There are as many outcomes possible as there are communities, ways of governing, exercising control and administering decisions.

Similarly, self-determined development *is ongoing*. It is not a singular event or something that is defined as at a particular moment in history:

> Self-determination should not be viewed as a one time choice, but as an ongoing process which ensures the continuance of a people's participation in decision making and control over its own destiny… This

52 M van Walt van Praag (Ed.), *op.cit*, p27; *Advisory Opinion on Western Sahara* (1975) ICJ 12, pp32-33.

> view makes it possible for incremental changes to be implemented rather than forcing parties to agree on definitive changes which can be too radical for some and insufficient for others. Rather, it should be seen as a process by which parties adjust and re-adjust their relationship, ideally for mutual benefit.[53]

Below I argue that it is not sufficient that Indigenous communities have control of the development process. They must develop the capacity to exercise that control in order to achieve their development goals. The object of development is the expansion of the capabilities of people to realise that which they value. Capacity development can take a long time. It also requires a long term relationship between government and Indigenous communities during which communities can learn from their experiences and build on their changing abilities.

A further component of self-determined development for Indigenous people is the recognition of their sovereignty over land and resources. Erica-Irene Daes's final report on *Indigenous Peoples and their Relationship to Land*,[54] contains a list of objectives that 'may be useful for assessing the value and appropriateness of proposed principles and other measures or endeavours relating to the rights of indigenous peoples to lands and resources'.[55] The following of these objectives reflect the importance of Indigenous peoples' right to land and resources as a component of their right to development:

(i) To ensure that indigenous peoples have land and resources sufficient for their survival, development and well-being as distinct peoples and cultures, including, so far as possible, their traditional cultural and sacred sites;

(ii) To correct in a just manner the wrongful taking of land and resources from indigenous peoples;

(iii) To resolve and avoid uncertainty of land and resource ownership, and to avoid conflict, instability and violence in relation to indigenous rights to lands and resources;

(iv) To assure the rule of law, non-discrimination and equality before the law in regard to indigenous peoples and their rights to lands and resources, while recognizing the right of indigenous peoples to exist as distinct cultures with certain unique rights;

(v) To assure that all lands and resources are utilized in a sustainable and ecologically sound manner.[56]

The report gives these a more concrete form, in its 'Principles for State and international actions regarding indigenous land, territories and resources'.[57]

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53 M van Walt van Praag, *ibid*, pp27-28.

54 E-I Daes, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities and President of the Working Group on Indigenous Populations, *Indigenous Peoples and their Relationship to Land,* UN Doc: E/CN.4/Sub.2/2001/21, 11 June 2001.

55 *ibid*, para 86.

56 *ibid*, para 86.

57 *ibid*, para 144.

The merit of a self-determination approach to development as outlined above is not only that it is consistent with human rights principles. According to studies conducted by the John F Kennedy School of Government at Harvard University,[58] this approach is essential to breaking the cycle of poverty in Indigenous communities and laying the foundation for economic and social development.

> Sovereignty, nation-building, and economic development go hand in hand. Without sovereignty and nation-building economic development is likely to remain a frustratingly elusive dream….[59]

A 'nation-building' approach to the problem of Indigenous poverty and unemployment builds an enabling environment 'that encourages investors to invest, that helps businesses last, and that allows investments to flourish'.[60] The building blocks for this environment are the communities' own governing structures and institutions:

> Putting in place effective institutions of self-governance is a critical piece of the development puzzle, but it is not the only one. Institutions alone will not produce development success. Sound institutions have to be able to move into action. In our research and in our work with Indian nations, we think about development as having four central pieces or building blocks: sovereignty, effective institutions, strategic direction, and decisions/action.
>
> Sovereignty is the starting point; without it, successful development is unlikely to happen in Indian Country. But as we have argued above, sovereignty has to be backed up with effective governing institutions. These provide the foundation on which development rests. Development itself, however, still needs focus. For most Indian nations, not just any kind of development will do. Most nations have priorities: aspects of their society or situation that they wish to change, features that they wish to preserve or protect, directions they see as compatible with their views of the world, directions they wish to avoid. The crucial issues for societies to decide as they put together their agenda are these:
>
> - What kind of society are we trying to build?
> - What do we hope to change in our society?
> - What do we hope to preserve or protect? What are we willing to give up?
> - What are our development priorities (e.g. sovereignty, health, employment, income, skill development, etc.)?
> - What are our development concerns (e.g. cultural impacts, environmental impacts, changing demographics, out-migration, etc.)?
> - What assets do we have to work with?
> - What constraints do we face?

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58 The Harvard Project on American Indian Economic Development (the Harvard Project) was founded by Professors Stephen Cornell and Joseph P Kalt at Harvard University in 1987. The project is housed within the Malcolm Wiener Center for Social Policy at the John F Kennedy School of Government, Harvard University. Papers on the findings of the research projects conducted can be found at <www.ksg.harvard.edu/hpaied/overview.htm> accessed 17 December 2003.

59 S Cornell and JS Kalt *Sovereignty and Nation-Building: The Development Challenge in Indian Country Today*, <www.ksg.harvard.edu/hpaied/res_main.htm> pp2-3 accessed 15 January 2004.

60 *ibid,* p8.

> The answer to these questions form the basis of a development strategy. They provide criteria against which development options can be evaluated and development decisions can be made.[61]

Native title presented an opportunity in Australia to put in place the building blocks of Indigenous development by recognising the institutions that reflect the sovereignty of Indigenous people. It was an opportunity to give recognition to the distinct political identity of Indigenous people and the cultural, economic and political values that characterise this identity. However, the legal construction of native title in the High Court's decisions in the *Miriuwung Gajerrong* and the *Yorta Yorta* cases and through the NTA ensures that native title cannot be a vehicle for Indigenous sovereignty.

The recognition of native title in Australia is premised on the supreme and exclusive power of the State. While this premise underlies the High Court's decisions in both the *Mabo*[62] and the *Miriuwung Gajerrong* cases, it is most clearly stated in the *Yorta Yorta* decision:

> what the assertion of sovereignty by the British Crown necessarily entailed was that there could thereafter be no parallel law-making system in the territory over which it asserted sovereignty.[63]

In the *Miriuwung Gajerrong* decision the Court attributes the 'inherent fragility' of native title to the imposition of the new sovereign order:

> An important reason to conclude that, before the NTA, native title was inherently fragile is to be found in this core concept of a right to be asked permission and to speak for country. The assertion of sovereignty marked the imposition of a new source of authority over the land. Upon that authority being exercised, by the creation or assertion of rights to control access to land, the right to be asked for permission to use or have access to the land was inevitably confined, if not excluded. But because native title is more that the right to be asked for permission to use or have access (important though that right undoubtedly is) there are other rights and interests which must be considered, including rights and interests in the use of the land.[64]

It can be seen in the *Miriuwung Gajerrong* decision that the construction of native title at common law as an inherently fragile and inferior interest in land, originates from an assumption that the nature of the power asserted by the colonizing state is singular, total and all-encompassing. The *Yorta Yorta* decision illustrates the consequences of this for the recognition of native title:

> Upon the Crown acquiring sovereignty, the normative or law-making system which then existed [Indigenous laws and customs] could not thereafter validly create new rights, duties or interests. Rights or interests in land created after sovereignty and which owed their origin and continued existence *only* to a normative system other than that of the

61 *ibid,* pp24-25.
62 *Mabo and others v Queensland (No. 2)* (1992) 175 CLR 1.
63 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) at [44].
64 *Western Australia v Ward; Attorney-General (NT) v Ward; Ningarmara v Northern Territory* [2002] HCA 28 (8 August 2002) per C J Gleeson, Gaudron, Gummow and J J Hayne at [91].

> new sovereign power, would not and will not be given effect by the legal order of the new sovereign.[65]

This is a very limited view of Indigenous rights and not one accepted in international law. In relation to Australia's obligations under Article 1 of the *International Covenant on Civil and Political Rights*, the Human Rights Committee recommended in its Concluding Observations on Australia that:

> The State party should take the necessary steps in order to secure for the indigenous inhabitants a stronger role in decision-making over their traditional lands and natural resources.[66]

Nor is the High Court's view on Indigenous rights accepted in other common law jurisdictions. In Chapter 4, I contrast the position adopted by the High Court in Australia in relation to Indigenous sovereignty with that taken by the Courts in Canada and the USA. What is relevant here is that the construction of native title in Australia is not only inconsistent with the human right to development, it also fails to provide a useful tool for Indigenous communities and government to change the circumstances of Indigenous people's lives in a sustainable and empowering way.

However the native title process is not just about the way in which the NTA and the common law give recognition and protection to legal rights and interests. While this element presently dominates the native title process, there is another component that has the capacity to redirect native title towards the economic and social development of Indigenous people in a way which is consistent with their right to development.

This potential arises from the fact that native title requires governments to engage with Indigenous people as the traditional owners of the land. This is a special type of engagement that carries with it an acknowledgement of Indigenous peoples' distinct identity based on their relationship to the land. It is my hope that this engagement will mature through the native title process to one that acknowledges that native title holders are a distinct group who legitimately have claims to be recognised as a people. From this it is but a small step to an engagement between government and native title holders directed to the development objectives of Indigenous peoples and to a dialogue about how these might be achieved within the development of the Australian nation.

Sustainable development

The concept of sustainable development has been evolving since at least the early 1970s. Starting in 1972 the key principles have been set out in a number of declarations and reports, including *The Declaration of the United Nations Conference on the Human Environment, 1972*; UN General Assembly *World Charter for Nature, 1982*; World Commission on Environment and Development's report, *Our Common Future*, 1987; *Rio Declaration on Environment and Development*, and *Agenda 21, 1992*; *The Johannesburg Declaration on Sustainable Development, 2002*.

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65 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58 (12 December 2002) at [43] per C J Gleeson, Gummow and J J Hayne. Italics in the original.

66 UN Doc CCPR/CO/69/AUS, para 9.

These declarations and reports have produced strategies that have become the basis for development practices worldwide. The basic tenets of sustainable development are the integration of environmental protection with economic and social development, futurity, conservation of resources, equity, quality of life and participation.[67] These principles lay a basis for development that weaves environmental considerations, economic outcomes and social justice into an holistic development model.

The discourse of sustainability provides Indigenous people with a useful set of principles and processes which would enable greater participation in economic development based on recognition of their distinct identity and their unique relationship to land and resources. Increasing attention is being given to the role of sustainable development in programs designed to address economic development within Indigenous communities. Linking economic development outcomes to the social, ecological, political and cultural needs of Indigenous communities gives rise to new ideas for sustainable economic, social and cultural outcomes.

The 1987 World Commission's report, *Our Common Future*, examined the effects of development on Indigenous peoples and concluded that they are specifically and profoundly at risk from imposed economic exploitation. This is because they live in isolated, often resource-rich environments, and that the sustenance, socio-legal structure, religious beliefs and place of residence of Indigenous communities are founded on the natural environment in which these communities live.

The 1987 Report also acknowledged the important influence of Indigenous peoples' knowledge and their profound relationship to land on the core idea of sustainability; that the land and the environment is an intrinsic part of humanity's economic, social and cultural existence. Such observations led the Commission to conclude that the traditional rights of Indigenous groups must be respected in the context of sustainable development.[68] This approach to Indigenous rights was reflected in the Rio Declaration, which states:

> Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognise and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.[69]

More specifically, *Agenda 21* states that 'Indigenous people and their communities shall enjoy the full measure of human rights and fundamental

67 M Jacobs, 'Sustainable Development: A Contested Concept', in A Dobson (ed) *Fairness and Futurity*, Oxford University Press, 1999.

68 *Our Common Future, op.cit,* pp114-116.

69 *Rio Declaration on Environment and Development*, *Agenda 21,* Chapter 37, UN document A/CONF.151/26, 12 August 1992, ('**Rio Declaration**'), endorsed by UN General Assembly on 22 December 1992 (UN document A/RES/47/190, Principle 22.

freedoms without hindrance or discrimination'.[70] *Agenda 21* also promotes the effective participation of Indigenous groups in land management practices on their traditional country and in national policy approaches to land and resource management.

The vital role of Indigenous peoples in sustainable development was reaffirmed in the World Summit on Sustainable Development held in Johannesburg in 2002. The *Indigenous Peoples' Plan of Implementation on Sustainable Development*,[71] drafted by Indigenous Peoples attending the World Summit, asserted a number of important principles underlying the basis of Indigenous peoples' participation in the sustainability dialogue. These included:

- custodianship over traditional territories (to own, control and manage our ancestral lands and territories, waters and other resources)
- obligations of inter-generational transfer of knowledge, resources and territories
- full and effective participation in all developments affecting Indigenous peoples
- free and prior informed consent
- protection of traditional knowledge and Indigenous intellectual property
- equitable sharing of benefits arising from "agreed" development

The *Indigenous Peoples' Plan of Implementation on Sustainable Development* together with the *Kimberley Declaration*[72] formed the basis of a Partnership formed at the World Summit called the Partnership on Indigenous Rights and Sustainable Development. The Partnership is a common platform for sustained dialogue between Indigenous peoples' organisations, governments and multilateral agencies. It aims to promote knowledge on Indigenous Peoples' rights and priorities in development agencies and national governments, exchange experiences of good practice, and influence policy processes and decision making regarding sustainable development and human rights. Significantly the notion of capacity building in this context applies not only to Indigenous organisations but also to the capacity of government and other agencies to enter into a dialogue on sustainability with Indigenous People.

A guiding principle of the partnership is that the dialogue should be based on the principles of:

- recognition of Indigenous peoples rights to land and self determination,
- mutual respect and recognition,

70 UN Department of Economic and Social Affairs, Division for Sustainable Development, *Agenda 21*, Section III, Ch. 26, para 26.1 at <www.un.org/esa/sustdev/documents/agenda21/english/agenda21toc.htm> accessed 17 December 2003.

71 *The Indigenous Peoples' Plan of Implementation on Sustainable Development*, Johannesburg, South Africa, 2002 found at <www.treatycouncil.org/Final%20Indigenous%20Peoples%20Implementation%20Plan.pdf>.

72 *Kimberley Declaration,* International Indigenous Peoples Summit on Sustainable Development, Khoi-San Territory, Kimberley, South Africa, 20-23 August 2002.

- honesty and transparency,
- joint decision making and monitoring
- mutual agenda setting, and,
- respect and recognition of indigenous cultures, language and spiritual beliefs.[73]

The principles and concepts shaping the sustainability dialogue are not new to Indigenous people. In fact they are informed by the same concepts underlying Indigenous peoples' right to self-determination: a recognition of their political status as a people and a concomitant right to freely dispose of their natural wealth and resources and freely pursue their economic, social and cultural development.

The critical difference is not the concepts which make up the discourse on sustainability, but its location in both the public and private sphere of economic development. Sustainability not only seeks to provide an ethical underpinning to the relationship between the citizen and the State. It is equally applicable to the relationship between a developer and those affected by, or participating in, the development.

Some multinational companies, eager to gain access to resources and maintain conditions of stability for their long term projects, have shown a willingness to enter the sustainability dialogue and in some cases change their practices to match their stated positions. The Report of the Mining Minerals and Sustainable Development Project, (MMSD Project), *Breaking New Ground*[74] presents an analysis of a large industry group utilising the dialogue on sustainable development to provide a new framework for mining developments. The recognition of principles such as prior and informed consent in relation to land use decisions indicates a progressive approach to development.

Native title provides a limited framework for traditional owner groups to enter negotiations with companies seeking access to their land and resources. Rather than utilising the native title process to integrate economic development with the values that make up Indigenous identity, native title has stultified this holistic approach.

The construction of native title as a bundle of rights and interests, confirmed in the *Miriuwung Gajerrong* decision, reflects the failure of the common law and the *Native Title Act* to recognise Indigenous people as a people with a system of laws based on a profound relationship to land. Native title constructed as a bundle of separate and unrelated rights with no uniting foundation engenders a fragmentation of economic, social and cultural values rather than their integration.

Despite the invasive legal structures which keep Indigenous identity and economic development apart, it is generally agreed that agreement making and negotiation processes within the native title system are capable of generating economic benefits for Indigenous people. The challenge is to maximise the capacity of native title to generate wealth through the recognition of a distinct Indigenous identity.

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73 *ibid.*

74 Mining Minerals and Sustainable Development Project, *Breaking New Ground*, Earthscan, 2002.

A sustainable development framework for native title negotiations

It is clear from the discussion above that the construction of native title in the NTA does not provide a foundation for Indigenous people to realise their right to sustainable development. However it is also clear that the legal recognition of Indigenous peoples' relationship to their traditional lands through native title is a necessary first step in a rights-based approach to development. It reflects the importance of land to the identity of Indigenous people. It also provides a foundation to Indigenous people's own development in which their economic, environmental, social and cultural values are seen as interrelated through the traditional laws and customs from which they originate.

The aim of this section is to move beyond this first step of the legal recognition of native title in a direction different to that taken in the NTA, by asking 'What would a government and a native title claimant group discuss if the agreed aim of the native title process was the realisation of the group's right to sustainable development?'. How would native title negotiations and agreement-making be structured so as to achieve this agreed goal? These questions can be answered by addressing the following principles.

Sustainable Development Relies on an Effective Process

What emerges from the principles of both the DRD and sustainable development is that development is a process. In the words of Dr Manley Begay, co-director of the Harvard Project on American Indian Economic Development:

> Sustained and systemic economic development… does not consist or arise from building a plant or funding a single project. Economic development is a process, not a program.[75]

This is a critical point in relation to the negotiation of native title agreements. It is not enough that agreements contain good economic, social and cultural outcomes in exchange for the settlement of the native title claim. The process of reaching these outcomes is just as important.[76] Thus, at the outset the parties to a native title negotiation must discuss the process most conducive to the claimant group's economic and social development and their respective roles in this process.

Discussions focused on the *process* of development might include the issue of time frames and how long it might take the traditional owner group to identify its objectives and develop capacity to engage effectively with the development process. Resourcing the process of development would also be an issue for discussion in which non-financial resources, including knowledge and skills necessary to assist traditional owners and Native Title Representative Bodies (NTRBs) identify and achieve the goals could be included.

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75 Manley Begay Jr, *"Corporate and Institutional Strengthening for Effective Indigenous Self-Governance on the Ground – Policy Lessons from American Indian Nations",* paper presented at the *Indigenous Governance Conference*, Canberra, 3-5 April 2002, p5. Available at <www.reconciliationaustralia.org>.

76 P Agius & o'rs, 'Doing Native Title as Self-Determination: Issues From Native Title Negotiations in South Australia', draft paper for *International Association for the Study of Common Property Pacific Conference*, Brisbane, September 2003.

Sustainable Development Requires Capacity Development

Sustainable development declarations have long identified the need for capacity building to achieve sustainable development goals.[77] Principle 9 of the Rio Declaration states:

> States should cooperate to strengthen endogenous capacity-building for sustainable development...

Sustainable development is a locally driven process that occurs within a system of interrelated levels and understandings, including the local, regional, state, national and international levels. Accordingly, the focus of a sustainable development approach is on those who are seeking to achieve it. For Indigenous communities this approach sees them as agents of their own development. This approach is consistent with that outlined in the Aboriginal and Torres Strait Islander Commission's (ATSIC's) Annual Report for 2002-02 where the Acting Chairman describes the challenge facing Indigenous communities and ATSIC as follows:

> We want Indigenous people and communities to drive change and shape their own futures. But that means we have got to get two things right:
>
> - The capacity of community members and the community as a whole to make good policy and to campaign and negotiate for the outcomes they want; and,
> - The good governance and self-management of Aboriginal and Torres Strait Islander people at national, regional and local levels.
>
> 'Capacity building' and 'good governance' are buzz words around at the moment. But the issues that they cover are fundamental. Basically, they mean building the skills of all Indigenous people to improve ourselves, to shape our own lives, to run our own affairs, and to take our rightful place as a unique part of Australian society.[78]

In native title negotiations this approach requires that traditional owners play a central role in their own development and that the pace and agenda of a capacity development process is determined by the abilities and objectives of the traditional owner group.

Capacity development directed to the sustainable development of Indigenous communities has five main elements:

- It must be driven by a local agenda
- It must build on the existing capacities of the group
- It must allow ongoing learning and adaptation within the group
- It requires long term investments
- It requires that activities be integrated at various levels to address complex problems.[79]

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77 See: Rio Declaration; UN Commission on Sustainable Development, *Capacity-building for Sustainable Development, Report of the Secretary General*, 4 March 1996, UN Economic and Social Council, UN. Doc E/CN.17/1996/15.

78 Acting Chairperson's review of ATSIC. *Annual Report 2002-2003*, ATSIC, Canberra 2003, p9.

79 J Bolger, 'Capacity Development: Why, What and How', *Capacity Development Occasional Series*, Vol 1, No.1 May 2000, Canadian International Development Agency.

A locally driven agenda[80]

This principle is fundamental to capacity development. The purpose of a locally driven agenda is to empower communities and groups who aspire to achieve sustainable development to determine the process themselves. This requires that the group establish its own objectives.

The process of determining a locally driven agenda requires an informed and effective decision-making structure within the group. Such a structure should provide the foundation of a governance model. This is particularly true in the context of native title, which, based on traditional owner structures, provides a cultural foundation for the establishment of decision-making structures that may develop into more formalized governance structures.

However, traditional decision making processes may not adequately address the type of issues which arise from a development agenda. It is critical therefore that the capacity of traditional owners and their representatives to undertake effective decision-making be further developed. Native title negotiations can provide a framework for the group to discuss with government the time-frames and the resources necessary to ensure that decision-making structures can be adapted to respond to the development process.

While the NTA prescribes the establishment of bodies corporate to hold and exercise native title rights on behalf of the group, there is no mechanism to ensure these bodies have the capacity to manage the development agenda of the group. Native title negotiations can provide a forum for discussions between the group and government on the suitability of these bodies as a vehicle for sustainable development, the identification of skills that need to be developed to achieve the local agenda and the time frames necessary for capacity development within the governing institution.

Building on local capacities and assets

Capacity development recognises that all communities or organisations possess capacity that can be further developed. Capacity may exist in terms of an organisation's committed membership, its representative nature or a community's ability to sustainably use and manage their natural environment. Traditional owner groups have cohesive cultural and social relationships, a unique relationship to the land of their ancestors, and values that are shared by the members of the group. This internal capacity forms the basis for capacity development.[81] The emphasis of capacity development is on building the skills of people within a community or an organisation rather than using external skills to identify and drive the achievement of objectives.

This principle has important implications for native title negotiations. These capacities are important assets in a development process. It gives the group a basis to establish their own objectives and take control over the development

80 United Nations Economic and Social Council, *United Nations system support for capacity-building*, New York 1-26 July, 2002, E/2002/58.

81 This approach is upheld by the Rio Declaration, Principle 9 which requires that 'States should cooperate to strengthen endogenous capacity-building for sustainable development…'

process, even though particular skills may need to be developed to implement these goals effectively.

While traditional owner groups have structures and processes for decision-making, these may not be adapted to the type of decisions that arise from their development agendas. It may be that the group needs to build upon these traditional governance structures in order to make effective decisions, manage the process, overcome complex problems, engage with external groups and build a vision for the future.

For example, senior traditional owners have the governance capacity to make decisions about important sites through the decision making structures established by traditional law and customs but may not have the capacity necessary to make decisions about the management strategy for an Indigenous business enterprise. Therefore it is necessary that adequate and appropriate governance institutions are established to enable Indigenous groups to make decisions. Prioritising governance ensures that Indigenous groups are able to make effective sustainable decisions.

Ongoing learning and adaptation

Ongoing learning and adaptation are important features of a capacity development approach. Capacity development objectives may change over time and the skills of proponents should develop and advance with the success or setbacks of their development goals.

> A series of new ideas, values, rules and behaviours must be learned, internalized and institutionalized, particularly those that shape the relationships amongst people in a society. Stakeholders must learn new ways of problem solving, team building, leadership and conflict resolution. Learning is not 'delivered' to participants but is acquired by experience and through inter-action.[82]

An important mechanism for ongoing learning and adaptation are monitoring and evaluation programs. The purpose of monitoring and evaluation is to identify progress and strengthen capacities. Therefore the monitoring and evaluation process of a capacity development approach should be developed at the outset of the project and set criteria based on the objectives of the development process. Native title negotiations can provide a forum for the group to discuss with government realistic targets and agreed indicators of success. In this way the role of the government in facilitating the group to achieve these targets can be discussed at the outset.

The monitoring and evaluation programs should include indicators that measure the success of sustainable development objectives. For example, if traditional owners have negotiated an agreement that includes employment outcomes, a relevant evaluation would measure the number of peoplefrom the traditional owner group employed under the agreement and identify barriers to employment. These monitoring and evaluation programs can asses not only the strategies adopted to achieve the development goals, but also the process of capacity

82 United Nations Development Programme, *Capacity Development and UNDP, Supporting Sustainable Human Development*, Draft 1 15 May 1997 <www.magnet.undp.org/Docs/cap/BKMORG~1.htm> accessed 20 October 2003.

development.[83] Specifically, 'the effectiveness of process must be monitored as well as product or outcomes'.[84] This approach requires long timeframe to accurately evaluate capacity development initiatives.

Ongoing learning and adaptation requires that traditional owners have the opportunity to develop capacity and evaluate their objectives over time. The current practice in native title negotiations to develop a singular agreement in order to settle a claim does not support an ongoing and evaluative approach. By contrast, ongoing learning should be applied in a manner similar to the incremental treaty making process currently being undertaken in Canada. This involves negotiating a series of agreements over time that allows for the gradual development of capacity within the group.

An incremental approach

The experience of treaty-making in Canada provides important guidance for native title negotiations in Australia. Although there are significant legal, historical and constitutional differences between these jurisdictions,[85] the policy choices made in Canada provide an important precedent for the negotiation of agreements in Australia.

Treaty-making in British Columbia

In 1993 the British Columbia Treaty Commission was established to undertake the co-ordination of the treaty making process in British Columbia (BC). After eight years, no treaties had been finalized and the Treaty Commission undertook a review to identify what had been achieved in eight years and what were some of the obstacles to finalizing treaty outcomes.[86] The review revealed that urgent action was necessary to make the treaty process more effective.[87]

The review found that the current negotiating process was expensive and time consuming. In the meantime, it does not provide stability on the ground for First Nations, governments or third parties. Nor does it improve the social and economic conditions for First Nations and other British Columbians. This led to growing frustration and reduced support for treaty making.

In response to these problems the Treaty Commission has recommended in its report that an incremental approach to agreement-making be adopted, rather than attempting in the one negotiation process to settle all matters conclusively.

An incremental approach

The central recommendation in the Treaties Commission Review was that:

> First Nations, Canada and British Columbia shift the emphasis in

83 UNDP *ibid,* 1997.
84 UNDP *ibid,* 1997, p18.
85 See Chapter 4 for a comparative analysis of Indigenous policy and legal regimes in Canada, the United States of America and Australia.
86 In 1993, the federal and provincial governments and the First Nations Summit launched the B.C. treaty process and established the B.C. Treaty Commission (BCTC). The BCTC coordinates the start of negotiations, monitors progress, keeps negotiations on track, provides information to the public and allocates funds to support First Nations' participation.
87 British Columbia Treaty Commission, *Looking Back – Looking Forward*, BC Treaty Commission, Vancouver, British Columbia, 2001.

> treaty making to incremental treaties – building treaties over time – so that when so that when a final treaty is signed, the new relationships necessary for success will largely be in place.[88]

The working group noted that it is a process for building treaties by negotiating over time a series of arrangements or agreements linked to treaties that can be implemented before a final treaty. This concept is in its early formulation and requires further elaboration.

An incremental approach emphasizes a number of the principles of capacity development including; long term investment in the negotiation of agreements, ongoing learning and adaptation and; the creation of partnerships and development of long term relationships. These principles and those embedded within an incremental treaty making approach require that governments:

- address the wider social and economic interests of traditional owner groups
- build agreements incrementally and over time in response to:
  - the objectives and capacity of traditional owners and
  - the objectives of key stakeholders
- understand native title agreements as the basis for a long term investment and partnership between government and traditional owner groups.

The British Columbia experience has shown the fundamental necessity of building relationships on an incremental basis and of linking social and economic development to settlement of land claims or native title issues. It is through this process that viable relationships and partnerships can be developed which lay the basis for economic and social development. As the BC Claims Task Force Report noted, early implementation of sub-agreements may provide the parties with an opportunity to demonstrate good faith, build trust and establish a constructive relationship.

An incremental approach does not mean a limited or restricted approach, or that only minor issues should be dealt with initially. However recognition of the capacity limitations of Indigenous groups, and the fact that other priorities might at times intrude into the process, can be accommodated in an incremental approach. Indeed the development of governance structures and effectiveness and capacity development should form part of the process of developing agreements. In this respect the potential unfairness of groups having to conclude final agreements when they may not yet have the capacity to do so can be avoided.

The experience of treaty making in Canada provides important guidance for native title negotiations policies. Incremental treaty making supports a holistic approach to agreement making that seeks to address broader social and economic issues within Indigenous groups. While experience in BC reveals the shortcomings of a 'one off agreement making' process and reaffirms the principles within capacity development. These are important considerations for native title negotiations that focus on resolving legal issues rather than responding to these issues in a way that also addresses the broader interests of the traditional owner group.

88 British Columbia Treaty Commission, *Looking Back – Looking Forward*, BC Treaty Commission, Vancouver, British Columbia, 2001, p14.

Long term investments

Capacity development requires long term investment in time and resources. Learning, assessment, successes and failures are all part of a capacity development approach. These processes occur over time and form a transformative process of learning:

> …in all areas of human endeavor the beliefs that individuals, groups, and societies hold which determine choices are consequences of learning through time – not just the span of an individual's life or of a generation of a society, but the learning embodied in individuals, groups and societies that is cumulative through time and passed on inter-generationally by culture or society.[89]

Understanding the intergenerational nature of learning and the role of time within this process is crucial to the success of a capacity development approach. The importance of a long term commitment to programs or services directed to Indigenous people is widely recognised. The Commonwealth Grants Commission in its 2001 *Report on Indigenous Funding* identified a 'long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals'[90] as a key principle for improving the allocation of resources to meet Indigenous need.

In contrast, time within native title negotiations is a rare commodity. Traditional owners and their representatives are under constant pressure to comply with the Court timeframes which fail to take account of the need for traditional owners to build effective decision-making structures, identify the capacity needs and aspirations of their group and begin to actively participate in native title negotiations. Short timeframes are a serious impediment to capacity development within traditional owner groups and threaten any opportunity at achieving sustainable development.

Long term investments in capacity development also require the investment of adequate and consistent resourcing.[91] Within the native title system the Native Title Representative Body has primary responsibility for assisting traditional owners in native title negotiations and are well placed to facilitate capacity development within traditional owner groups. In addition Prescribed Bodies Corporate (PBCs) are responsible for the ongoing management of native title and provide the organizational structure to enable ongoing and sustainable development.

As discussed in detail in Chapter 3 the Commonwealth government has failed to provide adequate funding to NTRBs nor indeed any funding to PBCs, even though these institutions are the primary vehicles for achieving the development objectives of the native title claim group. Native title negotiations must focus on

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89 D C North, 'Economic Performance Through Time in The American Economic Review, 84(No,.3) 1994 quoted in C Lusthaus, M H Adrien, M Perstinger, 'Capacity Development: Definitions, Issues and Implications for Planning, Monitoring and Evaluation', *Universalia Occasional Paper Series* No.35, September 1999, p9. Available at <www.capacity.undp.org/cap-dbase/104cd.htm> accessed 13 October 2003.

90 Commonwealth Grants Commission, Report on Indigenous Funding 2001, Commonwealth of Australia, Canberra, 2001, pxix.

91 Detailed discussion of funding issues within the native title system is set out in Chapter 3.

the need for long term and stable resourcing commitments to institutions that are integral to the success of the development process.

Integration of activities

As indicated above, sustainable development is a locally driven process that occurs within a system of interrelated levels and understandings, including the local, regional, state, national and international levels. Capacity development must therefore occur at a number of levels and respond to the power relationships between them. In relation to native title, capacity development must ensure that the goals of the various institutions operating at different levels within the overall system are consistent with the realization of the right of the native title claimant group to development.

Agencies within State and Commonwealth governments, Aboriginal and Torres Strait Islander Services (ATSIS), NTRBs, the National Native Title Tribunal, the Federal Court and industry bodies are the key actors within the native title sector. To begin a process of capacity development with traditional owner groups, the actors within the sector level must support such an approach. Their policies and programs must be co-coordinated towards this goal.

This approach would require State and Commonwealth government commitment to capacity development within native title negotiations; adequately resourced NTRBs; flexible Federal Court timeframes to support capacity development and effective native title negotiations; co-operative relationships between State and Federal governments and NTRBs; and the support of the National Native Title Tribunal through its mediation role. Most importantly each of these actors must commit themselves to supporting a capacity development approach to native title negotiations. Lack of support from just one of these actors may undermine the process and its likelihood of success.

The goal of the recently implemented Council of Australian Governments (COAG) 'Whole of government' initiative managed by the Commonwealth is the co-ordination of services so as maximize the effectiveness of government agencies across government. Based on a COAG Communiqué released in November 2000, this initiative is being trialed in 8 Indigenous communities throughout Australia. Its central platform is 'Shared Responsibility – Shared Future'.[92] Recognising that Indigenous policy and programs need improvement, the initiative proposes that:

- governments must work better together at all levels and across all departments and agencies; and
- Indigenous communities and governments must work in partnership and share responsibility for achieving outcomes and building the capacity of people in communities to manage their own affairs.

While the co-ordination of government services is consistent with a capacity development approach it is not sufficient in itself to achieve the sustainable development of the group. In addition the question needs to be asked whether

92 Indigenous Communities Coordination Taskforce (ICCT), *Shared Responsibility – Shared Future – Indigenous Whole of Government Initiative: The Australian Government Performance Monitoring and Evaluation Framework*, October 2003, p2.

the coordinated government services are directed towards empowering the Indigenous community to achieve its development goals.

I discuss in Chapter 3, Part 2 how native title has effectively been excluded from the "Whole of government" initiative. There has been little consideration given either by State or Commonwealth agencies, to utilizing the assets which are built from the recognition of the inherent rights of Indigenous people through native title. This is evidenced by the failure to coordinate native title policy objectives with those that are directed to the economic development of Indigenous people.

At an organizational level capacity development may require changes in corporate culture, organizational structures, personnel functions and management systems.[93] Organisations such as NTRBs may require improvement or capacity building to assist traditional owner groups to achieve sustainable development goals.

The 2001-2002 Federal Budget provided $11.4 million to capacity building for Native Title Representative Bodies. The need for NTRB capacity building became apparent from the NTRB re-recognition process required under the 1998 amendments and ATSIC cyclical reporting. These two processes revealed that many NTRBs were struggling to manage the demands of their 'grassroots' obligations and statutory functions, while others lacked appropriate internal administration systems and office/communication infrastructure. The capacity building program includes a four year partnership between NTRBs and ATSIC, and a framework agreement between identifying objectives, strategies and projects to be funded under the program agreed.[94]

A joint NTRB and ATSIC forum[95] in 2001 targeted the following areas for the program:

- corporate and cultural governance,
- management and staff development,
- native title technical training,
- collaborative relationships, and,
- research and applied capacity building.

While capacity building directed to organisations such as NTRBs is an important element of achieving sustainable development, it must be consistent with and enhance the development objectives of traditional owner groups by providing opportunities, skills and resources necessary to facilitate and promote their empowerment.

It is clear from the above discussion of the elements of capacity development that sustainable development is an ongoing process that requires not that sustainable development be 'delivered', but that those who seek to achieve sustainable development within their communities are actively engaged in setting

93 J Bolger, 'Capacity Development: Why, What and How', *Capacity Development Occasional Series*, Vol 1, No.1 May 2000, Canadian International Development Agency.

94 Aboriginal and Torres Strait Islander Commission, 'Capacity Building for Native Title Representatives Bodies', Native Title Fact Sheet 6/2001, December 2001.

95 ATSIC Native Title and Land Rights Centre, *Report of the NTRB Leaders Forum*, Noosaville, November 2001 available at <www.ntrb.net/images/userupload/pdf/report.pdf>.

the agenda and determining the outcomes. The greatest challenge in this process is developing the governance structures within the traditional owner group to carry this responsibility.

The Northern Territory government recognizes the challenge of bringing together contemporary governance arrangements with culturally based systems of authority and decision-making:

> Previous policies have resulted in largely imposed localized structures that have been designed for "governing for dependence". Without effective governing institutions, leaders who have cultural legitimacy and the ability for Indigenous institutions to exercise real decision making powers, the aims [of the COAG trial] will simply not be sustainable or of any long term social or economic benefit.[96]

In a recent paper for the *Northern Territory Indigenous Governance Conference* held 4-7 November 2003, Professor Mick Dodson recognised:

> 'Governance' is about power, relationships and processes of representation, decision making and accountability. It is about who decides, who has influence, how that influence is recognised and how decision makers are held accountable. 'Good governance' is about creating the conditions for legitimate and capable decision making and for collective action about a community's affairs. It's about robust and accountable decision making at a collective level with transparent grievance processes that protect privacy.[97]

Governance enables communities to make decisions and work together to reach outcomes. It is an essential element of capacity development. Governance both enables capacity development to begin – how else would Indigenous groups identify their own objectives – and expand as the capacity of the group to achieve its own objectives develops. In this way capacity development, becomes an immediate and foundational mechanism to build governance within Indigenous communities.

Governance has been identified by the research of the Harvard Project as the most important element in achieving sustained social and economic development within American Indian Nations.

The Harvard Project on American Indian Economic Development[98] set out to understand why some tribes had been able to break away from long term poverty and economic stagnation, with all the attendant social problems, while others had not. Stephen Cornell of the Harvard Project has observed that among the key research findings of the Project is the critical role of self-governance:

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96 Office of Indigenous Policy, Department of the Chief Minister of the Northern Territory, *Correspondence with Aboriginal and Torres Strait Islander Social Justice Commissioner,* 14 November 2003.

97 Professor M Dodson, 'Capacity Development for Indigenous Governance and Good Leadership', paper presented at *Northern Territory Indigenous Governance Conference*, Jabiru NT, 4-7 November 2003.

98 *op.cit*, fn56.

> In the United States at least, genuine self-rule appears to be a necessary (but not sufficient) condition for economic success on indigenous lands.[99]

Cornell and Taylor have observed that on the basis of twelve years of research:

> The evidence is compelling that where tribes have taken advantage of the federal self-determination policy to gain control of their own resources and of economic and other activity within their borders, and have backed up that control with good governance, they have invigorated their economies and produced positive economic spillovers to states.[100]

However, in a discussion relevant to Australian traditional owner sustainable development, Cornell sought to identify the meaning of self-government, noting that it is significantly different to mere administrative control. The key findings of the Harvard research point to five factors as the key determinants of tribal economic success: sovereignty, governing institutions, cultural match, strategic thinking and leadership.

Sovereignty

In every case examined where there has been sustained economic performance, the major decisions about governance structures, resource allocations, development strategy and related matters are in the hands of the Native American Indian nations concerned.

Governing institutions

Self rule is not enough, it has to be exercised effectively, which means stability in the rules by which governance takes place, and keeping community politics out of day-to-day business and program management. As well, there has to be fair, effective and non-politicized resolution of disputes. It is necessary to put in place capable tribal bureaucracies that are able to effectively deliver services and implement decisions.

Cultural match

The Harvard Project has identified the need to develop tribal governing institutions that have credibility within Indian society, that "resonate with indigenous political culture". As Cornell points out, historically outsiders, typically the US Government, have designed and imposed tribal governing institutions; and accordingly these institutions are ineffective and inappropriate in managing sovereign societies. However, the evidence is that there is no one model that applies across all Indian nations, and that the solution to "cultural match" has to be worked out according to the particular situation of each group, and its response to the need to build institutions on an indigenous base.

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99 S Cornell, "*The Importance and Power of Indigenous Self-Governance: Evidence from the United States*", Paper presented at the Indigenous Governance Conference, Canberra 2002. Paper available at <www.reconciliationaustralia.org>.

100 S Cornell and J Taylor, *Sovereignty, Devolution and the Future of Tribal State Relations,* Malcolm Wiener Centre for Social Policy, June 2000, p6. Available at <www.ksg.harvard.edu/hpaied/docs/PRS00-4.pdf>.

Strategic thinking

Despite the pressures for Indigenous communities to look for short term outcomes, the Project has noted the key importance of longer term strategic thinking and planning, involving a systematic examination not only of assets and opportunities but also of priorities and concerns.

Leadership

The Project noted the key role of leadership in terms of persons who can envisage a different future, recognize the need for foundational change, are willing to serve the tribal nation's interests instead of their own, and can communicate their vision to other community members.

In summary, the Harvard Project, without diminishing the importance of economic factors (resources, distance to markets etc) found that the primary requirements for developmental success were political rather than economic, focusing around issues of governance, or more broadly speaking, "nation building" or "nation re-building":

> Nation-building refers to the effort to equip indigenous nations with the institutional foundations that will increase their capacity to effectively assert self-governing powers on behalf of their own economic, social and cultural objectives.[101]

The findings of the Harvard Project are compelling – sustainable outcomes for Indigenous communities cannot be achieved without effective Indigenous governance institutions.[102]

I discuss above how the legal construction of native title in the High Court's decisions in the *Miriuwung Gajerrong* and the *Yorta Yorta* cases and through the NTA disables native title cannot as a vehicle for Indigenous governance and sovereignty. Through native title, governments and courts had an opportunity to give legal recognition to the distinct political identity of Indigenous people. The Harvard project confirms that the failure to take up this opportunity makes it more difficult for policies and programs aimed at the economic development of Indigenous people to succeed.

However, native title is more than a construct of legislation and the common law. While the Commonwealth has failed to envisage a development role for native title, the opportunity exists within native title negotiations and agreement-making to build the governance models necessary to achieve sustainable development for the traditional owner group.

Partnerships

The concept of partnerships is embedded within strategies to achieve sustainable development. The Rio Declaration and its program for implementation, Agenda 21, identify the importance of a partnership approach,

101 Cornell, *op.cit*, p8.

102 S Cornell and J P Kalt, *Sovereignty and nation-building: the development challenge in Indian Country today,* available at <www.ksg.harvard.edu/hpaied/res_main.htm> accessed at 14/01/04.

declaring that 'States shall cooperate in a spirit of global partnership'[103] to achieve sustainability goals. The role of partnerships was reiterated in the 2002 World Summit on Sustainable Development where the UN Commission on Sustainable Development (CSD) was given responsibility for promoting initiatives and partnerships to achieve sustainable development.[104] The CSD undertook this role acknowledging that 'partnerships, as voluntary multi-stakeholder initiatives, contribute to the implementation' of sustainable development outcomes.[105]

Sustainable development, conceived as a process that occurs within a system of interrelated levels requires partnerships between these levels in order to connect organisations, sectors and individuals to its goals.

If native title negotiations are to contribute to achieving sustainable development goals, key stakeholders within the native title system must connect through this common objective.

The most important relationship for Indigenous people seeking sustainable development is their relationship with government. For traditional owner groups to achieve their sustainable development goals it is critical that this relationship is one where the group retains control of the development process with the government adopting a facilitative role to assist the group to achieve its development goals.

The Council of Australian Governments (COAG) 'Whole of government' initiative, discussed above, proposes that governments work in partnership and share responsibility for achieving outcomes and building the capacity of people in communities to manage their own affairs.

In August 2003 the then Minister for Immigration, Multicultural and Indigenous Affairs included partnerships as an element of his approach to Indigenous issues:

> [There is a] need to recognise that there is a partnership of shared responsibility between governments and Indigenous people. Governments and outsiders alone cannot effect the necessary changes.
>
> - Indigenous Australians have rights like all other Australians – rights to education, health services and the like. Governments therefore have obligations to provide those services in a fair, reasonable and appropriate way.
> - But rights and responsibilities are inseparable, and there is a view, well founded I believe, that the responsibility of the individual has not been given sufficient attention.[106]

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103 Rio Declaration principle 7.

104 United Nations, *Report of the World Summit on Sustainable Development, 26 August – 4 September 2002*, A/CONF.199/20*, principle 146.

105 UN Commission on Sustainable Development, *The Implementation Track for Agenda 21 and the Johannesburg Plan of Implementation: Future Programme, Organisation and Methods of Work of the Commission on Sustainable Development*, principle 22, Advanced unedited text, 14 May 2003. Available at <www.un.org/esa/sustdev/csd/csd11/csd11res.pdf> accessed 20 October 2003.

106 P Ruddock, 'ATSIC and its future', Speech, Bennelong Society Conference – An Indigenous Future? Challenges and Opportunities, 29 August 2003, online at <www.bennelong.com.au> 20 October 2003, p2.

Agreement making was identified as the mechanism for implementing the government's shared responsibility and partnership approach. In August 2002, the Minister stated that 'we need agreements that are a two-way undertaking that change the relationship from one of passive welfare dependency to a much more equal relationship' based on empowerment.[107] Such agreements, he stated, should be guided by principles of involvement of the local Indigenous community in decision making; shared responsibility; flexibility to meet local circumstances; and an outcomes focus with clear benchmarks to measure progress.

These commitments of the government offer significant potential for making real advances in the situation of Indigenous peoples. Yet native title is not an element of this approach. Nor does the government explore the potential of native title agreement-making to establish the parameters of a partnership arrangement in which the development of the native title claim group is a mutual objective.

What is indicated from this failure to include native title in a partnership approach is that the partnerships contemplated between government and Indigenous people are not based on the acknowledgement of distinct Indigenous identity and cultures or on recognition of the distinct status and inherent rights of Indigenous peoples. It is not based on recognising Indigenous jurisdictions or on sharing power.

Consequently the partnerships contemplated are not between equals. They are partnerships that contain the same asymmetrical relationships which have fostered the type of dependency that the government is purporting to address.

The limitations of the government's approach to native title require that traditional owners find alternative partnerships in order to pursue their development goals. These may include state governments and their agencies (including in some instances, agencies other than those dealing with native title), non-government organisations, and other Indigenous organisations. Based on an agreed vision that native title negotiations can contribute to sustainable development these partnerships can work together to overcome complex problems.

Important partnerships may also develop between traditional owners and industry groups, particularly where native title negotiations arise from an industry or resource development project. While the ambit of native title rights has been limited by the NTA, native title negotiations can be more wide-ranging, particularly where sustainability principles have become embedded in the culture of the company concerned.

The international dialogues discussed above on the right to development and sustainable development establish a new basis on which Indigenous people can enjoy the benefits of development rather than suffering its impact. Native title provides an opportunity to lay the foundations for Indigenous peoples' development consistently with their economic, social, cultural and political structures and with international human rights principles.

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107 P Ruddock, 'Agreement making and sharing common ground', Speech, ATSIC National Treaty Conference, 29 August 2002, p3.

Chapter 2

Native Title Policy – State and Commonwealth profiles

Human rights principles require that Indigenous people's relationships to land, based on traditional laws and customs, be given legal recognition and protection. International legal principles also recognise that Indigenous peoples have economic, social and cultural human rights. Native title, as it is constructed through the Australian legal system, has a limited capacity to meet these human rights standards. Nevertheless it is clear that native title has become more than the recognition of rights by the legal system: it is also a process by which traditional owner groups are brought into a relationship with the State through the lodging of a native title claim.

State, Territory and Commonwealth governments' native title policies have a significant effect on the scope and content of the agreements they make with native title applicants. Such policies influence whether agreements will be confined to the legal definition of native title rights and interests or whether they address broader criteria. The following section provides a national overview of native title policies as they are presently formulated at the State[1] and Federal level and the bureaucratic structures in which these policies are situated. These policies are then evaluated in the following chapter by reference to the following criteria:

- Does the policy contribute to the economic and social development of the group in accordance with international human rights principles?
- Is the policy formulated with the effective participation of Indigenous people?

The material included in this chapter was drawn from publicly available government policy documents and also information from various Indigenous organisations across Australia. In each State and the Northern Territory, consultants retained by the Commissioner interviewed officers from Native Title Representative Bodies and also various other organisations and people who

1 Reference to State governments' policies and practices in this Chapter includes reference to Territory government policies and practices.

had relevant experience of the Government's engagement with traditional owner communities. The research and interviews were conducted between August and October 2003.

Following the research, representatives of the Commissioner and consultants met with every State Government and, subsequently, the Commonwealth Government. This enabled the Commissioner to gain a better understanding of government actions and policies. In December 2003, most States were provided with, and invited to comment on their particular policy profile and my analysis of whether these policies contributed to the economic and social development of the group in accordance with international human rights principles.

New South Wales

Native Title Developments, as at 11 December 2003

	NSW	National Total
ILUAs[2] (registered: in notification or awaiting reg decision)	4 : 0	105 : 16
Determination that native title exists (litigated: consent)	0 : 1	7 : 24
Determination that native title does not exist (litigated: consent)	9 : 1 *	13 : 2
Native title claimant applications not finalised (registered: not registered)	43 : 16	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings: no. of claims)		11 : 22

* 9 Local Aboriginal Land Council unopposed non-claimant determinations that native title does not exist pursuant to s40AA *Aboriginal Lands Rights Act 1983* (NSW) and 1 consent determination that native title does not exist to confirm a surrender of native title through Arakwal ILUA.

\# Not including hearings for the preservation of evidence.

Native title policy

The NSW Government's approach to native title is summarised by the Department of Lands as follows:

> The NSW Parliament has recognised that land in the State of New South Wales was traditionally owned and occupied by Aboriginal people. The New South Wales Government understands that land is of spiritual, social, cultural and economic importance to Aboriginal people. As a result, the NSW Government supports the recognition by Australian law of native title rights held in relation to land by Aboriginal or Torres Strait Islander people as established in the landmark 1992 Mabo (No. 2) decision of the High Court of Australia. The New South Wales Government acknowledges the right of Aboriginal people within the State to lodge native title claims or to seek agreements concerning their native title rights. The NSW Government supports the use of the Indigenous Land Use Agreements (ILUA's) to provide a flexible and cooperative means of resolving native title issues to achieve fair and equitable outcomes for all parties.

2 Indigenous Land Use Agreements.

> Negotiated ILUA provides an opportunity to also avoid costly and divisive litigation. Where the recognition of native title rights is sought under an ILUA, the State requires that credible evidence be produced to demonstrate that native title does continue to exist before agreement can be reached.[3]

The Premier of NSW issues memoranda on a range of matters. It is the Premier's memoranda on native title that form the basis of the NSW Government's policies and practices in this area.[4] The six memoranda with relevance to native title are:

1995 – No. 43	Handling of Claims to Native Title
1998 – No. 66	Compliance with new procedures under the Commonwealth's Native Title Act
1998 – No. 77	Native Title Legislation
1999 – No. 23	Native Title and Indigenous Land Use Agreements
2001 – No. 06	Partnerships: A New Way of Doing Business with Aboriginal People

It is useful to provide more detail on two of these memoranda: Indigenous Land Use Agreements, and Partnerships.

In 1999 the Premier issued a Memorandum in relation to the use of Indigenous Land Use Agreements (ILUAs) to resolve native title matters.[5] The Memorandum advises that if an agency of the NSW Government is considering the possible use of an ILUA they should first write to the Premier seeking approval and setting out the information about the land or waters concerned, the purpose of the proposed ILUA and the matters intended to be covered by it. It notes that some ILUAs may require Cabinet approval. The Cabinet Office reports directly to the Premier and is responsible for ensuring priorities are managed, technical requirements are met, standard conditions are used and precedents are developed that can be used across the public sector in NSW. While the agency may negotiate the details of the ILUA (with legal assistance provided by the Crown Solicitor's Office), when completed, the details must be submitted to the Premier for approval prior to the State formally committing to enter into it. The Memorandum acknowledges that while not all matters may be capable of being resolved through an ILUA, in appropriate cases they can be a productive means of dealing with native title matters. The Memorandum is silent on whether this includes the use of ILUA's in the context of a consent determination.

In 2001 in response to the end of the term of the Council for Aboriginal Reconciliation, a Premier's Memorandum announced the development of a new plan of action to build a partnership between Aboriginal people and the

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3 <www.dlwc.nsw.gov.au/landnsw/llsd/ladant.html#What%20is%20nt>.

4 <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1995/m95-43.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_ memos/prem_circs/circ98/c98-66.html>; <www.premiers.nsw.gov.au/pubs_dload_ part4/prem_circs_memos/prem_circs/circ98/c98-77.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1999/m99-23.htm>; <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm>.

5 Memorandum No 99-23, *Native Title and Indigenous Land Use Agreements*, available at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/1999/m99-23.htm> accessed 12 December 2003.

NSW Government.[6] The new plan includes a range of measures aimed at strengthening Aboriginal leadership and economic independence. A high level committee of officials was charged with the responsibility for overseeing the development of the plan. The plan identifies a number of strategies for working in partnership and institutes new arrangements for achieving tangible progress in Aboriginal affairs by making clusters of government agencies jointly responsible for meeting agreed targets. There will be seven priority areas: health, education, economic development, justice, families and young people, culture and heritage, and housing and infrastructure. It is expected the plan will cite a number of agreements or partnerships in a number of different areas, for example in relation to justice, health, and service delivery. There is no specific mention of native title matters to be included in the plan.

In November 2002, the NSW Government, ATSIC and the NSW Aboriginal Land Council entered into the *NSW Service Delivery Partnership Agreement*, the purpose of which is to improve social and economic outcomes for Aboriginal and Torres Strait Islander peoples in NSW. An overview of the Partnership Agreement is provided in *Social Justice Report 2002*.[7]

The NSW Government has not provided financial assistance to NSW Native Title Representative Bodies (NTRB) to progress native title claims.

> …the NSW Government is of the view that the Commonwealth bears the responsibility for ensuring these bodies are sufficiently funded to enable them to perform their statutory functions.[8]

Since 1983 the state government has transferred land with a current value of $680 million to Aboriginal Land Councils in NSW. The *Aboriginal Land Rights Act 1983* (NSW) (s28) also provided that 7.5 % of land tax in NSW would be paid to the NSW Aboriginal Land Council from 1984 to 1998 to be used for the purposes of the Act. Approximately $580 million was paid to the NSW Aboriginal Land Council over this period. Currently the fund has a balance of $500 million available for land purchase.

Government structure

In NSW, the Premier has primary responsibility for native title policy, including whether to enter into an Indigenous Land Use Agreement. The Premier is assisted in this area by the Cabinet Office, the Crown Solicitor's Office and the Department of Lands (formerly the Department of Land and Water Conservation). The Cabinet Office, plays a key role in providing policy advice to the Premier and for co-ordination between the Crown Solicitor's Office, the Department of Lands, the Premier's Office and the Cabinet. The Crown Solicitor's Office provides legal advice, and the Department of Lands has the primary responsibility for the day-to-day conduct of the NSW Government's response to native title applications and other native title matters.

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6 Memorandum No 2001 – 06, *Partnerships: A New Way of Doing Business with Aboriginal People*, available at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm>, accessed 12 December 2003.

7 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2002*, Human Rights and Equal Opportunity Commission, Sydney 2003, p225.

8 Correspondence from NSW government, 12 January 2004.

The NSW Government identifies the Department of Aboriginal Affairs' mission or charter as 'To empower Aboriginal people in NSW through social, economic and cultural independence and reconciliation'.[9] The Department is responsible for wider policy development and program delivery on social and economic development for Aboriginal people in NSW. Its website contains details of its economic and community development policies and programs.[10] The Department also administers some economic development initiatives which it shares with the Department of State and Regional Development.[11] These initiatives have an emphasis on business development. The Department of Aboriginal Affairs explains its role as working 'closely with Aboriginal people to develop policies and projects that protect their rights and interests in relation to land and cultural heritage. The Department … monitors the development of native title policy in NSW, including the effectiveness of NSW Government agencies in their development and delivery of native title policy and services'.[12]

Following the appointment of the new Ministry in NSW in April 2003, the Minister assisting the Minister for Natural Resources (Lands) was nominated as the State Minister for the purposes of the *Native Title Act*. The Minister represents the NSW Government in native title determination applications and has the primary day-to-day conduct of the NSW Government's response to native title applications and other native title matters. However, the power to agree to an ILUA is maintained by the Premier and not State agencies.

Negotiation threshold

The NSW Government requires a native title determination application to be lodged with the Federal Court. However it does not require the application to have passed the registration test in the *Native Title Act 1993* (Cth) before it will enter into negotiations.

The NSW Government's position on entering into negotiations over a native title determination application is that it requires the presentation of credible evidence 'to demonstrate that native title does continue to exist before agreement can be reached'.[13] The Government has published no general document identifying what matters should be addressed by credible evidence. However, it has provided some guidance to claimants by way of individual letters which require particular information depending on the circumstances of the case. One letter provided to me by the NSW Crown Solicitors referred the claimant to the Queensland Government's connection guidelines as an indication of what is required by the NSW Government.

This letter also specified matters in relation to which the Government is prepared to negotiate under an ILUA on the receipt of credible evidence:

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9 <www.directory.nsw.gov.au/result/detail-organisation-frames.asp?origin=false&xpath=Root/NSWGOV/o=NSW%20Government_comma_c=AU/ou=Portfolio/ou=Aboriginal%20Affairs/nswOrder=03_plus_ou=Organisations/NSWOITOrgUnit@ou=Department%20of%20Aboriginal%20Affairs,> accessed 10 September 2003.

10 <www.daa.nsw.gov.au>.

11 <www.smallbiz.nsw.gov.au/aboriginal/default.htm>.

12 <www.daa.nsw.gov.au/landandculture/>, accessed 3 December 2003.

13 <www.dlwc.nsw.gov.au/landnsw/llsd/ladant.html#What%20is%20nt> accessed 10 September 2003.

a. the recognition of native title and a consent determination depending on the nature of the evidence;
b. a co-management agreement with respect to national parks, Crown reserves and other Crown lands under the *Crown Lands Act 1989* (NSW), which would provide for:
   (i) an advisory committee role
   (ii) jobs and training positions for Aboriginal people
   (iii) special rights in respect to land, eg right to conduct eco-tourism
   (iv) cultural protection measures;
c. consideration for the naming or co-naming of sites of significance;
d. eligibility for appointment to boards and committees as the indigenous representative for the area;
e. possible transfer of vacant Crown land to a corporation representing the native title group;
f. the undertaking of future acts and compensation issues;
g. withdrawal of the native title application if not determined by the Court.[14]

However, the Government has advised that it is 'prepared to negotiate non-native title resolutions of native title claims without requiring the production of credible evidence of native title'.[15]

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in New South Wales.

In 2000, the Arakwal People signed an Indigenous Land Use Agreement with the NSW Government through the National Parks and Wildlife Service and the then Department of Land and Water Conservation, a range of community groups and the Byron Shire Council. The NSW Government has also provided some assistance to the Arakwal People for a feasibility study for the National Park that was to be created in part of their claim area.

Under the agreement, the Arakwal People have agreed to the creation of the Arakwal National Park, located around Cape Byron adjacent to Byron Bay, to be jointly managed by the Arakwal People and the National Parks and Wildlife Service. The Park will provide jobs and training for Arakwal people. The Arakwal People also agreed to the surrender of their native title in three small parcels of land in exchange for the transfer of two of those parcels under the *Aboriginal Land Rights Act 1983* (NSW) to the Arakwal Corporation (Iron Bark Avenue Land and Paterson Street Land) and the opening of a public road. The agreement provides for Crown land to be transferred to the Arakwal Corporation for traditional owners to live on and also provides for the transfer of land for the construction of a cultural centre and tourist facility.[16]

In 2001 an ILUA was reached between the Twofold Bay Native Title Group, the Department of Defence and the State of NSW over a proposed Naval Ammunitioning Facility near Eden in southern NSW.[17] The Commonwealth

14 Correspondence from New South Wales Crown Solicitors Office, 5 November 2003.
15 *ibid.*
16 See <www.atns.net.au/biogs/A000136b.htm>; <www.atns.net.au/biogs/A000168b.htm; www.atns.net.au/biogs/A000172b.htm> accessed at 5 September 2003.
17 <www.atns.net.au/biogs/A000818b.htm> accessed at 5 September 2003.

provided some assistance to the NSW Aboriginal Land Council (when it was the NTRB for NSW) to engage Senior Counsel to negotiate an agreement on behalf of the native title claimants over some Crown land required for defence purposes. The Commonwealth also provided some assistance for some anthropological work in the area.

On 9 September 2003, the NNTT announced the resolution of the Kamilaroi People's native title claim over Crown land near Coonabarabran.[18] A Memorandum Of Understanding has been signed between the Kamilaroi People, the Coonabarabran Local Aboriginal Land Council, the Coonabarabran Pony Club, the Coonabarabran Showground Reserve Trust, the Coonabarabran Shire Council and the NSW State Government. Under the terms of the MOU, the native title application is withdrawn and replaced by an application for a grant under the *Aboriginal Land Rights Act 1983* (NSW).

Northern Territory

Native title developments, as at 11 December 2003

	NT	National Total
ILUAs (registered : in notification or awaiting reg decision)	29 : 1	105 : 16
Determination that native title exists (litigated : consent)	4 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	0 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	150 : 34	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	2 : 3	11 : 22

Not including hearings for the preservation of evidence.

Native title policy

The Northern Territory Government has advised that it will enter into negotiations with the NTRBs for Consent Determinations. However the government has indicated it will require anthropological evidence of an acceptable standard before it will agree to a Consent Determination (though it has no current policy on this). The Ministry of Justice has indicated that the government will continue to negotiate with a native title claimant group while the evidence was being gathered.

The Territory Government has an economic development strategy,[19] part of which addresses Indigenous economic development. This strategy envisages 'equitable opportunity for Indigenous Territorians to participate in economic

18 National Native Title Tribunal, 'A lot of 'local happiness' at the signing of the Coonabarabran agreement, Media Release, 8 September 2003, available at <www.nntt.gov.au/media/1062991413_532.html> accessed at 5 September 2003.

19 Northern Territory Government, *Building a Better Territory*, June 2002, <www.otd.nt.gov.au/dcm/otd/publications/major_projects/economic_development_strategybuilding_a_better_territory.pdf> accessed 17 December 2003.

growth', and outlines both strategic approaches and associated priority actions for each strategy. The five main themes of the Indigenous economic development strategy are:

- promote Indigenous capacity to participate in economic development;
- enable Indigenous people to use their rights to land to advance their economic well-being to boost Territory economic development;
- maximize opportunities for sustainable employment for Indigenous Territorians;
- identify and exploit opportunities for Indigenous economic development arising from the growth of both core and emerging industries in the Territory; and
- support the development of Indigenous business enterprises.

The Northern Territory Government accepts the established role of the NTRBs in managing processes within and between Indigenous groups, particularly as between the two Land Councils effectively all Indigenous people in the Northern Territory are represented.

The government's approach to native title negotiations is reflected in its recent initiatives to jointly develop with the Northern Land Council and the Central Land Council a submission to the Commonwealth Government's review of the *Aboriginal Land Rights (Northern Territory) Act;* as well as drafting the *Parks and Reserves (Framework for the Future) Bill 2003* as a mechanism for the establishment, maintenance and management of a comprehensive system of parks and reserves in the Northern Territory.

Government structure

The Territory's Chief Minister manages a whole-of-government approach to Indigenous matters through the Office of Indigenous Policy located in the Office of the Chief Minister. The Office of Indigenous Policy indicates that it works in areas of policy development including:

- Indigenous economic development;
- Service delivery by NT Government agencies, especially improving coordination across government;
- Issues relating to land and native title;
- Indigenous governance and building capacity to develop sustainable communities;
- Access to mainstream and indigenous-specific government programs and services; and
- Communicating with the indigenous and the wider community.[20]

The Office of Indigenous Policy also provides whole-of-government strategic policy advice on Indigenous affairs including:

20 <www.dcm.nt.gov.au/>.

- Coordinating policies and strategies to resolve outstanding land issues;
- Coordinating Indigenous Economic Development policy;
- Developing options to improve the social well being and living conditions of Indigenous Territorians;
- Development of effective Indigenous governance and capacity building to develop sustainable communities;
- Improving access to mainstream and Indigenous-specific government programs and services; and
- Communicating the NT Government's policies to the Indigenous and wider community.[21]

Several other government departments (such as the Departments of Justice, Lands, Planning and Environment, Business, Industry and Resource Developments) have specific units which deal with issues of native title under the *Aboriginal Land Rights Act*. These units address matters such as:

- providing specialised legal services to government and client agencies in respect of Aboriginal land and native title matters. A significant proportion of this work involves representing the Northern Territory in matters before the High Court, Federal Court, Aboriginal Land Commissioner and the National Native Title Tribunal (Aboriginal Land Unit, Department of Justice); and
- researching land related records and compile tenure history reports and maps of land parcels to assist with the resolution of native title and Aboriginal land claims (Native Title Unit, Department of Lands, Planning and Environment).

Negotiation threshold

The Ministry of Justice has advised that there are no negotiation threshold issues in the Northern Territory. The Northern Territory Government hosted the first Indigenous Economic Forum, *Seizing our Economic Future* held in Alice Springs in March 2003. Indigenous Economic Forums are a priority of the Northern Territory Government which made three initial commitments following the first forum:

- undertake a detailed examination of the various findings and proposals emerging from the forum;
- establish a more coherent policy framework across the whole of the Northern Territory Government in relation to Indigenous economic development at the Territory-wide and regional levels. This framework will identify the roles and responsibilities of individual departments and agencies in relation to program and policy responsibilities and be available to all relevant stakeholders;

21 <www.dcm.nt.gov.au/dcm/indigenous_policy/indigenous_policy.shtml>.

- establish a permanent high-risk task force on Indigenous economic development with nominated representatives from the NT Government, industry, Commonwealth agencies, Land Councils and ATSIC. The role of this task force will be to identify key strategies and directions, opportunities and barriers, establish and direct project teams where required, and deliver timely responses.[22]

In relation to intra-Indigenous disputes, the government's approach to Indigenous decision-making processes is to effectively leave these issues up to the NTRBs. It believes that after 25 years of managing the ALR Act, the NTRBs are well-equipped to manage the same overarching issues which apply to native title.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in the Northern Territory.

With regard to the National Park initiative, separate Parks Trusts (with individual ILUA's providing Northern Territory Freehold title and joint management arrangements) will be established. It is proposed to establish new National Parks over a 10-15 year period, the aim being to increase the stake Indigenous people will have in the economic future of the Northern Territory. It should be remembered however, that the High Court found that native title in the Keep River National Park is a co-existing right which was confirmed by the Federal Court determination handed down on 18 December 2003. The Court determined that native title exists and the nature and extent of the native title recognised by the common law, are non-exclusive rights to use and enjoy the land and waters in accordance with their traditional laws and customs. The determination also recognises the right of native title holders to 'make decisions about the use and enjoyment of the NT determination area by Aboriginal people who recognise themselves to be governed by Aboriginal traditional laws and customs'[23] And provides for exclusive rights over three fee simple areas granted to Aboriginal Corporations in the early 1990s.[24] Resolution of rights and interests in the Keep River is hoped will result in a co-existence template for negotiations for native title in National Parks and could in turn be applied to Pastoral Leases.

Native title has led to positive economic outcomes in the Northern Territory, for example, the negotiated settlements of the East Arm Point and Palmerston North developments with the Larrakia people, and as the determination over Alice Springs with the Arrernte people native title claimants and holders. In the case of the East Arm Point development, the Northern Territory Government acquired land for a Port. This prompted the NLC to lodge a native title application over the area. As a result of negotiation between the government and the NLC, land was provided to the Larrakia people as a freehold grant for commercial purposes and economic development. The end result has been that the Larrakia are developing some of the land at the present time. The settlement occurred a

22 <www.nt.gov.au/dcm/indigenous_policy/indigenous_policy.shtml>
23 *Attorney-General of the Northern Territory v Ward* [2003] FCAFC 283, Determination, para 5.
24 *ibid*, para 8 and 9.

week before the claim was due in the Federal Court, and as a result, the NLC subsequently withdrew the claim.

There are also Community Living Areas in the Northern Territory which comprise excisions from Pastoral Leases. These are complementary to ALRA land and are able to accommodate Indigenous people who have moved away from their country to get work. They are provided on the basis of need. The Northern Territory Government has agreed to continue granting Community Living Areas with the non-extinguishment of future grants of Northern Territory Freehold, but generally it relies upon resources from the Commonwealth Government to support the economic and social aspirations of these communities.

Queensland

Native title developments, as at 11 December 2003

	Qld	National Total
ILUAs (registered : in notification or awaiting reg decision)	60 : 13	105 : 16
Determination that native title exists (litigated : consent)	1 : 17	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 1**	13 : 2
Native title claimant applications not finalised (registered : not registered)	176 : 17	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

** Both are non-claimant determinations – one application was made by a Local Council, the other a Pastoral Lease Holder.

Not including hearings for the preservation of evidence.

Native title policy

The Queensland Government has repeatedly stated it prefers negotiating native title outcomes to litigation which is "costly for taxpayers and unlikely to resolve the practical issues which arise 'on the ground'."[25] However, it also notes that 'if negotiation fails and an agreed position cannot be reached, the claim shifts to the Federal Court for a judicial determination'.[26]

The government has produced a *Native Title Contact Officers' Manual* which is available on the internet.[27] The Manual is designed to assist government officials to 'ensure that native title is appropriately acknowledged, as required by law, in

25 'NT&ILS Business' <www.nrm.qld.gov.au/nativetitle/pdf/manual/core_business.pdf>. This is section 2.4 of the *Native Title Contact Officers' Manual* available at <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 10 November 2003. Other examples at <www.nrm.qld.gov.au/nativetitle/faq/manage_claims.html> accessed 11 November 2003; Department of Natural Resources and Mines, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, Queensland Government, October 2003, Brisbane, p3.

26 'NT&ILS Business' *ibid.*

27 <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 18 December 2003.

all business conducted across government'.[28] It sets out the government's approach to negotiations:

> The State represents the interests of all Queenslanders at negotiations. The State adopts the position that no one, including native title holders, should be worse off as a result of the resolution of a native title claim.
>
> In a negotiation, the State asks that:
>
> - all existing interests be recognised and protected;
> - claimants provide evidence that they can be recognised as native title holders under the Native Title Act. Broadly, this means they must show
>   - evidence of traditional ownership and continuing connection with the area claimed; and
>   - evidence of past and existing tenure and land use be considered so that it can be decided if a determination of native title can be made. Broadly, except in the special circumstances set out in the *Native Title Act*, native title cannot be found to exist where it has been extinguished by past grants of tenure or uses of the land. The *Native Title Act* sets out many of the past grants of tenure that extinguish native title.[29]

Queensland has a state regime enabling Indigenous control of various lands: the *Aboriginal Land Act 1991* (ALA) and the *Torres Strait Islander Land Act 1991* (TSILA). These state Acts address future act issues arising from the NTA and allow for lands to be transferred to or claimed by Indigenous people in Queensland. Future acts on land under the ALA or TSILA do not extinguish native title. Nor do they affect the right of any group to make a native title claim. The Department of Natural Resources and Mines is the sole administrator of the Acts. The Aboriginal Land Tribunal deals with claims. The ALA and TSILA were drafted and implemented prior to the *Mabo* decision and the *Native Title Act*. These Acts operate independently from the claims process and administration process of the *Native Title Act*.

At the time of writing, the Queensland Government had consulted about and drafted a new cultural heritage scheme for the State: the *Aboriginal Cultural Heritage Bill 2003*. This bill acknowledges the link between cultural heritage and native title. If the bill becomes legislation, primary responsibility for Indigenous cultural heritage will move from the State's Environmental Protection Authority to the Department of Natural Resources and Mines. This will mean that native title, the *Aboriginal Land Act 1991* and *Torres Strait Islander Land Act 1991*, and cultural heritage matters will all be included in the portfolio of one Minister.

The government agreed a protocol with the Queensland Indigenous Working Group (QIWG) in 1999. This agreement was signed by the Queensland Premier and the QIWG Chair, and is available on the internet.[30] In it, the two parties commit to an open and honest process of consultation in regard to legislative

28 <www.nrm.qld.gov.au/nativetitle/pdf/manual/welcome.pdf> accessed 18 December 2003.
29 <www.nrm.qld.gov.au/nativetitle/faq/manage_claims.html> accessed 11 November 2003.
30 <www.nrm.qld.gov.au/nativetitle/pdf/manual/protocol.pdf> accessed 4 December 2003.

and policy issues. The agreement provides some basic statements of how the government will provide the Indigenous Working Group with opportunities to contribute to policy development and to review and comment on legislation, and that the government will take the Group's views into account. The document specifies a range of matters in which consultations will occur. These include:

- mining agreements;
- strategies to reduce backlog of mineral tenements;
- native title procedural rights;
- Indigenous title to and management of national parks and protected areas;
- use of the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*;
- legislative review to incorporate native title into other state processes;
- incorporating social and environmental impact assessment into major project developments; and
- environmental protection policy.

The document notes the government may consult with other Indigenous parties as relevant, but specifically states that 'in every consultation with Indigenous parties, the Queensland Government will have due regard to the representative mandate of those parties when taking into account and lending weight to the parties' views'.

From 1998 to 2002 Queensland had its own procedure for dealing with applications for exploration and mining, and their effect on native title. States are permitted, under the NTA, to adopt their own procedures for these matters.[31] In an attempt to deal with a high volume, and particularly the backlog, of mining and mining exploration permit applications, the State has been involved in negotiating a number of more general approaches for dealing with the applications. This has built on the 1999 Protocol between the government and the Queensland Indigenous Working Group, and on the 2001 Kalkadoon Explorer Reference Group (KERG) ILUA.[32] The KERG ILUA is an agreement between the State and the Kalkadoon people addressing the backlog of exploration permit applications in the Kalkadoon claim area of north-west Queensland.

Also in 2001, the State and QIWG negotiated a Statewide Model ILUA[33] to deal with the backlog of exploration permit applications over the whole of the State. The State agreed to fund the negotiation and authorisation costs leading to the model ILUA and also to provide funding for additional NTRB staff needed to process mineral tenements granted through the model ILUA provisions.[34] The model ILUA operates as a standard agreement which parties can adopt, thereby saving them the time and expense of negotiating their own arrangement. However, the parties are free to negotiate their own arrangement under the NTA procedures, should they so wish. The model ILUA terms, which are endorsed

31 NTA, ss25(5) & 43.
32 <www.nrm.qld.gov.au/nativetitle/pdf/kerg_ilua.pdf> accessed 4 December 2003.
33 <www.nrm.qld.gov.au/nativetitle/pdf/statewide.pdf> accessed 4 December 2003.
34 <www.nrm.qld.gov.au/nativetitle/archives/statewide.html> accessed 16 December 2003.

by four Queensland NTRBs,[35] establish an area agreement which native title claimants can adopt as regulating the conduct of mineral exploration within their claim.

Following court proceedings throughout 2001 and 2002 challenging the Queensland procedures, in 2003 the government decided to adopt the Commonwealth's right to negotiate process, administered by the National Native Title Tribunal. This scheme included the expedited procedure provisions. However, the Queensland Government, aware of the use of the expedited procedure in other jurisdictions, sought to have some arrangement to give greater protection to native title interests than the standard expedited procedure provided. A Queensland Government official giving evidence to a Commonwealth Parliamentary inquiry explained that the expedited procedure is a considerable reduction of the procedural rights afforded to native title parties.[36] Therefore the Queensland Government intended that, for exploration permits proposed to pass through the procedure, there should be conditions providing guaranteed heritage protection plus a well-established notification process, meetings, dispute resolution and arrangements for inspections. These conditions were negotiated with QIWG and the Queensland Resources Council and the parties agreed on the *Native Title Protection Conditions*.[37] The Conditions, which have the effect of increasing the protection for the native title parties, can be placed on an exploration tenement that the government proposes to grant through the expedited procedure. Native title parties are still able to object to the tenement's processing through the expedited procedure, but it is not expected that NTRBs will support the objections.[38]

In March 2003, the State released its draft *Rural Leasehold Land Strategy*,[39] followed by regional consultative workshops. The Strategy has been developed to guide the sustainable management and use of state rural leasehold land. State rural leasehold land, which is predominantly for grazing and agriculture and covers about 65% of Queensland.[40] The draft Strategy applies to perpetual leases, pastoral holdings, term leases, and special leases issued for grazing and agricultural purposes and has formed an important background to native title negotiations. This is so particularly in negotiations between native title holders and pastoral lessees, as any proposal for tenure upgrade, for example, has now to be dealt with in the context of the likely requirements of the Strategy. The Strategy specifies its goals as including recognition and support for cultural,

35 Queensland South Representative Body, Gurang Land Council, Central Queensland Land Council, and North Queensland Land Council: <www.nrm.qld.gov.au/nativetitle/dealings/ilua.html> accessed 16 December 2003.

36 G Dickie, evidence to House of Representatives Standing Committee on Industry and Resources*, Resource and Exploration Impediments*, Official Committee Hansard, 7 March 2003, pp355-362.

37 <www.nrm.qld.gov.au/nativetitle/mining/ntpcs.html> accessed 4 December 2003.

38 National Native Title Tribunal Media Release, *Tribunal welcomes Queensland agreement making process for Indigenous and mining groups*, 16 June 2003.

39 <www.nrm.qld.gov.au/land/state/pdf/draft_leashold_land_mar03.pdf> accessed 16 December 2003.

40 There are over 8,000 leases covering an area of approximately 86 million hectares <www.nrm.qld.gov.au/land/state/managing_lh_land.html> accessed 16 December 2003.

traditional and heritage values and is based on 'recognis[ing] the interests of traditional owners and their implications for the management and use of state rural leasehold land (by encouraging the use of Indigenous access and use agreements)'.[41]

In the move to achieve native title related outcomes in Queensland, a number of agreements, ILUAs and others, have been reached. The number of registered ILUAs nationwide at 8 October 2003 was 90. Of these, 54, or 60%, were in Queensland, although the State itself is not a party to all of these agreements.

The State has provided funding to the NTRBs to assist with future act matters. The funding is for $70,000 a year for two years for each NTRB to employ an officer to deal with future acts. There is a further offer of $75,000 per year to each NTRB for a further two years on the condition that the designated officer not only processes future act applications but is involved in capacity building assisting the native title group to set up its own processes for response, for example, issuing of notices and holding of meetings.

In some instances, assistance from the State has also been received for authorisation meetings, and for the meetings necessary to negotiate ILUAs and other agreements. These have included aspects of the pilot South-West Petroleum Project and the Regional Forestry Agreement. The National Native Title Tribunal has also provided financial and logistical assistance to hold consultations, information meetings and mediation conferences.

The Queensland Government is involved in a broad partnership framework (involving Aboriginal and Torres Strait Islander communities, the government, and other parties) to work toward a better future for Indigenous people. As part of the framework, the Department of Natural Resources and Mines (NR&M) and the Environmental Protection Agency (EPA) are developing a proposal for a Land, Cultural Heritage and Natural Resources Agreement. The proposal, approved by Cabinet in November 2002 for community consultation, is currently a discussion paper called *Looking After Country Together*.[42] As part of the community consultation process the Department of Aboriginal and Torres Strait Islander Policy in association with NR&M and the EPA co-ordinated a series of fifteen state-wide community workshops from September to November 2003. The comments and submissions arising from the consultation process will assist in preparing the Agreement. *Looking After Country Together* states that the final agreement 'will lead to a formal [government] commitment…to share responsibility for outcomes, and to share effort, risks and benefits in endeavours to improve Indigenous people's access to and involvement in the management of land and sea country'.[43] While the final agreement is not yet finalised, it is possible to get some idea of the government's intentions from *Looking After Country Together*. The key outcomes envisage increased Indigenous ownership of and access to traditional land and sea country, and increased Indigenous

41 Section 4.2 draft State Rural Leasehold Land Strategy.

42 <www.nrm.qld.gov.au/land/partnership/pdf/discussion_paper.pdf> accessed 18 December 2003.

43 *Looking After Country Together*, p5.

involvement in its planning and management.[44] The overarching vision for the final agreement is that:

> By 2012, Indigenous people have significant access to, and involvement in the management of land and sea country. Indigenous people will have the resources and skills needed to effectively plan for and sustainably manage land and sea country to meet their aspirations.[45]

Looking After Country Together also covers native title, recognising that government systems need to be updated and better incorporate native title interests.[46] The paper also proposes review and where necessary amendment of legislation that relates to the management and allocation of natural resources to make such legislation compatible with contemporary Indigenous rights and interests, including native title interests.[47]

Government structure

Ministerial responsibility for native title in Queensland lies with the Minister for Natural Resources and Mines. This responsibility was transferred from the Premier in July 2002, and so the majority of the government's native title engagement is the responsibility of the Department of Natural Resources and Mines. The Department of Premier and Cabinet retains a native title policy officer responsible for advising Cabinet on native title issues.

Negotiation threshold

Prior to the High Court's August 2002 decision in *Western Australia v Ward*,[48] the state's policy towards the provision of connection reports was set out in its *Guide to Compiling a Connection Report*.[49] As a result of the *Ward* decision, however, the State revised its connection guidelines and released them in October 2003.[50]

The revised *Guide* does not include 'any substantive discussion about the underlying legal issues that must necessarily inform the writing of a connection report'.[51] However 'the author of a connection report may need to consider a number of key legal concepts that have been discussed in recent High Court

44 'Increased ownership of and access to traditional lands is not only central to the well being of Indigenous people, is it consistent with Queensland Government's commitment to social justice and to the fulfilment of prior promises.' *Looking After Country Together,* p8.

45 *Looking After Country Together,* p10.

46 '[T]he government recognises the need to update land policies and review pre-native title legislation to ensure that land, natural resource and conservation management and administration properly accommodate native title rights and interests', *Looking After Country Together,* p16.

47 To meet these strategies, *Looking After Country Together* suggests outcomes such as 'Land transfer and native title policy mechanisms and legislation are effective and well integrated', and 'Land, cultural heritage and natural resource legislation and policies accommodate Indigenous native title interests', p17.

48 *Western Australia v Ward* (2002) HCA 28.

49 Queensland Government 1999 *Guide to Compiling a Connection Report*. Brisbane.

50 Queensland Government, *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, October 2003, Natural Resources and Mines, Native Title and Indigenous Land Services.

51 *ibid*, p1.

decisions, particularly *Yorta Yorta* (2002) and *Ben Ward* (2002)'.[52] In relation to establishing a claim, the *Guide* also makes clear that:

> In accordance with a preference for the recognition of native title through a mediation process rather than a litigated process, the State wishes to establish and maintain a dialogue with native title claim groups, their representatives and experts commissioned to research and write their connection report.[53]

and that:

> For purposes of mediation, the State is willing to accept the first documented contact as the primary reference point from which an inference might then be made back to the time of sovereignty…It is also recognised that the data more pertinent to an anthropological inquiry can only be found in recorded studies undertaken well after the date of first contact.[54]

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Queensland.

In a number of negotiations, the State has actively pursued outcomes beyond a native title determination. The Comalco, or Western Cape Communities Co-existence Agreement, signed in 2001, has resulted in 2003 in Comalco's divestment of the Sudley pastoral lease to the native title holders. The transfer involves economic and social outcomes in terms of several million dollars to be held in a charitable trust. All infrastructure and cattle have been given to the people; as well there are training and employment opportunities and the opportunity for people to go back onto country and develop income-generating schemes such as tourism. There will also be a native title outcome sought through the application of s47 *Native Title Act* to the lease, and a determination of exclusive possession, anticipated and allowed for by the structure of divestment.

A recent agreement in the north-west has been reached with the Department of Main Roads over the Mt Isa/Camooweal road. This will involve the opportunity for tenders for construction and employment to be submitted by local traditional owner groups, based on the model of the work done for the Georgina River Bridge and Highway project in Camooweal in 2000-2002.[55]

In other parts of the state many of the outcomes are in relation to mining and exploration. Only a minority of claims is being negotiated for native title determinations, although a number of claims are formally in mediation with the Native Title Tribunal. In one region, for example, in relation to negotiations for agreements, the Native Title Representative Body (NTRB) certified seven ILUAs in 2003 and expects to certify between 15 and 30 over the next few years. The NTRB has also been involved with the Environmental Protection Authority (EPA)

52 *ibid.*
53 *ibid*, p3.
54 *ibid*, p5.
55 <www.ministers.dotars.gov.au/ja/releases/2000/november/a167_2000.htm> accessed 16 December 2003.

in the Queensland Regional Forestry Agreement.[56] Other discussions with the State are taking place in relation to opal mining and a gem fields ILUA. Over the past eighteen months, two NTRBs have been dealing with a government authority, Burnett Water Pty Ltd, in relation to four projects. Although a proposed ILUA was not signed by all the native title applicants, a number of related outcomes have been agreed. These include some cash compensation; training, employment, and business opportunities; cultural awareness training for all contractors; and funding for a project officer for the NTRB to be employed full-time for one year. The company has also helped with a project proponent service agreement.

Other negotiations have resulted in a Memorandum of Understanding between Ngadjon Jii people, the EPA, and the Wet Tropics Management Authority, a Commonwealth agency.[57] Although separate from the native title claim negotiations, and explicitly not a native title determination or recognition of native title, the MOU arose out of those discussions and through the active involvement of the Native Title and Indigenous Land Services negotiator. Perhaps most significantly, the area of agreement is within a National Park, the first of its kind in Queensland. Included in the MOU is an agreement that access to an area of the park of particular significance, known as Top Camp, will be restricted to Ngadjon Jii people. The MOU also includes a Ngadjon Jii right to bury, which the EPA could include, not as a native title right, but under the *Nature Conservation Act 1992* (Qld). The MOU is specific about the agreement being to 'maximise the economic and social benefits' to Ngadjon Jii People and to acknowledge the cultural importance of the area. The Commonwealth, through the Wet Tropics Management Authority, played an active role in the agreement, and is a party.

South Australia

Native title developments, as at 11 December 2003

	SA	National Total
ILUAs (registered : in notification or awaiting reg decision)	1: 0	105: 16
Determination that native title exists (litigated : consent)	0: 0	7: 24
Determination that native title does not exist (litigated : consent)	1: 0	13: 2
Native title claimant applications not finalised (registered : not registered)	21: 7	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	1 : 1	11 : 22

Not including hearings for the preservation of evidence.

56 The Regional Forestry Agreement process emerged from the National Forest Policy, agreed to by the Commonwealth, State and Territory governments in 1992. This involvement ended on 30 June 2003.

57 See joint media release, *Historic Accord Recognises Benefits of Indigenous Park Management*, 27 February 2003, issued by Queensland Government's Environmental Protection Agency, ATSIC, Wet Tropics Management Authority, and North Queensland Land Council <www.rainforest-crc.jcu.edu.au/latestNews/media%20releases/IndParkManage.doc> accessed 16 December 2003.

Native title policy

The South Australian Government's approach to Indigenous decision-making processes is to acknowledge and to work effectively with the Aboriginal Legal Rights Movement (ALRM) and the Congress of Native Title Management Committees. The Congress has representation from all of the native title claims in South Australia represented by the ALRM. This forum, administered by the ALRM, represents the grass roots constituency that provides the ALRM (and indirectly the South Australian Government) with instructions on progressing their respective native title claims by negotiation and/or litigation.

The South Australian Government supports the State-wide ILUA negotiation process which is described by the Indigenous Land Use Agreement (ILUA) Negotiating Team as "a joint venture by the parties involved in negotiating native title issues in South Australia". Key stakeholders that participate in this process include the South Australian Government, the ALRM, the South Australian Farmers Federation, and the South Australian Chamber of Mines and Energy. The South Australian Government's approach to the ILUA negotiations is by way of a five-member ILUA Negotiation Team comprising the Native Title Section of the Crown Solicitor's Office in the Attorney-General's Department, the Department of Primary Industry Resources, the Department for Environment and Heritage, and the South Australian Department of Aboriginal Affairs and Reconciliation (DAARE).

The SA Crown Solicitor's Office advises that the Native Title Section also works closely with the Attorney-General's Indigenous Land Use Agreement (ILUA) Negotiating Team in efforts to negotiate Indigenous Land Use Agreements as an alternative to taking cases to court. The Crown Solicitor's Office has provided advice on native title and land-related issues to Ministers, Departments and agencies, has assisted the Attorney-General in the development and preparation of State native title legislation, and has prepared a Native Title Handbook for the assistance of Departments and agencies.

It is significant that the NTRB for the State has publicly commended the Government's approach to engagement. The ALRM's attitude to the South Australian Government is best summed up by Malcolm Davies (ALRM Chairman) with reference to the State-wide Framework Negotiation Strategy whereby "the ALRM Council has established strong workable relationships with peak government and non-government bodies".[58] Neil Gillespie (CEO, ALRM) adds that "there is wide support from the Government of South Australia and other representative peak bodies in working with ALRM Council and the Native Title Unit."[59]

The South Australian Government confirms that the ALRM has received insufficient funding from ATSIC to enable them to negotiate; this resulted in the South Australian Government providing funds totalling $5.4 million to 30 June 2003, with an additional $1.5 million for the current financial year.

58 Aboriginal Legal Rights Movement Inc, *Annual Report 2001-2002*, Adelaide, 2002, p2.
59 *ibid*, p3.

The ALRM as a relatively small NTRB does not currently have the capacity to comprehensively promote the economic and social development of the Indigenous people it represents. In fact, the ALRM highlights the "most difficult issue confronting ALRM are the limitations on the services that ALRM is able to provide to native title claimants. The limitations on service provision exist because of budget restrictions."[60] Furthermore, the ALRM states that even though "the South Australian Government provided significant funding assistance to ALRM to enable the State-wide Framework Negotiation Strategy to progress" the South Australian Government has indicated that it too "only has limited funds available to assist ALRM this financial year."[61]

Government structure

The South Australian Premier and Attorney-General have joint responsibility for native title issues in South Australia. The Crown Solicitor's Office in the Attorney-Generals Department provides a legal service to government in the areas of native title law, Aboriginal heritage and related matters.

Negotiation threshold

The South Australian Government has negotiation threshold issues which include the registration of a native title claim before it will proceed with negotiations (notwithstanding the fact that it engages in non-native title negotiations), the resolution of any significant native title claim overlaps, the need to have a reasonably cohesive native title claimant group, a willingness to negotiate, and a stable functioning management committee. It is considered that the effective functioning of the Management Committees and the ALRM will provide the necessary cohesion and stability to enable inter and intra-group disputes to be resolved, enabling negotiated outcomes to occur.

The Crown Solicitor's Office has indicated that the South Australian Government has no connection report criteria for Consent Determinations. It intends to develop criteria over the next 12-15 months.

A statement by the government in late 2002 indicated a willingness to pursue consent determinations 'as an adjunct to pre-negotiated ILUAs in appropriate cases'.[62] The State has proposed a three-stream level of assessment, providing different options to the claimants: the first, to proceed to a consent determination; the second, to proceed to a negotiated ILUA (but a consent determination would not be available); and the third stream where the State considers 'the claim is so tenuous or ill-founded that the State cannot justify recognising it through ILUA negotiation'.[63] The government stated that it will develop, with ALRM, the relevant levels of connection evidence for categorising claims under these three streams, and the means by which the evidence is obtained.

60 *ibid*, p1.
61 *ibid*, p21.
62 See 'Consent Determinations' <www.iluasa.com/news.asp>, accessed 23 December 2003.
63 *ibid*.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in the state.

The South Australian Government is negotiating with the Narunggar people. The ALRM certified the Narunggar ILUA over an area with no registered native title claim. The Narunggar ILUA embraces a wide range of issues including local government, planning, heritage and future acts. The negotiations over the Port Vincent Marina with the Narunggar people arose because the Crown Solicitor's Office could not guarantee that native title was extinguished. Therefore, an ILUA was negotiated.

National Parks in South Australia are problematic at the present time because National Parks declared before 1975 extinguished native title. As a result, the South Australian Government is considering its position regarding future co-operative management. There is also a policy question on the level of engagement the government wants to have with Indigenous people in park management. It is proposed for example, that the Unnamed Conservation Park, in the far central-west of South Australia, on the border of Western Australia will be managed by the Traditional Owners under a three tiered agreement.

The South Australian Government considers that National Parks issues will be addressed on a park by park basis, rather than by a single overarching agreement. There is no single government approach to the joint management of National Parks at the present time. The unnamed conservation park is under the *Maralinga Tjurutja Land Rights Act 1984* (SA). The South Australian Government is seeking co-operative management of National Parks with Aboriginal people: legislation is being considered to allow the transfer and co-management of the unnamed conservation park and the establishment of a Board of Management involving Indigenous people as well as an Advisory Committee. It is envisaged that amendments under the *National Parks and Wildlife Act 1972* for the unnamed conservation park will be adapted more generally by the South Australian Government.

Future Act agreements between native title claimants and mining/exploration companies occur in South Australia and generally include provisions for heritage, land access, low impact exploration procedures, protection of Aboriginal sites and employment and training opportunities.

Statewide negotiations[64]

In 1999, the SA Government proposed to ALRM that native title claims in South Australia should be settled by negotiation. The government indicated that:

- it expected that negotiated agreements would involve recognition of native title, rather than its extinguishment;
- everything was 'on the table' for potential negotiation;[65] and
- one of the government's primary goals for negotiated agreements would be to establish how native title rights are to be understood to enable practical co-existence.

The proposal for state-wide negotiations was supported by SA Chamber of Minerals and Energy (SACOME) and the SA Farmers Federation (SAFF). Meetings between ALRM, the government, and these two organisations commenced in 1999, with all parties agreeing that court actions would be a costly and lengthy way of pursuing settlement of native title claims. The parties also considered that litigation would likely hinder sustainable relationships between native title groups and other parties.

ALRM had some preliminary discussions with these organisations about the possibilities. However, ALRM was cautious not to assume the role of negotiating the mechanisms and procedures for settling native title claims in South Australia without substantial involvement of native title claimant groups. As ALRM candidly observed about itself:

> Institution building with native title claimants was a fundamental part of our work in 2000 because no existing institution has authority to speak for native title claimants in Statewide negotiations. … While ALRM is a Statewide Aboriginal organisation, managed through an elected board, its representative structure reflects its original primary role as a criminal law and justice advocacy service, with members elected from amongst the residents of the various places in SA where large numbers of Aboriginal people live. The structure long predates recognition of native title and has no clear accountability to native title groups. The opportunity presented to ALRM to enter into Statewide negotiations thus immediately presented the challenge of establishing whether the various

64 Material in this case-study is drawn from the following sources, unless otherwise indicated: P Agius & o'rs, "Doing Native Title as Self-Determination: Issues From Native Title Negotiations in South Australia", draft paper for *Pacific Regional Meeting of the International Association for the Study of Common Property*, Brisbane, September 2003; P Agius & J Davies, "Initiatives in Native Title and Land Management in South Australia: the Statewide Native Title Negotiations Process", conference paper *15th Biennial Conference of the Australian Rangeland Society*, Kalgoorlie, September 2002; P Agius, "Innovative Agreements in Native Title and Cultural Heritage", conference paper for *Cultural Heritage and Native Title 2003 Conference*, Brisbane, September 2003; P Agius & J Davies, "Post Mabo Institutions for Negotiating Coexistence: Building a Statewide Negotiation Process for Native Title in South Australia", conference paper *2001, Geography – A spatial odyssey*, Otago, January 2001; J Davies, "Traditional CPRs, new institutions: Native Title Management Committees and the Statewide Native Title Congress in South Australia", conference paper *Pacific Regional Meeting, International Association for the Study of Common Property*, Brisbane, September 2003; State of South Australia (Indigenous Land Use Agreement Negotiation Team), *Submission to Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, October 2000, available at <www.aph.gov.au/senate/committee/ntlf_ctte/report_19/submissions/sub06.doc> accessed 22 December 2003.

65 J Davies "Traditional CPRs, new institutions" *ibid*, p2.

> native title groups want to be part of Statewide negotiations, and, if so, how they will be represented.[66]

In mid 2000, the SA Government provided $870,000 to the ALRM to facilitate decision-making by native title groups about participation in the proposed state-wide negotiations. The government indicated the funds had 'no strings attached'.[67] The decision-making process involved native title claims throughout the state. Native title claims in SA each had their own native title management committee, drawn from among the claimants, to assist in managing the claim. Across the state, there were over 20 management committees, each having authority from its claimant group to manage that claim process and the exercise of procedural rights under the NTA. Accordingly, ALRM considered it important for these committees to consider the proposal for state-wide negotiations.

A series of meetings of the native title management committees culminated in them deciding to form a state-wide organisation and to participate in the proposed state-wide negotiations. The state-wide group of native title management committees, called the Congress, made its decisions through an 'opt in' process. This process allowed for issues to be discussed within each native title management committee, which follow their own procedure, and then report the result back to the larger meeting leading to the larger group's collective decision.

The comprehensive and inclusive decision-making about entering negotiations gave the SA Government confidence in the process and ALRM's role. The government explained the process to a Commonwealth Parliamentary Inquiry:

> Recently, almost all the State's Native Title Management Committees, which represent the great majority of native title claimants in South Australia, agreed to enter into ILUA negotiations on matters of State-wide application as one group, with the ALRM's Native Title Unit to act as a facilitator for the negotiations. ... The outcome of this meeting [of the Congress of native title management committees] is a strong signal that native title claimants, as well as the South Australian Government, SAFF and SACOME, see the ILUA negotiations as being preferable to litigation in resolving native title issues.[68]

The SA Government has made a concerted effort to ensure broad engagement and input into the negotiations. The government established a Cabinet Committee to oversee the progress of the negotiations comprising the Attorney-General, Deputy Premier (also the Minister for Primary Industries and Resources), Minister for Environment and Heritage, and Minister for Aboriginal Affairs. The SA Government is represented in the state-wide process through a negotiating team drawn from the main public sector agencies that impact on native title matters.[69] This team enables the government's policies from a wide field to be brought to the negotiation table, and the outcome of negotiations to be put in place in agencies.[70]

66 P Agius and J Davies "Post Mabo Institutions for Negotiating Coexistence"*, op.cit,* p3.

67 *ibid,* p4.

68 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission, op.cit,* p4.

69 Members of the team come from the Attorney-General's Department, Department of Primary Industry Resources (PIRSA), Department for Environment and Heritage (DEH), and South Australian Department of Aboriginal Affairs and Reconciliation (DAARE); see <www.iluasa.com/sag.asp> accessed 22 December 2003.

70 See <www.iluasa.com/sag.asp> accessed 22 December 2003.

Since 1999, more organisations have joined the state-wide negotiations including the SA Fishing Industry Council, Local Government Association of SA, and Seafood Council (SA) Ltd. The National Native Title Tribunal attends meetings as an observer.

While all parties acknowledge the process is cheaper than litigation, there is still a need for substantial funding, particularly to enable the many meetings to occur. Continuity of funding for participation is an issue for all parties because each is reliant on special allocations from State and/or Commonwealth sources to maintain its involvement. An ALRM officer explained that 'mutual advocacy for each other's funding requirements has emerged as all parties realise that they cannot make progress to their own goals for the negotiations without the participation of other parties'.[71]

Certainly all parties have their funding difficulties, but the major resourcing issue is funding for ALRM and native title claimants to take part in the negotiations. This has been identified by both the SA Government[72] and ALRM. Both parties are hoping ATSIS will be able to assist with funding, but ATSIS/ATSIC's historic emphasis has been on litigation/mediation of specific claims; it did not provide funding for the state-wide process.[73] Early in the negotiations, the State Government explained this situation to a Commonwealth Parliamentary Inquiry:

> Under the Native Title Act it is envisaged that such funding [funding of the representative body (ALRM) and native title claimants to take part in the negotiations] will be provided by ATSIC. To date, however, despite several approaches and submissions to ATSIC, it has refused to provide any such funding, preferring instead to fund only litigation. The state government is of the view that this priority for litigation is inappropriate, although it acknowledges that preparation of cases does need to continue in parallel with ILUA negotiations. We find ATSIC's stance frustrating and baffling. In our view, resources should be applied to the ILUA negotiation process because of the very real prospect of greatly reducing the long-term cost of resolving native title issues.[74]

Along with the development of the Congress (representing native title management committees across the state), the process has seen negotiations conducted through a main table and various side tables. The Main Table:

- develops protocols for discussion between parties for the settlement of individual native title claims;
- provides a forum for parties to raise concerns from their 'sector'; and
- oversees a work program to address these concerns.

The Side Tables:

- consider specific issues (such as mineral exploration, national parks or fishing and sea rights);
- involve only those parties who have active interests in those particular issues;

71 P Agius and J Davies "Initiatives in Native Title and Land Management in South Australia" *op.cit*, p3.

72 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission*, *op.cit*, p10.

73 P Agius "Innovative Agreements", *op.cit*, p3.

74 State of South Australia (Indigenous Land Use Agreement Negotiation Team) *Submission*, *op.cit*, p10.

- enable more detailed research and discussion of these issues; and
- formulate proposals for the Main Table to consider.

An important aspect of the process is ongoing achievement of meaningful outcomes, rather than locking claimants into waiting for an all-or-nothing settlement choice at some stage in the future. Accordingly, while progressing toward a mechanism for addressing native title throughout the state, there have also been substantial and important outcomes during the process. ALRM sees the state-wide negotiation process as already having delivered significant outcomes including:[75]

- Several pilot projects involving negotiations between native title management committees and development interests which have produced Memoranda of Understanding and ILUAs with support from the Congress;
- On-going multi-stakeholder working parties actively reviewing a range of issues, including Aboriginal heritage management, National Parks and land access;
- High levels of community and stakeholder participation in relationship-building and cross-cultural recognition;
- Establishment of the Congress of South Australian Native Title Management Committees (Congress) as a recognised peak body on native title issues in the state;
- Development of Native Title Management Committees' (NTMC) capacity to make decisions for themselves, to choose whether or not to be involved in negotiations proposed by the state, to set strategic direction and priorities in the process, and to participate directly in decision-making and deliberations about native title and Indigenous rights;
- Significant increases in the capacity of Native title management committees and the Congress to drive and manage complex negotiations;
- Reduced anger, frustration and time delays for native title interests and other parties in Native Title processes;
- Withdrawal of a government argument that native title was historically extinguished across the state in 1836;
- Substantial amendment of the Confirmation and Validation Bill before it was presented to the South Australian Parliament in December 2000;
- Aboriginal representation on the state government's Ministerial Advisory Board;
- Continuing engagement on issues of policy and process from native title claimants, the State Government, SAFF, SACOME, SAFIC, and the Seafood Council of Australia, and the South Australian Local Government Association (SALGA);
- Clear guidelines and procedures for Aboriginal burials on pastoral leases, facilitating the continuation of this traditional practice;[76] and

75 Unless otherwise indicated, this list is derived from P Agius and o'rs "Doing Native Title as Self-Determination", *op.cit*, pp8-9.

76 P Agius and J Davies "Initiatives in Native Title", *op.cit*, p5.

- developed an employment and training strategy for Aboriginal people in the minerals and energy sector.[77]

It is illustrative to consider a few of these points in more detail.

One of the pilot projects (the first point listed above) has been the development of a mineral exploration template. This was developed by ALRM, SACOME and the SA Government over two years. It provides standard terms for an ILUA which claimant groups can adopt specifying an alternative procedure to the NTA's right to negotiate. Individual parties are then able to choose this arrangement (saving time and money) or negotiate different terms. The template has been/is being used in a couple of negotiations by the Antakarinja and Arabunna claimant groups. There have also been moves, at the state-wide level, toward a Pastoral Template and Local Government template, which may be developed by broadening the principles negotiated in a specific negotiations.

The second point included in the list of significant outcomes above is the issue of Aboriginal heritage. ALRM, SACOME, SAFF and the government worked together to develop a proposal for a South Australian Aboriginal Heritage scheme. The proposal follows the parties' agreement there should be a scheme that would provide both a strong level of protection of Aboriginal heritage and certainty for all land users about how they can use the land involved. The proposal is available on the internet[78] and has been distributed for public consultation.

The state-wide negotiation process is not only providing benefits at the macro level, but there are also tangible results for individual native title claims. The ALRM sees a useful outcome of the process so far has been the SA Government's acceptance of the authority and governance structure established through the native title management committees. The government does not require native title claimant groups in SA to prove their connection to country through assembling anthropological evidence in a connection report prior to entering negotiations.[79] This is in contrast to government requirements relating to the initial step in Queensland (1999) and WA (2001).[80]

The SA Government has commended the state-wide negotiation process to the Federal Court, saying:

> The process has, amongst other things, developed a high level of understanding between the parties and enhanced the capacity of claim groups to negotiate in an informed and responsible manner. The establishment of the Congress of Native Title Management Committees is but one example of the capacity building strategy and the ILUA process generally. In this light the State [Government] has worked and continues to be willing to work in a constructive way with … other parties to resolve claims by negotiation/mediation rather than litigation.[81]

77 *ibid*, p1.

78 See <www.iluasa.com/heritage_prot_scheme.asp> accessed 22 December 2003. The proposal is available at <www.iluasa.com/HSTPaper11Jun02.pdf>.

79 Note, however, that though the government does not require connection evidence before commencing negotiations, it does require connection evidence if it is to reach a consent determination in relation to a particular native title claim; see heading 'Consent Determinations' at <www.iluasa.com/news.asp> accessed 23 December 2003.

80 J Davies "Traditional CPRs, new institutions" *op.cit,* pp13-14.

81 P Agius "Innovative Agreements", *op.cit*, p4.

Native title developments, as at 11 December 2003

	Tas	National Total
ILUAs (registered : in notification or awaiting reg decision)	0 : 0	105 : 16
Determination that native title exists (litigated : consent)	0 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	0 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	0 : 1	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

Not including hearings for the preservation of evidence.

Native title policy

Native title has not been established as a major area of policy in Tasmania. There is no recognised Native Title Representative Body for Tasmania and currently there is only one native title application that affects Tasmania. The Tasmanian Government is not at the negotiation stage with this application.

Government structure

The Tasmanian Premier has personal responsibility for Aboriginal Affairs in Tasmania as the Office of Aboriginal Affairs is within his portfolio and is located within the Department of Premier and Cabinet. The Department is also responsible for administering the *Aboriginal Lands Act 1995* (Tas). The Premier is also the Minister for Tourism and National Parks.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Tasmania.

The Tasmanian Government has indicated that it has its own plans for handing land back to Aboriginal people as well as plans for the co-management of national parks.

In October 1999 the Tasmanian Government announced its intention to table in the State Parliament a package of measures to address reconciliation between Aboriginal people and the wider Tasmanian community. The package included:

- the transfer of eight areas of Crown Land totalling 52,800 ha;
- measures for determining Aboriginality for the purpose of electing members of the Aboriginal Land Council of Tasmania; and
- measures to enable the Aboriginal community to conduct traditional burial and cremation ceremonies.

The introduction of the package of measures followed two previous pieces of legislation that transferred land to the Aboriginal community. The first was the enactment of the *Aboriginal Lands Act 1995* which enabled the transfer of 12

parcels of land to the Aboriginal community. The second was the enactment of the *Aboriginal Lands Amendment (Wybalena) Act 1999* which returned Wybalena to the Aboriginal community. These Acts partially recognised the rights of the State's Aboriginal people to practice their culture and transferred ownership of a total of thirteen parcels of Crown land to the Aboriginal Land Council of Tasmania.

In response to concerns about the lack of consultation raised by the Tasmanian community about the Premier's reconciliation package, the Tasmanian Legislative Council established a Select Committee of Inquiry in November 1999 "to inquire into and report upon the *Aboriginal Lands Amendment Bill 1999*, having regard to the *Aboriginal Lands Act 1995* and any other matters seen as relevant to the Bill". The Select Committee reported in June 2000.[82] The Committee rejected the proposition that land transfers will assist reconciliation and concluded that Aboriginal people in Tasmania have no greater rights to the return of their land than Aboriginal people elsewhere in Australia. The Committee noted that claims by Tasmanian Aboriginal people are not sufficient justification to transfer Crown land. The Committee recommended that any future land claims or proposed transfers of land be removed from the political arena and be fairly assessed by an independent expert.

The Tasmanian Government responded to the Select Committee's report in August 2000 by stating that it was committed to continuing the process of reconciliation that was commenced by the Council for Aboriginal Reconciliation and that reconciliation is not just words, it requires positive actions. "The State must move forward with reconciliation by taking actions to support the long-term survival of Aboriginal culture in this State and to ensure a strong future for the Aboriginal community".[83]

The government was criticised in the report for not consulting broadly about the proposed transfer of land. The Tasmanian Government replied that it supported the view of eminent Australian historian Professor Henry Reynolds that preceding Tasmanian governments were direct successors of the colonial governors of the 1830s and, as such, the current Tasmanian Government has a responsibility to rectify past injustices. The government believed that it had a responsibility to negotiate with the Aboriginal community and to propose legislation to the Parliament.

The Select Committee also stated that it believed that land claimed by the Aboriginal community should be assessed against certain criteria. The Tasmanian Government's response was that it used the following criteria to assess the land claims of the Aboriginal community:

- significance of the land to the Aboriginal community;
- and to be owned by the Crown;
- other existing interests over the land not to be impediments to transfer;
- significance of land to non-Aboriginal community to be recognised;
- natural values to be recognised;

82 <www.parliament.tas.gov.au/ctee/old_ctees/aboriginallands.htm> accessed 5 Sepember 2003.

83 Tasmanian Government *Response to Legislative Council Select Committee Report on Aboriginal Lands*, 2000, p5.

- public access issues to be addressed;
- appropriate arrangements able to be made for dealing with public infrastructure.[84]

The Tasmanian Government rejected the proposition that the transfer of land to the Aboriginal community should be regarded as just another type of land reclassification. The return of land to the Aboriginal community also involves Indigenous rights and aspirations, the redress of historic grievances and retention of Aboriginal cultural heritage. The procedures used in other processes are not suitable for dealing with these matters sensitively.

The Tasmanian Government reiterated its intention to proceed with the package of measures.

On 12 September 2003, the Tasmanian Premier announced his intention to again reintroduce legislation proposing the hand-back of Crown land to the Aboriginal community in Tasmania. The government's previous attempt to return over 50,000 hectares of Crown land to Aboriginal people in Tasmania was blocked by the Legislative Council in March 2001.

The Department of Premier and Cabinet has advised that the Tasmanian Government is giving consideration to the co-management of National Parks in Tasmania. The details of the approach that the Tasmanian Government will adopt is still under consideration. The National Parks where this will be applied are yet to be determined.

Victoria

Native title developments, as at 11 December 2003

	Vic	National Total
ILUAs (registered : in notification or awaiting reg decision)	10 : 1	105 : 16
Determination that native title exists (litigated : consent)	0 : 0	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	18 : 2	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)		11 : 22

Not including hearings for the preservation of evidence.

Native title policy

On 3 November 2000, the Victorian Government, ATSIC and Mirimbiak Nations Aboriginal Corporation (the then NTRB for Victoria) signed a Protocol for the Negotiation of a Native Title Framework Agreement for Victoria. The Protocol provided for the negotiation of a Native Title Framework for Victoria and the resolution of native title claims through mediation and negotiation rather than litigation. The Protocol noted that the Framework is to provide for the

84 *ibid*, p4.

development of Indigenous Land Use Agreements (ILUAs) that permit recognition, protection, and exercise of native title rights and interests, and also provides for a simplified future acts regime. The Protocol also allows for negotiation of broader outcomes including the provision of employment, training and enterprise development opportunities to Indigenous communities.

Importantly, the Protocol does not affect any existing claims or negotiations, and makes it clear that the Framework and any subsequent regimes implemented in Victoria must be consistent with the provisions of the Commonwealth's *Native Title Act 1993*.

During 2000 the Victorian Government released its Native Title Policy which:

- proposes negotiating outcomes to native title issues for the benefit of all parties;
- outlines a coordinated whole of government approach to responsibilities under the *Native Title Act 1993* (Cth); and
- proposes that a possible outcome of mediation is the recognition by government of the existence of native title.

The Policy states that the Victorian Government's preference is to seek to achieve negotiated or mediated outcomes to native title applications because they have the potential for better long term opportunities for Aboriginal people and give more certainty for industry. Native title claims in Victoria are to be resolved in the interests of both the Indigenous and the wider Victorian community. The Policy includes four strategies for achieving its aims:

- development of a coordinated Victorian Government approach to managing native title issues;
- working to achieve sustainable negotiated outcomes to native title matters;
- development of partnerships between the government, native title applicants and their representative body, and other stakeholders; and
- development of clear processes within government agencies for the implementation and management of outcomes of native title matters.

The government's Department of Natural Resources and Environment (NRE) (now the Department of Sustainability and the Environment) adopted an Indigenous Partnership Strategy to assist in building effective relationships with Victoria's Indigenous communities, to enable the Department to examine its existing policy and service frameworks, and to provide opportunities for the Indigenous community to be involved in the management of Victorian natural resources.[85] The Department formally recognises that Victorian Indigenous communities, as the traditional custodians of Victoria's land and waters, have a fundamental management role in Victoria's natural resources. The Indigenous Partnership Strategy, developed in 2001 contains eight main initiatives:

85 Minister's Foreword, *NRE Indigenous Partnership Strategy,* <www.nre.vic.gov.au/web/root/domino/cm_da/nrecab.nsf/TOC/0006020FE3D94CA7CA256B98000ABBC8#TOC> accessed 17 December 2003.

- Cultural Awareness – developing a program aimed at encouraging mutual understanding and improved relationships between Victorian Indigenous communities, NRE and NRE service providers (statutory authorities, regional bodies, and private providers) and community groups (Coastcare, Coast Action, Landcare, Bushcare, Farmsmart, etc).
- Community Partnerships – developing culturally relevant processes for improving relationships and encouraging positive participation of Indigenous people at the decision-making levels within the Department of Natural Resources and Environment.
- Capacity Building – developing the capacity and capability of Indigenous organisations and communities to initiate and manage NRE related government programs and services, and promoting an understanding within NRE of Indigenous community aspirations and potential skills for involvement in land and resource management.
- Cultural Heritage, Land and Natural Resource Management – promoting partnership with Victorian Indigenous communities, and awareness and consideration of cultural heritage as an integral component of land and resource management.
- Indigenous Employment – increasing employment opportunities for Indigenous people within NRE and its agencies.
- Economic development – increasing opportunities for purchasing goods and services from Indigenous owned enterprises and Indigenous community-run employment and training programs.
- Communication – ensuring NRE's communication strategy will deliver positive promotion of Indigenous projects and activities.
- Community profiling – assisting in the establishment of a process of community profiling as a resource for Indigenous communities.

Further details on each of these areas are available on the internet.[86]

The government has provided some assistance to Claimants to participate in negotiations. This has included financial assistance for attendance at meetings, part funding of project staff in conjunction with the NTRB, and funding for specific projects such as collaborative research with unrepresented groups.

Government structure

The Department of Justice is responsible for the Victorian Government's policy in relation to native title matters and for coordination with other government agencies within Victoria. The Department of Justice also has the primary responsibility for negotiating native title applications.

The Department of Sustainability and the Environment, which took over the land administration and management functions from the former Department of Natural Resources and Environment in December 2002, has responsibility for future act matters. The Department is divided into five regions. Each region has

86 *ibid.*

a regional coordinator who has responsibility for future act processes in that region. The Victorian Government Solicitor's Office provides legal advice on native title matters on request.

Negotiation threshold

During 2001-2002 the Department of Justice, in partnership with the then Department of Natural Resources and Environment, developed guidelines and procedures for the administration of Crown lands in compliance with the *Native Title Act 1993* (Cth). In September 2001 the Native Title Unit of the Department of Justice released the Victorian Government's *Guidelines for Native Title Proof*.[87] This document provides information to claimant groups about the nature of evidence required to establish native title rights and interests in Victoria and the steps that must be followed.

For native title applications in Victoria to be settled through mediation, agreement must be reached between the native title claimants and all other non-claimant parties about the merits of any single claim. Essentially, native title claimants must provide evidence to justify recognition of their native title rights, commonly referred to as "proof of connection". The Victorian Government advises that while the criteria in the guidelines for establishing connection have been refined following the High Court's decision in the *Yorta Yorta* case in December 2002, the *Guidelines* are still generally applicable.

Under the *Guidelines*, the level of recognition possible is commensurate with the level of traditional connection demonstrated by evidence. The *Guidelines* provide information about the level of proof required for different outcomes, the assessment of proof, the form the proof might take, the kind of government assistance that may be made available to claimants such as mapping, access to archival records, and the confidentiality of materials. Table 1 (below) shows that the sliding scale of evidence required depends on the outcomes.

87 The Guidelines are not available at present on the Department of Justice's website but can be obtained on request from the Native Title Unit, Department of Justice, Ground Floor, 55 St. Andrews Place, Melbourne.

Table 1: Native Title Negotiations in Victoria – General Evidentiary Requirements and Outcomes

Source: State of Victoria, Department of Justice, page 13

INDIGENOUS LAND USE AGREEMENTS			CONSENT DETERMINATION OF NATIVE TITLE RIGHTS IN THE FEDERAL COURT
Future Act ILUA or mining agreement where Government is not a party	Future Act ILUA where Government is a party	ILUA as an alternative to a native title determination	
INCREASING SCALE OF EVIDENCE →			
Nil in most circumstances.	Basic certainty about: · The identity of the claim group and whether any particular person is in that group; · The identity of claimed native title rights and interests; · The fundamental factual basis for native title based on tradition; · Some evidence of traditional physical connection with any part of the claim; and · The area of the ILUA being consistent with the above.	Certainty: · That the claimants constitute an identifiable community or group and are the most appropriate people to assert cultural rights and interests for the area; · That the claimants can demonstrate contemporary observance of practices based on tradition connected to the claim area; and · That the claimants maintain the cultural rights and interests claimed in a relationship with the claimed area.	Consistent with the *Native Title Act 1993* (Cth), certainty that: · The claimants are an identifiable group descended from the people who occupied or possessed the claimed lands and water at the time of sovereignty; · The claimants continue to observe a system of laws and customs derived from the system of traditional laws and customs of their ancestors; and · The system of traditional laws and customs observed by the group connects with the land and waters claimed.

Consent determinations recognising native title rights and interests are subject to an appropriate standard of evidence being provided. The *Guidelines* also state that alternatively it may be possible to recognise rights 'that do not equate to native title rights but nevertheless establish that a particular Indigenous group has the primary cultural right to a particular place or area and that such rights will be recognised under an Indigenous Land Use Agreement'.[88] The *Guidelines* state that the Victorian Government will make every effort to avoid unnecessary expense or inconvenience in resolving native title matters.

88 *ibid*, p5.

Various fact sheets providing background information about native title and Crown land are available on the Department of Sustainability and the Environment's website.[89] These fact sheets provide general information about native title, future acts and indigenous land use agreements.

Scope of negotiations

The following section contains some examples of agreements and negotiations that have occurred in Victoria.

The Indigenous Partnership Strategy, mentioned above, plays a central role in the Department's relationships with Aboriginal people and communities. For example, Parks Victoria has developed a *Framework for Working with Indigenous Communities*,[90] and the Victorian Catchment Management Council has developed an agreed set of protocols, principles and strategies for Indigenous involvement in land and water management.[91]

On 10 August 2003, the *Herald Sun*[92] reported that the Victorian Government was negotiating with 20 communities which were seeking native title rights to more than 20,000 parcels of land covering approximately 10 million hectares. The media report released the details of an in-principle agreement reached between the Victorian Government and the Wotjobaluk People in October 2002. Victorian Attorney-General was reported as stating that the Federal Court had set a deadline for 19 September 2003 for all the parties to the claim to indicate where they stand. He called on all parties, including the Commonwealth, to support the in-principle agreement. On 15 October 2003 it was reported in *The Age* that the Commonwealth had informed the claimants of its intention to oppose the native title determination application.[93] However, on 21 November 2003, *The Age* reported that the Federal Government had decided to support the in-principle agreement.[94]

The Victorian Government cites its in-principle consent determination in the Wotjobaluk native title determination application in the Wimmera region of western Victoria as evidence of the scope of negotiations over non-native title outcomes.[95] The in-principle agreement identifies a number of matters negotiated to date that will benefit the Wotjobaluk people, including a range of non-native title outcomes:

- A consent determination of native title that identifies the rights and interests that comprise native title and determines that native title exists over less than two per cent of the claim area and has been extinguished in other areas. The Wotjobaluk people's native title rights and interest to hunt, fish, gather and camp along the banks of the Wimmera River will be subject to all existing laws and regulations;

89 <www.dse.vic.gov.au>, search: Managing Crown Land – Fact Sheets.
90 <www.parkweb.vic.gov.au/resources/13_0202.pdf>.
91 <www.vcmc.vic.gov.au>, search: 'Publications', then "Protocols for Indigenous Engagement'.
92 I Haberfield and C Tinkler "Native Title Rights Push into Victoria" *Herald Sun* 10 August 2003.
93 F Shiel 'Threat to historic native title deal' in *The Age*, 15 October 2003. The reasons for this opposition will be examined in more detail in Chapter 3 of the report.
94 F Shiel, 'Canberra backs native title deal' in the *The Age*, 21 November 2003.
95 Department of Justice, Victoria, *Summary of the in-principle agreement between the Wotjobaluk and the Victorian Government*, Department of Justice, Native Title Unit, 2003.

- Recognition that the Wotjobaluk People continue to have a traditional connection to an area of land wider than the area where they hold native title, known as the 'core area';
- An agreement to co-operative management over National Parks and other Crown land areas within the core area;
- The right to be consulted over, and have a role in protecting cultural heritage in relation to major development projects in the core area;
- Financial support for the Wotjobaluk People, including the purchase of three parcels of Crown land (totalling 45 hectares), which are of particular cultural significance, and ongoing administrative assistance for the Wotjobaluk Traditional Land Council Aboriginal Corporation which will hold the native title and administer the rights and responsibilities flowing from the agreement and;
- The erection of appropriate signage in the core area.

The Victorian government notes that, with the exception of the first dot point, these outcomes were negotiated referenced to current Victorian legislation and outside the NTA and can therefore proceed irrespective of whether a determination of native title is achieved.

The Department of Justice's 2002-03 Annual Report also discusses the Government's continued negotiations with the Yorta Yorta people outside the legal framework of the NTA.[96]

Western Australia

Native title developments, as at 11 December 2003

	WA	National Total
ILUAs (registered : in notification or awaiting reg decision)	1 : 1	105 : 16
Determination that native title exists (litigated : consent)	2 : 6 ***	7 : 24
Determination that native title does not exist (litigated : consent)	1 : 0	13 : 2
Native title claimant applications not finalised (registered : not registered)	100 : 33	508 : 111
Claims for the determination of native title heard by Federal Court in calendar year 2003# (no. of hearings : no. of claims)	8 : 18	11 : 22

*** Does not include Wanjina : Wungurr-Willinggin – Ngarinyin Federal Court litigated decision handed down 8th December 2003 nor the Miriuwung Gajerrong FC consent determination of 9th December 2003 although the previous Miriuwung Gajerrong litigated decision that native title exists is included.

\# Not including hearings for the preservation of evidence.

Native title policy

The State's overarching native title policy, accessed through the Premier's website, is entitled *Native title: agreement not argument*.[97] This covers various aspects of the native title system. Its main commitments are:

96 Department of Justice, *Annual Report 2002-03*, Victoria Melbourne, 2003.

97 <www.premier.wa.gov.au/policies/native_title.pdf> accessed 16 December 2003.

- convene negotiations between peak industry and Indigenous groups to develop mutually acceptable template agreements to facilitate negotiations on individual titles;
- vigorously support the negotiation of regional agreements designed to facilitate early consideration of native title issues where applications are made for exploration licences or mining leases;
- vigorously promote and sponsor the negotiation of Indigenous Land Use Agreements;
- negotiate with peak industry and native title bodies to seek agreement for the introduction of a low impact exploration law based on the NSW model;
- make extensive use of the NNTT's mediation role and resources to make more effective progress on negotiations on all active native title applications in Western Australia;
- resolve native title issues by negotiation and agreement and cut currently projected expenditure on native title litigation by at least $2 million;
- enter negotiations with the Western Australian Aboriginal Native Title Working Group (WAANTWG)[98] with the aim of concluding a framework agreement.

There have been a number of developments in Western Australia corresponding to these commitments. The developments which have native title as their central focus are addressed separately below. However, there have been several reviews or inquiries which have included native title within their scope. These include:

- Ministerial Inquiry into Greenfields Exploration in Western Australia (Bowler Report 2002).[99]

  This Inquiry was held in 2002 to identify strategies to increase resource exploration in Western Australia. The Inquiry, headed by WA parliamentarian John Bowler, investigated reasons for 'reduced ... investment in greenfields mineral exploration in Western Australia and recommend[ed] actions that might be taken to achieve the level of expenditure necessary for a sustainable future for this...sector'. The Inquiry was specifically invited to cover 'Land access difficulties related to native title issues... [and] Issues associated with delays in approvals processes and granting of mineral title'. The Inquiry provided a final report to the government in November 2002.
- Review of the Project Development Approvals System (Keating Review 2002).[100]

98 WAANTWG is the umbrella organisation representing NTRBs in Western Australia.
99 <www.doir.wa.gov.au/documents/aboutus/Bowler_Report.pdf> accessed 18 December 2003.
100 <www.doir.wa.gov.au/documents/investment/PremiersProjectApprovalsFinalReport(1).pdf> accessed 18 December 2003.

The WA Government commissioned an independent committee to review the system in WA for dealing with proposals to develop projects in the State. The review's objective was to develop a system of government decision-making that is coordinated and integrated, clear and unambiguous, and that is balanced between community and developer needs. The review was asked to consider government decisions in areas including Aboriginal heritage, land tenure and planning and land use. The review's final report was provided to government in November 2002 and is now being examined in relation to resource development mechanisms.[101]

- Technical Taskforce on Mineral Tenements and Land Title Applications (November 2001).[102]

The Western Australian Government also released a discussion paper on native title and future acts. The discussion paper recommended amendments to Western Australian mining legislation aimed to reduce the backlog of mining lease applications. The discussion paper also made recommendations about the processing of non-mining future acts.

In October 2001 the Premier of Western Australia, Dr Geoff Gallop, signed an agreement entitled *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians*. The other parties to the agreement were the Western Australian ATSIC State Council,[103] the Western Australian Aboriginal Native Title Working Group (WAANTWG), Western Australian Aboriginal Community Controlled Health Organization (WAACHHO) and the Aboriginal Legal Service of Western Australia (ALS).[104] The stated purpose of the agreement was:

> to agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.[105]

NTRBs undertake negotiations with State departments and agencies on a range of issues as outlined in the following table:

101 J Edwards, Western Australia Minister for the Environment and Heritage, Water Resources, *Speech for the APPEA Environment Workshop*, Fremantle, 11-12 November 2003, available at <www.appea.com.au/download.asp?ID=403> accessed at 15 January 2004.

102 <www.ministers.wa.gov.au/main.cfm?MinId=02&Section=0201b> accessed 18 December 2003.

103 Now ATSIS State Council.

104 It is interesting to note that although the agreement purports to be between all these parties, the signatories to the agreement are confined to the Premier, ATSIC WA State Council, Minister for Indigenous Affairs and the ATSIC National Chairman.

105 *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians*, October 2001, p3.

Table 2: WA government departments – negotiation issues

Department	Issue
Department of Industry & Resources (DOIR)	exploration and mining, heritage protection, economic development
Conservation and Land Management (CALM)	conservation, national parks, land management
Department of Indigenous Affairs (DIA)	heritage and site protection, Aboriginal Lands Trust (ALT) properties.
Department of Planning & Infrastructure (DPI)	land transfers and development
Department of Fisheries	off shore areas, management of resources
Crown Solicitor's Office	litigation issues, legal arrangements

Some government agencies maintain their own indigenous policy initiatives. As set out in the table above, the Department of Fisheries, CALM, DOIR and DPI all have significant responsibilities relating to the management of land or sea, including aspects relating to Indigenous land use and management and economic development.

A recently released draft Aboriginal Fishing Strategy, developed in consultation with Aboriginal interests and other stakeholders by the Department of Fisheries, addresses three key areas:

- the recognition and inclusion of customary fishing in fisheries legislation;
- the recognition and inclusion of Aboriginal people in the management of fish resources; and
- economic development opportunities in the fishing and aquaculture industries.[106]

In July 2003 CALM released a consultation paper, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*. The consultation paper included a proposal that title to conservation areas could in future be held either as:

> Crown land reserves placed in the care and control of:
> - the Conservation Commission of Western Australia,
> - the Marine Parks and Reserves Authority, or
> - an approved Aboriginal Body Corporate;
>
> or as inalienable freehold title held by an Aboriginal Body Corporate.[107]

Some of the government's recent separate initiatives in indigenous affairs can be seen as emanating from a prior commitment to social and economic development. For example, the CALM consultation paper on joint management refers to the agreement as underpinning the policy shift on joint management.

106 Draft Aboriginal Fishing Strategy released for public comment, media statement, Hon Kim Chance, Minister for Fisheries, 26 June 2003.

107 *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper, Government of Western Australia, July 2003, p14.

So too does the Department of Local Government and Regional Development in relation to its strategy 'Working with Indigenous People and Communities', which focuses on developing principles for the Department's work with Indigenous communities on capacity building, leadership and economic development.

The State recently announced its new policy for the processing of exploration and prospecting licence applications in line with the recommendations of a Technical Taskforce aimed at reducing the current backlog of mining, exploration and prospecting tenement applications and putting in place processes to facilitate the granting of new applications.[108] Applicants will be required to sign a 'Standard Heritage Agreement' or prove they have signed an 'Alternative Heritage Agreement' before the application will be submitted to the expedited procedure process under the NTA. If no heritage agreement has been signed the application will go through the NTA right to negotiate process which requires that all native title claimants agree to the issuing of the tenement and sign the State deed.[109]

The hardening policy approach of the Western Australian Government to native title is also evidenced in media statements of the Premier and Deputy Premier at various times:

- In August 2002, the Premier, Dr Gallop, responded to the High Court's ruling on the Miriuwung-Gajerrong case by stating that the decision 'clarifies the law and provides greater certainty to people involved in native title negotiations'. Dr Gallop went on to assert that while 'intractable issues' will need to be resolved in the court 'the State Government remains committed to an orderly process of negotiation to reach agreements'.[110]
- In October 2002, the Deputy Premier Mr Ripper issued a media statement announcing the release of new 'guidelines for evidence needed to help reach agreement' on native title claims, developed in response to the state government – commissioned Wand Review recommendations. The release included the cautionary note that 'native title is a legal process and there is no escaping that fact'.[111]
- On 13 December 2002, in a media statement about the Yorta Yorta High Court decision, Mr Ripper affirmed that the government continued to prefer the 'mediated settlement of native title issues' but added that this could be achieved 'either through a determination of native title by consent, or by the negotiation of outcomes outside the native title process'.[112]

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108 *Technical Taskforce on Mineral Tenements and Land Title Applications, Final Report*, Government of Western Australia, 2001, pp19-36.

109 Department of Industry and Resources, Information Paper, Government of Western Australia, October 2003, pp1-2.

110 The Hon. Geoff Gallop, Media statement, Government of Western Australia 8 August 2002, available at <www.mediastatements.wa.gov.au/>.

111 The Hon. Eric Ripper, Media statement, Government of Western Australia, 8 October 2003, available at <www.mediastatements.wa.gov.au/>.

112 *ibid*, 13 December 2003, available at <www.mediastatements.wa.gov.au/>.

- In February 2003, Mr Ripper announced the government's 'mediation plan' for the South-West Noongar claims to 'avoid protracted Federal court cases'. He added that although the government wished to 'settle the application through negotiation … open ended negotiation for years on end is an injustice in itself'. He again referred to the government's willingness to explore avenues outside the native title process'.[113]
- In a Ministerial statement to Parliament on 25 June 2003, the Deputy Premier advised that the State had suspended mediation on the Combined Metropolitan claim (one of the South West claims) and had decided that the claim was 'best resolved through the Federal Court trial currently underway'. He added that 'proposals for land justice outcomes' had been put to the applicants, but that 'little progress was achieved'.[114]
- On 3 July 2003, when the Federal Court handed down the Ngaluma and Injibandi determination, Mr Ripper issued a statement welcoming the finding but cautioning that although the government 'believed native title agreements were preferable to court cases … the circumstances of individual applications did not always allow for mediated outcomes'.[115]

Funding for NTRBs and claimant groups has usually been provided by the Commonwealth through ATSIC, now ATSIS. Recently, however, the State has made funding available to NTRBs for an extra Future Act officer in each region. This initiative was one of the recommendations made by the Technical Taskforce on Mineral Tenements and Land Title Applications to expedite the processing of the backlog of mineral tenements applications on land under native title claim.[116] Funding is dependent on the NTRB entering into a regional heritage agreement with the State to expedite the granting of prospecting and exploration licenses.

Government structure

The Western Australian Deputy Premier has whole-of-government ministerial responsibility for native title matters. The Office of Native Title (ONT) in the Department of Premier and Cabinet provides services to the Minister and to Cabinet on native title including:

- preparation of policy advice;
- coordination of negotiations on native title claims; and
- coordination of government's handling of projects and initiatives affected by the *Native Title Act*.[117]

113 *ibid*, 27 February 2003, available at <www.mediastatements.wa.gov.au/>.
114 The Hon. Eric Ripper, Ministerial statement – combined metropolitan native title application, Government of Western Australia, available at <www.ministers.wa.gov.au/main.cfm?MinId=02&Section=0054>.
115 The Hon. Eric Ripper, *op.cit,* 3 July 2003, available at <www.mediastatements.wa.gov.au/>.
116 *Technical Taskforce on Mineral Tenements*, *op.cit*, p19.
117 Annual Report 2001/2002, Department of the Premier and Cabinet, p3.

The ONT implements the government's native title objectives through:

- resolution of native title applications;
- minimising the State's exposure to compensation liability for invalid future acts and/or compensation for the extinguishment or impairment of native title;
- resolution of native title compensation applications wherever possible by agreement;
- developing and implementing policies, procedures and practices across government that ensure the future act regimes is administered efficiently and consistently;
- negotiation and involvement in the implementation of project agreements.[118]

Negotiation threshold

In October 2002 the government, in response to its earlier commissioned review of the native title claim process in Western Australia released a document entitled *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title* (the "guidelines"). At the time of the announcement the government stated that 'with the aid of these guidelines, claimants and their representatives will be able to make a realistic assessment of their prospects of success in mediation or litigation'.[119]

The guidelines restated the government's policy of preference for native title determinations to be achieved by negotiation.[120] The guidelines assert that Aboriginal evidence is 'the most important evidence in determining the continued existence of native title rights and interests'. Further, the state expects that connection reports will contain evidentiary material in sufficient detail to establish that the native title applicants:

- are the persons or groups of persons who hold native title;
- hold, under acknowledged traditional laws and observed traditional customs, native title rights and interests, the nature and extent of which are clearly identified for the purposes of the terms of a determination as referred to in section 225(b) of the *Native Title Act 1993 (Cth),* in the claimed area; and
- have maintained a connection with the claimed area.[121]

The guidelines also state that 'The Government may wish to further test the Aboriginal evidence contained in the connection reports 'on a case-by-case basis'.[122] The guidelines are silent on the question of what is meant by 'evidence'; for example whether it is to be oral, written, sworn, or how it could be 'tested'.

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118 Budget Papers 2003-2004, 'Premier and Cabinet – Output 8: Native Title policy development, implementation and negotiation', p91.

119 "New guidelines to aid native title claim resolution", media statement, Hon Eric Ripper MLA, Deputy Premier, 8 November 2002.

120 *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*, Office of Native Title, Department of the Premier and Cabinet, Government of Western Australia, October 2002, p2.

121 *ibid,* paragraph 1.4.

122 *ibid*, paragraph 3.4.

Burrup Peninsula[123]

The Burrup Peninsula is an area of land near the mining towns of Dampier and Karratha, about 1,300km north of Perth. In 2000, the Burrup was within three overlapping native title claims. The three claims originally commenced as one application, *Ngaluma Injibandi*, which was lodged in 1994 as an inclusive claim that embraced all people of Ngarluma and Yindjibarndi descent. In 1996 and 1998, two smaller groups lodged separate overlapping claims for exclusive possession of the Burrup respectively known as the *Yaburara Mardudhunera* and *Wong-Goo-Tt-Oo* claims. The members of these smaller claims were and are considered by the Ngarluma and Yindjibarndi people to be part of the Ngarluma Yindjibarndi group.

In January 2000, the Western Australian Government notified the native title parties of its intention to acquire land for the construction of a heavy industry estate on the Burrup Peninsula and adjacent Maitland area. The notification was the culmination of many years of planning for the expansion of industrial development in the region undertaken by successive state governments through the late 1970s, 80s and 90s. The proposed industrial estates were intended to contain a number of downstream gas-processing plants, as well as associated infrastructure facilities and industrial lay-down areas. In order to accommodate the increased population that would accompany the development, the State also required an extensive release of residential and commercial land in nearby Karratha.

In late 2001, the State announced its intention to conclude an agreement with all three native title claim groups for the acquisition of the Burrup and Maitland land by the end of March 2002. The proposed short four month timeframe for completing complex negotiations (time which included important cultural 'law business' for various Indigenous people in the area) was explained as a consequence of the immutable commercial deadlines of the five international companies who had expressed interest in taking leases in the proposed estates. The government indicated that if all five proponents took leases, their proposed developments would involve 7 billion dollars worth of capital expenditure, 3,500 direct and indirect jobs, and up to a billion dollars per annum expenditure in the Australian economy. Expenditure on capital alone was large enough to have a perceivable impact on the value of the Australian dollar in international currency markets. The State had itself already committed $120 million to infrastructure development necessary for the development.

The government decided to take the lead role in the negotiations, rather than leaving this to the companies. In the ordinary course, the government would not have done this and there was little precedent for this course within Australian native title negotiations. The government considered it should take the lead role because the area:

- was covered by three overlapping claims with the right to negotiate;
- included popular recreation sites for people in the region (Hearson Cove, the most popular beach, was within a 40km radius);
- had famous and culturally important Aboriginal rock engravings;
- was important to the NW Shelf Gas Development and the operations of Hamersley Iron and Dampier Salt;

123 Unless otherwise indicated, all material in this description is drawn from F Flanagan, "The Burrup Agreement: a case study in future act negotiation", paper given at the *Native Title on the Ground Conference*, Alice Springs, June 2003.

- had high conservation value, containing unique flora and fauna; and
- was proposed for $7 billion investment in Western Australia.[124]

The government established an inter-departmental steering committee led by the Office of Native Title within the Department of Premier and Cabinet. It appointed a lead negotiator to act for the government. The committee ensured that all government actions were coordinated, and worked together with the lead negotiator.

The government provided substantial funding to the claimant groups to develop their position and expectations of the negotiations and to assist them in arriving at an informed decision in relation to the proposed development. This gave the claimant groups the capacity to bring forward a comprehensive statement of their position early in the negotiations. The government also funded representatives of the groups' choices, including lawyers and accountants.

The starting point for the negotiation process was the Ngarluma and Yindjibarndi peoples' decision to be guided by their perspectives and priorities, rather than those of the State. The government's offers made over the previous two years did not reflect the Ngarluma and Yindjibarndi peoples' aspirations. The Ngarluma and Yindjibarndi peoples agreed to present a comprehensive counter-offer to the State that would establish a clear Ngarluma Yindjibarndi negotiation position and, it was hoped, fundamentally re-set the agenda for the negotiation. Time constraints made it impossible to complete a separate Economic and Social Impact Assessment prior to fine-tuning the content of the counter-offer. However, the Ngarluma Yindjibarndi people and their advisers had the benefit of access to similar work that had already been done for the community in previous negotiations for an earlier development by Woodside on the Burrup Peninsula. This information, together with the extensive available literature published about the Roebourne Aboriginal Community, assisted in identifying the kinds of issues that would need to be addressed in any agreement that set out to minimise the negative impacts of industrial development on the community.

In March 2002, the community presented State representatives with a comprehensive proposal for the final settlement of all native title issues relating to the acquisition of the Burrup and Maitland Estates and the Karratha land. The proposal was holistic in nature. In return for the full range of acts and activities to be undertaken by the State in establishing the industrial estates, the State was asked to agree to a package of measures and benefits including land, cultural heritage and environmental protection, financial compensation, residential and commercial land, improved roads, housing, education, employment and training that would represent 'just terms' compensation for the acquisition of native title. The presentation of the document was accompanied by a traditional welcome to country and a community presentation summarising the key points of the document. The presentation of the counter-offer performed a useful reference point later on in the negotiation process as it was clearly remembered by everyone as a moment when the community was united in telling government what they wanted from the negotiation. The counter-offer was also used by Ngarluma Yindjibarndi to gauge the progress of the negotiation over the following weeks by comparing the parties' subsequent positions to the position set out in the counter-offer.

124 The material in this and the following two paragraphs is taken from the presentation by A de Soyza, "Case Study: The Burrup Peninsula Native Title and Cultural Heritage Success" presented at the *Cultural Heritage and Native Title Conference*, 29 September-1 October 2003, Brisbane.

The Burrup agreement was not made subject to any confidentiality restrictions, and is publicly available on the internet.[125] Importantly, the benefits contained in the agreement endure regardless whether any of the native title parties are determined by the Federal Court to hold native title over the Burrup or Maitland.

In exchange for the native title parties' agreement to the surrender and permanent extinguishment of native title on the industrial land on the Burrup and Maitland Estates and the land required for the State for residential and commercial purposes in Karratha, the native title parties receive the following:

Burrup Non-Industrial Land

Freehold title to Burrup Non-Industrial Land to the high-water mark conditional upon:

- the freehold title being subject to existing easements and other interests including roads;
- the land being leased back to the State for ninety-nine years (plus a ninety-nine year option). One of the terms of the lease is that the Contracting Parties cannot sell the land to anyone else without offering it to the State first;
- An agreement between Ngarluma Yindjibarndi and the WA Department of Conservation and Land Management to manage the land in accordance with a Management Plan;
- A promise by the native title parties on the title that there cannot be any buildings on the coastal strip, except for recreational purposes;
- Commissioning and funding ($500,000 over 18 months) of an Independent Study to develop a Management Plan for the land in accordance with specified terms of reference and advised by an Advisory Committee;
- Management fund of $450,000 per year over five years for management of the land;
- A Visitors/Cultural/Management Centre on the land worth $5,500,000; and
- Infrastructure funding on the land worth $2,500,000.

Approved Body Corporate

The State will provide $150,000 to a Consultant to establish an Approved Body Corporate (ABC) and $100,000 per year in operating costs for four years. The ABC will hold the freehold title to the Burrup Non-Industrial Land, and allocate and distribute the money on the basis that each member of the ABC is entitled to an equal share. Membership will be open to members of the native title parties who enter the agreement.

Karratha Commercial and Residential Land

5% of Developed Lots in Karratha to be transferred to the Approved Body Corporate.

Financial Compensation

A total of $5,800,000 in upfront payments comprising:

125 <www.naturebase.net/national_parks/management/pdf_files/imp_deed.pdf> accessed 3 December 2003.

- $1,500,000 from the State on signing of the agreement;
- $2,000,000 from the State on the date of the first taking order for a lease;
- $1,150,000 20 days after leases are granted to proponents; and
- $1,150,000 20 days after the Current Proponents make their first shipments.

Ongoing Annual Payments

For Current Proponents: the State will pay $700 per hectare per year, escalated annually after five years at CPI plus 2%.

For Future Proponents: half of Market Rent (as determined using a formula devised with Market Valuation principles).

Employment, Training and Contracting

The State will pay an Employment Service Provider based or operating in Roebourne $200,000 per year for three years. The State, native title parties and the Employment Service Provider will negotiate an agreement which requires the Employment Service Provider to:

- conduct an audit of the skills of available Aboriginal people and contractors;
- conduct a needs analysis;
- conduct an analysis of the opportunities for employment and enterprise; and
- assist people and contractors to achieve their desired employment and enterprise outcomes.

The Proponents must meet a 5% Aboriginal employment target for their Operations Workforce or, if they are unable to meet the target, pay to the Employment Service Provider a levy of $4,500 per year for every Aboriginal person below the 5% target.

Education

The State will pay $75,000 per year for two years to an Approved Body Corporate to:

- support students to 'realise their school, vocational, training and tertiary ambitions';
- create a cohesive pathway between primary, secondary, vocational education and training, and tertiary sectors; and
- introduce cultural matters into education as appropriate.

Benefits outside the Burrup Agreement

In assessing the overall impact of the negotiations, regard should also be had to a number of matters that were agreed to by the State but were not included within the formal Burrup Agreement. As a result of the Ngarluma Yindjibarndi community's negotiation position, the State also agreed to commission a Rock Art Study to monitor the emissions from industry, identify impacts on the rock art and identify potential mitigation measures. Further, the State responded to Ngarluma Yindjibarndi requests for improved housing, transport, agency co-ordination and asbestos removal by implementing the Roebourne Enhancement Scheme, a scheme with a budget allocation of over $3.5 million to address these issues for the Roebourne community.

Commonwealth

Native Title Policy

The formulation and provision of legal and policy advice to the Commonwealth Government in relation to native title is undertaken by the Native Title Unit of the Attorney-General's Department. The Unit's work includes:

- managing the Commonwealth's involvement in native title litigation;
- advising the Commonwealth on the NTA's operation;
- liaising with State and Territory governments about alternative native title regimes; and
- developing conditions for the Commonwealth's provision of financial assistance to States and Territories for various native title costs and expenses.

The Unit's stated objective for native title is 'shaping a native title system that delivers fair, effective and enduring outcomes'.[126] The Department's website specifies strategies it will employ to pursue this objective including:

- seeking to resolve native title issues through agreement, where possible;
- facilitating whole-of-government coordination across the native title system; and
- working cooperatively with stakeholders in the native title system, in particular the States and Territories, to implement the NTA.[127]

The website also outlines the Commonwealth's attitude to, and role in, litigation:

> The Commonwealth has an interest in ensuring that the Native Title Act 1993 is interpreted in a way that is consistent with the Parliament's intention. In addition, the Commonwealth has property and other direct interests in some native title applications, and also has an interest in any compensation claims relating to native title. The Native Title Unit is responsible for advising the Attorney-General on Commonwealth participation in native title litigation.
>
> As at 1 June 2003, the Commonwealth was a party to 191 native title applications (out of 620 in total). A number of the applications are before the Federal Court for determination. Most of the remainder have been referred to the National Native Title Tribunal for mediation.[128]

Commonwealth policy is to promote the resolution of native title issues by agreement. In mediation, the Commonwealth seeks to ensure that its four principles of:

- certainty of rights recognised,
- consistency with the common law,

126 <www.ag.gov.au/www/nativetitlehome.nsf> accessed 23 December 2003.

127 *ibid*, accessed 23 December 2003.

128 According to the NNTT, as at 1 July 2003 there were 622 applications in the Federal Court, of which 362 had been formally referred to the NNTT for mediation.

- compliance with the Native Title Act 1993 (Cth), and
- transparency of process are reflected in negotiations.[129]

As at 1 June 2003, there were 45 determinations of native title overall. Of these, 26 were consent determinations (mediated outcomes) and 10 were litigated determinations. Overall, 31 determinations have found that native title exists. The Commonwealth has been a party to one consent determination and five litigated determinations (two at first instance and three on appeal).[130]

In his address to the Native Title Representative Bodies Conference in Geraldton in 2002,[131] the Attorney-General outlined the Commonwealth Government's approach to native title which can be summarised as follows:

- despite the difficulties and differences, it is in everyone's interests that native title issues be resolved as quickly and harmoniously as possible and that the best way of achieving it was by agreement;
- there is a common desire for practical and workable solutions;
- the government sees meaningful resolution of native title issues as part of the process of practical reconciliation;
- the government has consistently emphasised that the future of native title is in negotiated outcomes as opposed to litigation;
- the government recognises that some litigation is necessary and inevitable, however it has been actively promoting and encouraging alternatives to litigation, such as consent determinations and Indigenous Land Use Agreements (ILUAs).

The Attorney-General also stated that the Commonwealth's position on consent determinations was founded on two key concepts underlying the *Native Title Act 1993*:

- the recognition of native title is the recognition of already existing rights; and
- the process of recognition is a publicly accountable one.

Mr Williams explained the Commonwealth's approach to consent determinations, stating that it was based on four principles:

1. Consent determinations should create certainty about the native title rights recognised.
2. Those rights should reflect what the common law allows.
3. The determination should comply with the requirements of the *Native Title Act 1993*.
4. The process by which the determination is made should be transparent.

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129 <www.ag.gov.au/www/nativetitleHome.nsf/HeadingPagesDisplay/Native+Title+Litigation?OpenDocument> accessed 24 December 2003.

130 *ibid*, accessed 24 December 2003.

131 The Hon. D Williams, Native Title: 'The Next 10 Years – Moving Forward by Agreement', paper presented at the *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, Western Australia, 3-5 September 2002.

The Attorney-General affirmed that the Commonwealth has a clear and legitimate interest in the application of these principles to all consent determinations because the credibility of the process depends on consistency, effectiveness and sustainability of consent determinations.

Native Title Funding

The *Native Title Act* establishes a system for dealing with native title that includes the Attorney-General's Department, the Federal Court, the National Native Title Tribunal and ATSIC.[132] These organisations are funded by the Commonwealth with funding also available for respondent parties to the mediation and litigation processes under the NTA.

In a fact sheet prepared on the 2001-2002 Federal Budget,[133] the Attorney-General's Department stated that it had become apparent that workloads were much higher than the estimated workloads on which funding had been based in 1997-98, and were expected to increase as the number of active native title applications peaks in 2002-03 and declines thereafter.

A government fact sheet on land and native title is included in a series of Fact Sheets on Indigenous Issues on the website of the Minister for Immigration and Multicultural and Indigenous Affairs.[134] The fact sheet provides some background to Indigenous land and native title issues and states that in the 2002-2003 financial year, the Australian Government allocated $235 million to Indigenous Land and Native Title programs, including the programs of land purchases by the Indigenous Land Corporation ('ILC'). The fact sheet also states that 'When the ILC is fully funded in 2004, it will have approximately $1.4 billion capital base, the income from which will allow it to continue indefinitely purchasing land for those Indigenous people who are unable to gain ownership by other means'.[135]

Government officers have indicated[136] that other sources should be looked to for funding: just because the Commonwealth created a mechanism by which native title holders can engage with other rights and interests, this does not mean that the Commonwealth is the only possible source of funding for establishment and ongoing operating costs. The view expressed is that there is nothing stopping the States/Territories from providing assistance, especially as they are the sphere of government primarily responsible for land administration and management.

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132 The *Native Title Act 1993* was enacted before the recent changes to ATSIC and the creation of ATSIS.

133 *Resourcing of the Native Title System* <www.ag.gov.au/www/attorneygeneralHome.nsf/Alldocs/6D4E12CD73F51880CA256BD700052C11?OpenDocument&highlight=Resourcing%20of%20the%20Native%20Title%20System> accessed 20 December 2003.

134 Minister for Immigration and Multicultural and Indigenous Affairs, 'Land and Native title', Fact sheets, available at <www.minister.immi.gov.au/atsia/facts/index.htm> accessed 23 December 2003.

135 *ibid.*

136 The Hon. D Williams, *op.cit,* 2002, response to question following paper presentation.

Funding for NTRBs is provided through ATSIS. The funding is dependent on the amount that ATSIS receives from the Commonwealth. On this matter, a consultant noted:

> ATSIC argues that the funding provided by Government was significantly less than identified as being needed in the Parker Report,[137] and less than the funding sought in Cabinet submissions. ATSIC sought increases of $22.2M in 1995-96 (and received $13.95M) and $37M in 1996-97 (receiving $27.7M). Over the past five financial years, Government funding to ATSIC for native title has remained at similar levels – $40.8M in 1996-97 and $42.5M in 2000-01. In light of these funding constraints, the effects of which have only increased since the 1998 amendments to the *Native Title Act 1993* (Cth) increased NTRB statutory functions, and the need to prioritise the recognition of native title, ATSIC subsequently decided that it was only prepared to fund RNTBC establishment costs, rather than the ongoing costs of performing functions and meeting regulatory compliance requirements.[138]

Warnings about the lack of funding for NTRBs have been consistently raised. There have been repeated calls for increases to NTRB funding in the reports of Commonwealth agencies,[139] as well as by Commonwealth Parliamentary committees.[140] The issue also was noted in reports by state governments[141] and in materials from industry.[142] A Commonwealth Inquiry into mineral exploration received many government and company submissions recommending increases for NTRB funding.[143] The issue of NTRB under-funding was comprehensively covered in the *Native Title Report 2001*.[144] Nevertheless the Commonwealth Government has chosen to make no change to funding arrangements.

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137 Aboriginal and Torres Strait Islander Commission, *Review of Native Title Representative Bodies,* ATSIC, Canberra, 1995 (the Parker Report").

138 Anthropos Consulting Services & o'rs, *Research Project into the issue of Funding of Registered Native Title Bodies Corporate*, ATSIC, October 2002, p3.

139 *Parker Report*, *op.cit;* Senatore Brennan Rashid, *Review of Native Title Representative Bodies, ATSIC, March 1999* (the Love-Rashid Report).

140 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, Report on *Indigenous Land Use Agreements*, September 2001, para 6.83 and recommendation 4; and Standing Committee on Industry and Resources report, *Inquiry into resources exploration impediments*, August 2003, paras 7.42-7.51 and recommendation 19.

141 For example, *Ministerial Inquiry into Greenfields Exploration in Western Australia*, Western Australian Government report November 2002, recommendations 8-12; and *Technical Taskforce on Mineral Tenements*, *op.cit*, pp103-106.

142 ABARE report commissioned by the WA Chamber of Minerals and Energy, the Minerals Council of Australia, and the WA Government, *Mineral Exploration in Australia: Trends, economic impacts & policy issues*, p76, see <www.abareonlineshop.com/product.asp?prodid=12452>.

143 See submissions to the Standing Committee on Industry and Resources, *Inquiry into resources exploration impediments*, from the Queensland Government, AIMM, Newmont, SA Government, WA Government, and Minerals Council of Australia at <www.aph.gov.au/house/committee/isr/resexp/index.htm>.

144 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission, Sydney, 2002, pp55-85.

The funding of the native title system was recently discussed during a Parliamentary Inquiry into the effectiveness of the National Native Title Tribunal. The submissions to, and transcript of hearings by, the Inquiry are all publicly available.[145] The Inquiry endeavoured to present a transparent process by holding public hearings in Queensland, NSW, the Northern Territory and Western Australia.

However, the Committee also held a private briefing with the Minister for Immigration and Indigenous Affairs, the Minister responsible for NTRBs, during which the question of funding to NTRBs was discussed.[146] Transcript of this briefing is not available, so it is uncertain what exchange occurred. However, from the Committee's report, it appears the government has commissioned a report into ATSIC funding of NTRBs.[147] The Minister also stated:

> Until such time as the reasons for NTRBs performance difficulties are satisfactorily identified, the Government is unable to support any additional funding for NTRBs or, indeed, a reallocation of funding within the Commonwealth native title system more generally.[148]

However, where land councils are unable to properly perform their functions then little progress can be expected on any matter dealing with native title. This includes future act negotiations, resolving disputes between native title claimants, required notifications to native title claimants, certifications to permit arrangements to be registered with the Tribunal, or advice and representation of claimants. Land Councils assist nearly 90% of all native title claims in Australia, and are the primary institution to ensure effective input from native title parties.

NTRB funding is mainly regulated by ATSIS's grant conditions to each NTRB. New terms and conditions were presented by ATSIS in July 2003. ATSIS is focusing NTRBs more directly onto 'native title outcomes', restricting the scope for NTRBs to engage in matters such as heritage and other issues that may be important to traditional ownership interests. The grant conditions give ATSIS a complete discretion in providing the funds:

> While we [ATSIS] will endeavour to meet any timetable for release of funds, we retain discretion to reduce or suspend all or part of the Grant Funds at any time. Such action may be taken for a number of reasons, including breaches to grant conditions, budget cuts and changes in our funding policies and priorities.[149]

145 <www.aph.gov.au/hansard/joint/commttee/j-nat-tt.htm>.

146 Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund Report, *Effectiveness of the National Native Title Tribunal*, December 2003, para 1.11.

147 *ibid*, para 4.30.

148 *ibid.*

149 Aboriginal and Torres Strait Islander Services, *2003-04 General Terms and Conditions of Grant to bodies recognised as Native Title Representative Bodies under the Native Title Act 1993*, ATSIS, 2003, para 1.3.

Table 3: Funding figures for Native Title Representative Bodies[150]

Year	ATSIC funding for representative body function (a) $million	TSRA funding for representative body function (b) $million
1996-97	40.758	0.361
1997-98	44.277	0.368
1998-99	47.144	0.373
1999-00	46.788	0.703
2000-01	51.172	1.351
2001-02	50.503(c)(d)	1.572
2002-03	51.763(c)(d)	1.487
2003-04	53.163(c)(d)	1.555
2004-05	50.763(c)(d)	1.587
2005-06	47.063	1.630

(a) Information provided by ATSIC.
(b) Information provided by TSRA.
(c) Includes additional funding provided by the ATSIC Board of $3.94m in 2001-02, $3.4m for 2002-03 and $3.4m to be provided in 2004-05.
(d) The Government provided additional funding to ATSIC of $2.9m in 2001-02, $4.7m in 2002-03, $6.1m in 2003-04 and $3.7m for 2004-05 for representative body capacity building and priority claims resolution program.

Respondent funding

The Attorney-General's Department also administers three different schemes for providing assistance to non-native title parties:

- Under s 183 *Native Title Act*;
- Special Circumstances (Native Title) Scheme; and
- Common Law (Native Title) Scheme.

Assistance is available to any person who is a party or intends to become a party to an inquiry, mediation or proceedings related to native title. There is no 'hardship' test: financial assistance can be provided to peak bodies or organisations for members in relation to specific claims, as well as individuals or groups of persons with similar interests in a matter.

The following summary of the Attorney-General's funding for respondents is drawn from information provided to the Senate Estimates Committee by the Attorney-General's Department[151] and from the Department's published Guidelines on the assistance schemes:

150 The Attorney-General's Department provided the figures in this Table in response to a Question on Notice from Senator McKiernan on 31 May 2002. *Senate Estimates, 31 May 2002, Legal and Constitutional Committee* Source: Senate Estimates Committee QoN 241, 31 May 2002 <www.aph.gov.au>.

151 In response to Questions on Notice, for example, 31 May 2002, 13 February 2003 and 11 August 2003.

- The Attorney-General's Guidelines for the schemes are available on the Department's website.[152]
- The NTA does not require an application for assistance to be means tested in order to determine whether financial assistance may or may not be provided.
- The Guidelines provide that where appropriate, an applicant's financial circumstances will be taken into account in assessing an application for financial assistance.
- Where applications are made on behalf of a group, the parties will not be subject to individual evaluation of their financial position. This is to encourage group applications and representation, thus reducing the overall cost of providing representation and encouraging respondents to work together towards resolution of cases.
- Before a payment can be made, a grant of assistance needs to be approved by a delegate of the Attorney-General. In making a decision regard is had to the availability of assistance from any other source, whether the provision of assistance is in accordance with the guidelines, and whether it is reasonable that the application be granted.
- In assessing reasonableness, consideration is given to a range of factors, including:
  - the implications of the native title claim for the applicant;
  - does the applicant have a genuine role or genuine interest in the claim process;
  - whether the benefit to the applicant is worth the cost of the case; and
  - the novelty or legal importance of the issues raised.

There are particular administrative procedures that recipients of financial assistance must fulfil before payments are authorised. These additional processes are used by the Department to ensure that monies were expended appropriately and in accordance with the grant conditions. The table below shows the Attorney-General's annual funding to respondents since the scheme commenced.

Table 4: Native title financial assistance (non-claimants) scheme[153]

Year	Government's respondent funding for native title
1993-94	$ 1,060
1994-95	$ 683,317
1995-96	$ 949,146
1996-97	$ 1,182,229

152 <www.ag.gov.au/www/familylawHome.nsf/Web+Pages/BF02DE575B3FCC72CA256BDE00818724?OpenDocument>.

153 Table derived from a letter from the Attorney-General to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 7 October 2003.

1997-98	$ 2,021,092
1998-99	$ 7,338,997
1999-00	$ 7,032,677
2000-01	$ 7,516,936
2001-02	$ 11,266,000
2002-03	$ 10,340,366
Total	**$ 48,331,820**

The tables setting out NTRB funding and financial assistance to non-claimants clearly demonstrate large increases in funding to non claimants particularly between 1996-97 and 2001-02, against relative smaller increases in NTRB funding. As noted in the table substantive increases in NTRB can mostly be attributed to additional funding provided by ATSIC Board and Commonwealth capacity building funding. As can be seen from the table these funding allocations are expected to end in 2004-05, thereby reducing the level of funding to NTRBs for the year 2005-06. In addition to the limited funding increases made available to NTRBs, these organisations are required to satisfy strict funding guidelines imposed by ATSIS. This is in contrast, to the general funding guidelines for non-claimant financial assistance. The Commonwealth funding support provided to non-claimant and the funding of NTRBs reflects the consistent pattern of inequality within the native title system which fails to provide equal or even adequate support to the rights and interests of native title holders.

The Attorney-General's Department provided information to the Senate Estimates Committee showing some detail of the grants made during the 2002-03 financial year.[154] The Department explained that while it is not possible to provide details of the nature and purpose of individual payments, about 90% were payments for the purpose of negotiated agreements and 10% for the purpose of litigation. This estimate is based on the application for funding rather than the actual use made of the payment.

Information provided by the Attorney-General to the Commonwealth Parliamentary Inquiry into the Land Fund shows the following breakdown in the allocation of funding:

154 This was in response to several Questions on Notice from Senator Ludwig. The available data has not been aggregated in any way. The Attorney-General's Department prepares such tables for the Attorney-General's Native Title Consultative Forum. A similar table was provided for the previous financial year in answer to a previous Question on Notice from Senator Ludwig.

Table 5: Attorney-General's Respondent Funding, 2000-2003[155]

Type of respondent	% total expenditure 2000-01	% total expenditure 2001-02	% total expenditure 2002-03
Local govt organisations	41.68	43.01	16.36
Pastoralists	34.38	28.66	17.22
Fishers	15.85	12.55	36.80
Miners	3.79	5.23	18.86
Other	4.29	10.54	10.76

In 2003, the Attorney-General's Department wrote to all recipients of financial assistance in native title matters, advising that it had made changes to its procedures for dealing with financial assistance. As a result of these changes a number of group recipients were advised that pursuant to s.183 NTA their funding will be terminated unless they are directly involved as a party or future party in proceedings relating to particular native title applications. This resulted in some peak bodies being deprived of funding for information, training and general advice on agreements and agreement-making for their members.

Prescribed Bodies Corporate

When the Federal Court makes a native title determination, the NTA allows the native title holders to specify an organisation to manage the native title interests specified in the determination. These organisations are called Prescribed Bodies Corporate (PBCs). In May 2002, there were 20 PBCs registered on the National Native Title Register, thereby becoming Registered Native Title Bodies Corporate (RNTBCs).[156] In addition to other functions at the general direction of the native title group members the PBCs' work includes:

- managing the native title;
- entering into native title related agreements; and
- holding in trust and investing monies paid to the native title group resulting from dealings in their native title.

PBCs are the parties that manage the outcome of native title determinations. There is no funding for their work. The government has acknowledged that ATSIC grant conditions prohibit NTRBs from assisting the ongoing operating costs of RNTBCs.[157] The Attorney-General's Department, in response to questioning from the Senate Estimates Committee, explained that ATSIC was conducting a research project to obtain data on the structure and projected

155 Letter from the Attorney-General to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 7 October 2003.

156 Source: Senate Estimates Committee Question on Notice No. 244, 31 May 2002. The source of the figures is the Native Title Registrar, National Native Title Tribunal.

157 In answer to questions on notice from Senator McKiernan about funding for RNTBCs, on 31 May 2002 the Attorney-General's Department noted the NTRB assistance restrictions. Source: Senate Estimates Committee Question on Notice No. 244, 31 May 2002.

activity of RNTBCs across Australia. This research report was completed in October 2002.[158] The report noted that as at October 2002 there were 20 RNTBCs on the National Native Title Register, and predicted that there would be at least 58 RNTBCs by the end of 2006 and possibly 75 RNTBCs by 2008. The report explains that the costs associated with establishing and registering RNTBCs are considerable and that the nature and extent of such costs has never been given any detailed consideration. Currently, the establishment costs for most RNTBCs are being met by the NTRBs and by state-funded organisations such as community councils. Even if NTRB funding includes an amount for establishing RNTBCs it is still inadequate. In some cases there are no resources to meet establishment costs for RNTBCs.

The Attorney-General's Department acknowledged that the Native Title Coordinating Committee has discussed the lack of funding for RNTBCs, but that the details of those discussions remain confidential because the NTCC's deliberations and advice are yet to be considered by the Federal Government.

The Indigenous Land Corporation (ILC) has often been asked if it is able to provide assistance to native title holders, especially in relation to their ongoing operating costs for RNTBCs. The ILC points out that it does not fund any of the land holding bodies that may be established to take over land that it has purchased for the benefit of Indigenous people, and that under its current charter it is unable to provide such assistance. However the ILC has provided and will continue to provide assistance to native title holders with land management functions.[159]

Compensation

The Commonwealth has offered to provide financial assistance to the States and Territories for various types of compensation for extinguishment of native title. The extinguishment compensation the Commonwealth proposes to cover is the validation of acts before 1997 and also some government acts permitted since 1997. The Commonwealth has also offered to assist the States and Territories with the cost of administering the native title functions of certain State/Territory tribunals. These arrangements are to be finalised through bilateral agreements with each jurisdiction.

The Attorney-General's Department confirmed that, as at November 2003, no State or Territory has signed an Agreement with the Commonwealth for the provision of financial assistance for native title compensation and the costs associated with tribunals performing native title functions. The Department also confirmed that the Commonwealth's offer was still available should a State or Territory change their mind.

158 Anthropos Consulting Services & o'rs, *Research Project into the issue of Funding of Registered Native Title Bodies Corporate*, ATSIC, October 2002.

159 Indigenous Land Corporation, *Land Acquisition and Land Management Programs Guide 2002-2006*, ILC, Adelaide 2002, 'Frequently asked questions'.

Agency Responsibilities

The current Administrative Arrangements Order[160] identifies the Federal Attorney-General as being responsible for the administration of the Commonwealth's *Native Title Act 1993*, except to the extent administered by the Minister for Immigration and Multicultural and Indigenous Affairs. The Minister for Immigration and Multicultural and Indigenous Affairs is responsible for administering two parts of the Act, being those dealing with:

- the native title functions of prescribed bodies corporate and holding native title in trust; and
- Representative Aboriginal/Torres Strait Islander Bodies or NTRBs.

This means the Attorney-General's Department is responsible for the overall administration of the NTA, including funding for the Federal Court, funding for the National Native Title Tribunal, and financial assistance for respondents to native title determination applications.

In its Budget papers for 2001-02, the Commonwealth set out the framework established by the NTA and the programs funded by the Commonwealth for the administration and management of native title.[161] The Commonwealth's native title system comprises:

- The Federal Court
- The National Native Title Tribunal
- The Native Title Registrar (a statutory position, located in and serviced by the Tribunal)
- Representative Aboriginal and Torres Strait Islander bodies (NTRBs)
- financial assistance in native title cases
- financial assistance to the States and Territories
- compensation for Commonwealth activity
- Commonwealth litigation
- native title policy development

Native Title Coordination Committee

In 2000, the Attorney-General's Department formed the Native Title Coordination Committee. The Committee advises government on the overall operation and resourcing of the native title system. The Committee makes recommendations to government but because these recommendations are not publicly available, it is not possible to know the Committee's position or influence on the overall levels of funding for native title matters or how the funds are divided between the various component parts that comprise the native title system. The Committee meets about four times per year and its membership comprises:

- Attorney-General's Department Legal Services and Native Title Division (formerly Native Title Policy Division);

160 Order of 26 November 2001 amended 20 December 2001 and 8 August 2002. Available at <www.pmc.gov.au/docs/DisplayContents1.cfm?&ID=99> accessed 18 December 2003.

161 *Resourcing of the Native Title System op.cit*.

- Legal Assistance Branch of the Family Law and Legal Assistance Division in the Attorney-General's Department;
- Federal Court;
- Tribunal; and
- Aboriginal and Torres Strait Islander Services (ATSIS).

Attorney-General's Native Title Consultative Forum

The Attorney-General's Department also convenes the Attorney-General's Native Title Consultative Forum. This Forum meets three times per year and brings together representatives of all the key agencies and stakeholders involved in native title, including the Federal Court; the Tribunal; ATSIS; state and territory governments; representatives of the pastoral, mining and fishing industries; local government; NTRBs; and representatives of my Native Title Unit. This Forum has become a useful opportunity for exchange of information and experiences as well as for providing information and advice to the Attorney-General.

Office of Aboriginal and Torres Strait Islander Affairs

An Office of Aboriginal and Torres Strait Islander Affairs (OATSIA) has been established within the Department of Immigration and Multicultural and Indigenous Affairs.[162] The Office succeeds the former Department of Reconciliation and Aboriginal and Torres Strait Islander Affairs. OATSIA's role is to assist the Minister with Parliamentary duties, develop and evaluate policy and promote better outcomes from government programs for Indigenous people.

Aboriginal and Torres Strait Islander Services

Australia's peak Indigenous body, the Aboriginal and Torres Strait Islander Commission has been in existence for over twelve years. On 17 April 2003, the Minister announced the establishment of a new executive agency, Aboriginal and Torres Strait Islander Services, to administer ATSIC's programs and make individual decisions about grant and other funding to Indigenous organisations. In announcing these changes, the Minister said the aim of the establishment of ATSIS is to separate the roles of decision-making about the development of policy (to remain with ATSIC) from that of its implementation (to be undertaken by the new agency). Chapter 2 of my *Social Justice Report 2003*, discusses the ATSIC review and restructure in detail.

Commonwealth-State/Territory relations

Apart from the bilateral meetings between the Commonwealth and each State and Territory over the Commonwealth's offer on compensation for native title extinguishment, and the Attorney-General's Native Title Consultative Forum, there have been no regular policy forums between the Commonwealth and the States and Territories to discuss native title matters at a government-to-government.

162 <www.immi.gov.au/oatsia/index.htm>.

Chapter 3

An Evaluation of Native Title Policies throughout Australia

State, Territory and Commonwealth native title policies[1] direct the way in which governments conduct negotiations with native title claimant groups and the scope and content of the agreements they make as a result of these negotiations. Such policies may influence whether negotiations will be confined to native title rights and interests as they are legally defined, or whether they address the broader economic and social development needs of the claimant group.

In Chapter 1, I discuss the human rights principles which should shape native title policies if native title agreements are to contribute to achieving sustainable development for Indigenous people. I conclude that a policy based on these principles would, working in partnership with the claimant group:

- Aim to build the capacity of the native title group to identify its own development objectives.
- Assist the group to achieve its development objectives by building upon and utilising the assets, skills and knowledge already possessed by the group or its members.
- Facilitate the participation of the native title claimant group in the negotiation process both for the purpose of advocating its position, and also to integrate its objectives with those of other stakeholders.
- Define the government's role including the way in which the government should carry out that role. Emphasis should be placed on integrating and co-ordinating the responsibilities of various government agencies with each other and with the development objectives of the group.
- Assist the group to monitor and evaluate the success of the strategies that have already been adopted, both by the group and by the government, to achieve the group's development objectives.

1 Reference in this chapter to State government's police and practices include references to Territory policies.

- Assist the group to put in place new or additional strategies deemed necessary by the evaluation process.
- Structure the negotiation process consistently with the time required by the group to develop its capacity to achieve its development goals. The policy should ensure time frames are appropriate for this purpose. In addition, negotiations should not be an all-or-nothing event. They may need to be staged in accordance with the critical stages of the development process.
- Invest the resources necessary to allow the group to build its capacity to achieve its development goals. Development is a long term process and depends on a guaranteed source of funds. However, the group's goal should be to become independent of external funding. The benefit of a financial commitment in the development process is a community which is ultimately self-supporting and self-governing.

This chapter evaluates State and Commonwealth native title policies by reference to whether they direct native title negotiations towards the sustainable development of the claimant group in accordance with internationally recognised human rights principles.

Part 1: Evaluation of State and Territory policies

As indicated in Chapter 2 the material on which this policy analysis is based was drawn from publicly available government policy documents, information from various Indigenous organisations across Australia and interviews with State and Commonwealth government representatives. While this information reveals that States' native title policies and practices vary considerably, the capacity of these policies and practices to contribute to the economic and social development of the native title claimant group is determined by the State's response to the following issues.

Negotiate not Litigate

A common theme of State and Territory native title policies as they currently exist is a willingness to negotiate rather than litigate.[2] The reasons for this vary from practical concerns about the cost and delays associated with litigation to more substantive concerns about the effectiveness and viability of litigated outcomes. Absent from most State and Territory native title policies however is the identification of the goals that native title negotiations are seeking to achieve.

There are three situations in the native title process in which a negotiation policy might be applied by State and Territory governments. Each situation may result in the negotiation of a different type of agreement between government and the claimant groups. These are: negotiation of a consent determinations; negotiation of an agreement which complements or extends consent determinations, and negotiation of agreements not containing native title determinations but which utilise the native title process to enable outcomes for traditional owner groups.

First, as itself a party to the litigation, the State is in a position to decide whether it will consent to a native title determination being made by a court or whether it will require the native title parties to prove their case through a contested hearing. As a matter of policy, States have generally stated a preference to negotiate with native title parties so as to resolve the native title claim rather than proceed to a contested hearing. These negotiations are directed towards agreeing upon the terms of the order that the Court should make in relation to the claim. Once the parties have agreed to these terms it is within the discretion of the Court to make the orders sought. If the Court decides that it is able to make the orders, then a consent determination is made.

A preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title determinations respond as far as possible to the development needs of the native title claim group rather than just the demands of the legal system. While negotiations aimed at identifying the terms of a consent determination are subject to the requirement that the Court needs to be satisfied that it can make the orders sought, there is sufficient scope within the legal process to allow parties

2 For example, see the NSW Department of Lands website; Qld *Native Title Contact Officer's Manual*; SA Government *Why Negotiate?* at <www.il.com/sag.asp>; the Protocol for the Negotiation of a Native Title Framework Agreement for Victoria; WA Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title.

to focus their negotiations on determinations which facilitate a broader policy goal.

In Part 2 of this chapter I look at this issue as it applies to the Commonwealth's consideration of its role in consent determinations. I conclude that while the decisions of the High Court in the *Yorta Yorta*[3] case and the *Miriuwung Gajerrong* case[4] limit the extent to which native title determinations can contribute to the economic and social development of the native title claimant group there is still some latitude for negotiation of a consent determination which has retained this capacity. In particular the Court has left open the question of whether a change in the way in which a community acknowledges and observes their traditional laws and customs constitutes a break from those laws and customs or whether it constitutes an adaptation to changing circumstances. In the former case native title cannot be recognised while in the latter native title can be recognised. Parties have considerable latitude to prefer one approach over another. In addition the Court has still left open for considerable negotiation the way in which native title rights and interests allowing descriptions which give recognition to more economically productive rights and interests through a native title determination.

Secondly, there is a willingness in many States to negotiate agreements which complement consent determinations in order to ensure more effective outcomes for the native title claim group. These negotiations also provide an opportunity for the parties to focus on what the native title group requires for its development. While some of these needs may be met by a native title determination it is unlikely that the legal recognition of native title rights and interests will provide a complete basis for the group to achieve its development goals. The shortcomings of the legal system in this respect are highlighted in Chapter 1.

Finally, an opportunity for a negotiated outcome arises where a claimant group, although unlikely to satisfy the legal tests for obtaining a native title determination, nevertheless is able to show that its members are the traditional owners of a particular area and have a continuing connection to that country. The native title process provides an opportunity for the State to understand the social and cultural context for the development objectives of the group and to recognise the basis for these social and cultural values, the group's traditional laws and customs. The fact that the native title claim group cannot satisfy the legal tests should not result in this opportunity being lost.

Many States utilise the mediation process established under the NTA to engage in these three types of agreements. The Indigenous Land Use Agreement (ILUA) provisions of the NTA provide additional protection to the rights and obligations agreed as a result of these negotiations.

A policy of negotiation provides a basis for governments and traditional owner groups to fully utilise the three occasions for negotiation within the native title process to pursue goals in addition to, or other than, those imposed by the legal system. Unclear in most State native title policy documents, however, are

3 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002).

4 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002).

the objectives that the State is trying to achieve from these negotiations. This gap in States' native title policies means that native title negotiations have no consistent goals but change depending on the circumstances of the case. It also means that there has been little policy development at a State level around defining the elements of a native title agreement that may be required to contribute to the sustainable development of the traditional owner group.

Chapter 1 of this Report emphasises the need to shift the focus of native title negotiations and agreements towards the capacity development of the native title claim group. Such a shift requires a reappraisal of the negotiation process and the agreements that result from these negotiations. Agreements that would contribute to achieving the group's development objectives may include:

- measures to build the capacity of the group for economic management and governance;
- tailoring the agreement to the development agenda of the group;
- ensuring a cultural match between the terms of the agreement and the values of the group;
- providing or working towards the provision of assets on which economic growth can be built;
- providing a basis for sharing benefits generated from developments that occur on the land; and
- monitoring and evaluating the implementation of the agreement against agreed criteria.

Articulating the underlying purpose of the negotiation process at a policy level in terms of the economic and social development of the traditional owner group would also clarify the relationship between negotiations at the three levels discussed above (negotiating consent determinations, negotiating agreements ancillary to a determination, and negotiating agreements which do not include a native title determination).

Obtaining a native title determination through negotiation rather than litigation is just one way of augmenting the group's development base. Certain benefits flow from having determinations enforceable as orders of the Court. Native title determinations can constitute an important asset which can be utilised to achieve the group's objectives. Most importantly, a native title determination confirms to the world the status of the group as the traditional owners of the land.

However parties do not have sole authority to negotiate the terms of a native title determination. They must satisfy a court that the NTA can support the orders sought. In any case native title determinations alone, as presently formulated, are insufficient to provide a basis for sustainable development to occur. Having enforceable native title rights, legal recognition of traditional ownership and productive assets such as land are a necessary but not sufficient basis for economic and social development. Hand in hand with these gains, the group must develop its capacity to utilise these assets so as to fully realise its vision.

Agreements negotiated to augment a court determination should ensure that, as a package, the two elements of the agreement (the determination element and the non-determination element) contribute to the policy objective. In the

agreement between the Wotjobaluk people and the Victorian government for instance, a consent determination was just one element of the overall negotiation; 'non-native title outcomes' constituted the core element. The delay in the Commonwealth government's decision to support a consent determination was not seen by the Victorian government as an insurmountable obstacle to negotiating a package that was aimed at a broader objective.[5]

Further, traditional owner groups who are unable to meet the legal tests for a native title determination or whose native title rights and interests have been extinguished by previous grants would not be disadvantaged if the government was firmly committed to negotiating agreements that put in place the infrastructure for the development of those groups. As a further example of its positive approach Victoria has continued to negotiate with the Yorta Yorta people despite a negative finding from the Court. This reflects its willingness to recognise the people's traditional connection to country. A policy framework which aimed at the economic and social development of traditional owner groups and provided mechanisms to achieve it, would provide important parameters for this type of negotiation.

While many State governments are demonstrating a flexible approach to native title negotiations and a willingness to go beyond the legal parameters, the question that remains is whether the agreements provide the basis for the ongoing development of the group. This question will best be answered if State governments and Indigenous people together develop policies for this end, as well as criteria which can measure the negotiated outcomes against the group's development needs.

Victoria is clearly moving in this direction with the development of policy goals for native title negotiations and strategies for achieving them. Its strategies refer to a coordinated approach to managing native title issues; working to achieve sustainable negotiated outcomes to native title matters; development of partnerships between the Government, native title applicants and their representative body, and other stakeholders; and development of clear processes within government agencies for the implementation and management of outcomes of native title matters.[6]

While many of these strategies aim to improve government processes for dealing with native title, the recognition of the need to achieve sustainable negotiated outcomes for native title matters and to develop partnerships between government and native title applicants indicates the beginning of a more substantive approach to native title policy development.

In Queensland, as in other States, an increasingly important distinction is made between negotiations for a native title determination and other native title related agreements or outcomes. In relation to this latter category, the government is open to negotiating outcomes related to native title that may be achieved without having to wait for a native title determination. However, also consistent with many other States, little policy development is evident around the goals of these latter agreements.

5 See Chapter 2 for a more detailed discussion.
6 Victorian Government, *Native Title Policy 2000.*

The Queensland *Native Title Contact Officer Manual*[7] outlines the steps involved in the native title claim process. Included as a parallel process, is the negotiation of Indigenous Land Use Agreements. There is no indication whether this parallel process is merely the negotiation of agreements triggered by the future act provisions of the NTA, or negotiations ancillary to, or in substitution for, those directed towards a native title determination. There is no elaboration of the purpose of the parallel negotiations.

Nor does the protocol between the Queensland government and Queensland Indigenous Working Groups (QIWG), signed in 1999, provide further guidance on this issue. As indicated in the State profiles, the protocol establishes a process for policy development in relation to a number of native title related issues. The protocol ensures that the government's approach in relation to these issues will be developed through extensive consultation between government and the QIWG. The list of issues however does not include the development of a policy direction for the negotiation of native title agreements, including those ancillary to a determination and those made with traditional owner groups which may not meet the legal tests established under the *Native Title Act*.

In NSW, the Premier's Memorandum on Native Title and Indigenous Land Use Agreements (1999, No. 23) advocates ILUAs as a way of resolving native title issues. It provides direction to State government agencies considering the use of an ILUA in their dealings with Aboriginal people. The focus of the direction is on administrative and procedural issues rather than policy issues.

The Memorandum acknowledges that while not all matters may be capable of being resolved through an ILUA, in appropriate cases ILUAs can be a productive means of dealing with native title matters. The Memorandum is silent on whether this includes the use of ILUAs to augment or replace consent determinations. The Memorandum is also silent on the government's goals in negotiating an ILUA.

The Department of Lands' website also articulates the NSW government's approach to native title agreement-making. It states that a goal of native title agreements is 'to achieve fair and equitable outcomes for all parties'. However there is no detail as to what fairness and equity mean in the context of native title agreements or how they are to be achieved.

In Western Australia the Office of Native Title implements the government's native title policy. The policy, entitled *native title: agreement not argument,* set out in full in the State's profile in Chapter 2, undertakes to 'resolve native title issues by negotiation and agreement and cut currently projected expenditure on native title litigation by at least $2 million'.[8]

As set out in the WA profile, the government's platform of resolving native title claims through mediation and negotiation has been reiterated on a number of significant occasions since its election. It is clear the WA government is seeking ways to resolve claimant applications outside the litigation process. However,

7 Queensland Department of Natural Resources and Mines <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 17 December 2003.

8 <www.premier.wa.gov.au/policies/native_title.pdf> accessed 16 December 2003.

there is no detailed policy framework for directing the negotiation of native title agreements to the economic and social development of the native title group.

Native title negotiations and agreement-making in South Australia and Northern Territory are, more than in any other State, directed to the economic and social development of the traditional owner groups.

In South Australia this policy direction is driven by the State-wide ILUA process rather than an articulated policy position. This process is described in the previous chapter in the policy profile of South Australia. Its features are:

(i) A high level of Indigenous participation in the negotiation process

The South Australian government's commitment to the State-wide ILUA negotiation process (also referred to as a State-wide Framework Agreement) means that native title negotiations involve a high level of participation by traditional owner groups. This is because, as part of this commitment, the government supports the establishment by the Aboriginal Legal Rights Movement (ALRM) of a system of participation which ensures that traditional owner groups have an opportunity not only to directly negotiate their claim, but also to assist in the formulation of the government policy which directs these negotiations. Participation at these levels ensures that the development objectives of the native title claim group will be integral to the negotiation of native title agreements.

Under this approach native title negotiations are not merely a conduit to a series of native title or non-native title outcomes aimed to benefit Indigenous people. They are also part of a process in which the capacity of traditional owner groups to determine their own objectives and to achieve these objectives can be exercised.

Under the State-wide ILUA process, ALRM has equal standing with other stakeholders on a series of side tables that consider policy approaches to a range of issues including mining, fishing, local government and pastoralism. These side table negotiations have resulted in three significant draft template agreements concerning pastoral interests, exploration interests and mining interests. More importantly, they are laying the foundation for strong workable relationships between Indigenous and non-Indigenous people well into the future.

The formulation of policy in this way, through transparent, representative processes, shows a commitment by the South Australian government to facilitating the native title groups' development objectives. The negotiation of processes through a series of side tables is a means by which the claimant group can integrate their objectives with those of other stakeholders. Enshrining policy positions as template agreements (ILUAs) between stakeholders ensures not only the government's commitment to the agreed approach but a commitment by all the relevant groups involved in the negotiation. It also contributes to the development of stable and harmonious relationships between stakeholders and provides the basis for future economic developments.

(ii) The State seeks to facilitate Indigenous development rather than impose it

Using negotiation as the process by which a State develops its policy approach to traditional owner groups ensures that the development objectives identified by Indigenous people, rather than the objectives identified by the State, have a central place in that policy. Through negotiation the State can be urged to develop strategies to facilitate achievement by the group of its own goals.

In South Australia the negotiation process is structured to be consistent with the time frames required by the claimant group to develop its capacity to achieve its development goals. In addition, the conduct of a series of negotiation tables devoted both to specific claims and to more general issues, allows traditional owner groups to be involved in the process even if their particular claim is not on the table. In this way the negotiation process itself is a mechanism for capacity development. It also ensures negotiations are not an all-or-nothing event and can be staged according to the critical stages of the development process.

Finally, the State-wide ILUA process in South Australia reflects the government's willingness to invest resources necessary to allow the group scope for capacity building. As discussed in Part 2 of this chapter in relation to funding, the SA government has buttressed the Commonwealth's inadequate funding of Native Title Representative Bodies to ensure the state-wide negotiation process can be seen through to its intended conclusion: the development of self-supporting and self-governing Indigenous communities.

In the Northern Territory a similar commitment to the economic and social development of traditional owner groups is demonstrated in the way the government conducts native title negotiations. The policy goals of the Office of Indigenous Policy expressly apply to these negotiations and include co-ordinating Indigenous economic development policy; developing options to improve the social well being and living conditions of Indigenous Territorians; and the development of effective Indigenous governance and capacity building to develop sustainable communities.

Just as important as these policy goals is the process by which they are formulated. The Indigenous Economic Forum '*Seizing our Economic Future'* conducted in March 2003 was the first of three fora designed to inform the government's policy in the area of economic development for Indigenous people in the Territory. A major focus of the forum was the sustainable economic use of country.[9]

The Relationship between States' Native Title Policy and their Indigenous Policy

While there is a failure by many States to fully develop policy objectives for native title negotiations, this policy gap could be filled if States were willing to align native title negotiations with the economic and social development objectives contained in their broader Indigenous policies. However, native title

9 *Seizing our Economic Future*, Issues Paper, p2. <www.indigenousforums.nt.gov.au/dcm/indigenous_policy/forums/pdf/Indigenous_Economic_Forum_2003_Issues_Paper.pdf> accessed 11 December 2003.

continues to be positioned outside this broader policy framework. In many cases the role of native title is patently absent from States' policy responses to the reconciliation process. Native title negotiations and agreements are not seen as part of the State's policy toolbox directed towards transforming the conditions of Indigenous people's lives.

The failure to co-ordinate the goals of native title negotiations with the State's strategies to address the economic and social development of Indigenous people not only isolates the native title process from broader policy objectives; it limits the capacity of those broader policies to achieve their objective of addressing the economic and social conditions of Indigenous people's lives. By disregarding native title the policy fails to understand the importance of filtering development through the cultural values and structures of the group which is the subject of this policy.

I have already referred in Chapter 1 to the Harvard Project on American Indian Economic Development[10] and its finding that tribes that are successful in transforming their economic and social conditions are those which make their own decisions and have capable institutions of governance which reflect the cultural values of the tribal citizens. These findings reinforce my view that recognition of the distinct identity of Indigenous people and the cultural, economic and political values that characterise this identity are essential to the economic and social development agenda of Indigenous people. While the legal construction of native title in Australia has diminished the extent to which the law will recognise Indigenous laws and customs and decision-making structures, a broader approach to native title can give recognition to Indigenous identity as it manifests in the way of life of a vast array of traditional owner groups throughout this country. Negotiating development within the parameters of this broader understanding of native title provides an inbuilt mechanism for ensuring that many of the elements necessary to ensure the success of development policies are present.

Despite native title providing an ideal location to foster sustainable development for Indigenous people it is not included in the policy response of some governments to reconciliation. The two major policy responses to emerge from the reconciliation process which do facilitate the economic and social development of Indigenous people are, firstly, a "whole-of-government" approach to Indigenous policy and secondly, partnerships between government and Indigenous communities.[11] These two policy frameworks are discussed in detail in Chapter 1. They are also discussed in this year's *Social Justice Report*. In Chapter 1 I conclude that a whole-of-government approach, which requires government to integrate the responsibilities and policies of all the agencies

10 The Harvard Project on American Indian Economic Development (the Harvard Project) was founded by Professors Stephen Cornell and Joseph P. Kalt at Harvard University in 1987. The project is housed within the Malcolm Wiener Center for Social Policy at the John F. Kennedy School of Government, Harvard University. Papers on the findings of the research projects conducted can be found at <www.ksg.harvard.edu/hpaied/overview.htm>.

11 Council of Australian Governments (COAG) 'Whole of Government' initiative is managed by the Commonwealth and based on a COAG Communique released in November 2000. For more details see <www.pmc.gov.au/docreconciliationframework.cfm>.

concerned with providing services to Indigenous communities, is a very important element of achieving the sustainable development of these communities. However the implementation of this approach has been very limited and fails to ensure that Indigenous policies in all their manifestations are underpinned by consistent objectives. In particular it fails to ensure that native title policies are brought within or are consistent with strategies for achieving economic and social development.

The second policy response to reconciliation, the establishment of partnerships between Indigenous communities and governments, is also an important element of sustainable development. In the policy framework for sustainable development described at the beginning of this chapter, government can play an important role by facilitating the identification of development goals; assisting the group to build upon its assets, skills and knowledge to achieve those goals; helping the group identify which aspects of its asset skills and knowledge base may need to be supplemented; and facilitating the group to monitor and evaluate those strategies it has adopted to achieve its goals. This policy framework can be summed up as a partnership approach. It is a partnership, however, with a number of special characteristics.

First, for the approach to achieve sustainable development of the community, the dominant partner must be the Indigenous people. The Indigenous community must determine its policy objectives and strategies and control the way they are achieved. Decisions to this effect must be conducted by means of processes and institutions which the community respects and which reflect the group's cultural values. As discussed above, native title can provide a framework to ensure decisions are made in this way.

Second, the government's role in this partnership is to facilitate and assist the group to achieve its goals. The government should not take over the control of the process. Indigenous leader Gerhardt Pearson has put the situation thus:

> It is easy for government bureaucracies to accept so-called "whole-of-government" approaches, coordinated service delivery and so on. It is much harder for them to let go of the responsibility. On one hand we have the almost complete failure on their part to lead and facilitate social and economic development in Indigenous Australia. On the other hand, our experience is that the government bureaucracies are resistant to the transfer of responsibility to our people.[12]

Despite the limitations in the way the whole-of-government and partnership approaches have been applied, these two responses to reconciliation have provided an important foundation for economic and social development to occur in Indigenous communities. Yet in a number of cases States have not included native title in their response to reconciliation.

In NSW the government has responded to the reconciliation process with a plan of action aimed at strengthening Aboriginal leadership and economic

12 G Pearson, "Man Cannot Live By Service Delivery Alone", *Opportunity and Prosperity Conference*, Melbourne November 2003. Available at <www.capeyorkpartnerships.com>. Accessed 14 November 2003.

independence.[13] The plan builds on the concept of partnerships between government and Aboriginal people. In November 2002, the NSW Government, ATSIC and the NSW Aboriginal Land Council entered into the NSW Service Delivery Partnership Agreement, the purpose of which is to improve social, economic and cultural outcomes for Aboriginal and Torres Strait Islander people in NSW. There is no mention of native title in the document although the importance of traditional owners in national parks is referred to. The notion of partnerships and a whole-of-government approach is used in the limited sense of co-ordinating government service delivery to redress Indigenous disadvantage. It does not extend to recognising inherent rights as the basis for achieving better social and economic outcomes for Indigenous communities.

In Victoria, in September 2000, the then Department of Natural Resources and Environment[14] developed a comprehensive framework to assess its relationship with Indigenous communities to use it as a basis for delivery of services to Indigenous people. Out of this an Indigenous Partnership Strategy was developed in 2001 which contains eight initiatives, including capacity building, a partnership approach, Indigenous heritage as a component of land and resource management, and economic development.

The Wotjobaluk Agreement was developed in conjunction with the Department of Sustainability and Environment and Justice. It utilised a broad range of options available to the Victorian government. It is clear that elements of the Indigenous Partnership Strategy influenced the government's approach in the negotiation of this agreement, including the Government's willingness to recognise Indigenous custodianship of land and actively promote Indigenous participation in cultural heritage, land and natural resource management programs. This approach is comprehensive and could be further applied to ensure that the government's policy direction in all native title agreements is towards the economic and social development of Indigenous people. The Strategy could also be developed to provide criteria by which agreements that have been negotiated are evaluated and monitored to ensure they achieve their economic and social goals. This would provide a basis for a partnership between the government and the traditional owner group.

A key issue in Queensland is the interrelationship between native title and Indigenous concerns about cultural heritage and land and waters. Because many of these issues are dealt with by different government agencies, the State government is attempting to implement a whole-of-government approach to coordinate these various aspects.

Cape York offers an instructive study in the layering of policies and programs, both State and Commonwealth. Many of these policies and programs are related to, or impinge on, native title and affect the economic and social development of Indigenous people. In terms of regional policy approaches, the Commonwealth has made the Cape one of the trial areas for its Council of Australian Governments (COAG) whole-of-government approach under the

13 Partnerships: a New Way of Doing Business with Aboriginal People Premier's Memorandum No. 2001-06 at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm> accessed 10 November 2003.

14 Since December 2000, the Department of Sustainability and the Environment.

COAG Reconciliation Framework.[15] The COAG Cape York trial is designed to work collaboratively with the Queensland government's Cape York Partnerships approach, and specifically with the State government's response to the Cape York Justice Study, *Meeting Challenges, Making Choices*.[16] The latter program is the responsibility of the Department of Aboriginal and Torres Strait Islander Policy (DATSIP) which has established a Cape York Strategy Unit to implement its response. The response includes the appointing "Government Champions" (heads of Queensland government departments), who each have responsibility for developing effective relationships with particular communities in the Cape. *Meeting Challenges, Making Choices* sets out eight priority areas:

- Alcohol, substance abuse and rehabilitation
- Children, youth and families
- Crime and justice
- Governance
- Economic development
- Health
- Education and training
- Land and sustainable natural resource management.

One of the outcomes of Queensland's whole of government approach is the draft proposal *Looking after our Country Together.*[17] The proposal sets out three key objectives for the next ten years:

- Stronger Indigenous access to land and sea country
- Improved Indigenous involvement in planning and management of sea country
- Improved Indigenous involvement in and impact on natural resource planning and policy making.[18]

This discussion paper has been circulated through a series of community consultations between September and November 2003.

The Department of Natural Resources and Mines' Cape York Co-ordination Unit in Cairns has been set up to provide a coordinated approach to the economic, social, and environmental issues of the people in Cape York.[19] Although not directly involved in native title negotiations, the Co-ordination Unit plays a key role in the broader Indigenous issues relating to land and sea in Cape York, many of which involve native title holders or claimants and matters that are being dealt with in the context of native title or related negotiations.

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15 The Framework can be found at <www.dpmc.gov.au/docs/reconciliation_framework.cfm> See also D Hawgood, 2003 'Imagine what could happen if we worked together. Shared responsibility and a whole of governments approach', paper delivered at the *Native Title Conference*, Alice Springs, June 2003. Available at <www.aiatsis.gov.au/rsrch/ntru/conf2003/papers.htm>.

16 <www.mcmc.qld.gov.au/>.

17 <www.nrm.qld.gov.au/regional_planning/partnership/resources.html>.

18 <www.indigenous.qld.gov.au/partnerships>.

19 Queensland Government, Department of Premier and Cabinet Annual Report 2001-2002 at <www.premiers.qld.gov.au/about/annreport01-02/index.shtml>. Further information on Cape York Partnerships available at <www.premiers.qld.gov.au/about_the_department/publications/regional>.

These include the transfer of identified land and the establishment of Land Trusts under the *Aboriginal Lands Act 1991* (Qld) (ALA); and support for a number of Natural Heritage Trust (NHT) projects and for the implementation group for the Cape York Heads of Agreement eleven pilot properties. The Director-General of DNRM is the Mapoon community's "Government Champion" and the Co-ordination Unit assists with this work in co-operation with DATSIP's Cape York Strategy Unit. A particular program supported by the Unit with the assistance of NHT funding is the Land and Sea Management Centres currently located in Kowanyama, Pormpuraaw, Aurukun, Napranum, Mapoon, Injinoo, Lockhart River, Coen, and Hopevale.

Native Title and Indigenous Land Services (NT&ILS) officers and the Cape York Partnerships negotiating teams maintain ongoing liaison with the Cape York Co-ordination Unit, and with other government agencies with related responsibilities in the Cape, such as the Environmental Protection Authority (EPA) which administers the key Queensland legislation dealing with the environment.

This whole-of-government approach, adopted in Cape York as part of the COAG trials, ensures that the policies that apply to Indigenous people in that region are consistent across government agencies and directed to their economic and social development. A whole of government approach requires that these policy goals of economic and social development permeate native title policy. An important question for native title claimants and traditional owner groups in Queensland is whether the State government's response to reconciliation in the Cape will result in changes to the way in which native title is negotiated both in the Cape York region and throughout the State.

In Western Australia an important government response to the reconciliation process was the *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians.* The purpose of the Statement was:

> to agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.[20]

This broad aim of developing strategies to support and assist Indigenous people has been cited as underpinning new policy developments in WA government departments. For example, the Department of Conservation and Land Management (CALM) consultation paper on joint management refers to the agreement as underpinning the policy shift on joint management. So too does the Department of Local Government and Regional Development in relation to its strategy 'Working with Indigenous People and Communities' which focuses on developing principles for the Department's work with Indigenous communities on capacity building, leadership and economic development.

There is no indication at this stage that native title will play a role in the government's commitment to a 'new and just relationship with Indigenous

20 *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians*, July 2001, p3.

people' or in the development of a State-wide framework to facilitate negotiated agreements at the local and regional level.

In July 2003 the Tjurabalan native title determined area, and the areas covering Balgo and Yagga Yagga Aboriginal communities, were identified as one of the Council of Australian Government's (COAG's) trial sites for a new coordinated approach to develop more flexible programmes and services for Indigenous communities.[21] As part of this coordinated approach, WA announced its commitment to the establishment of a permanent police presence in the region as a priority in response to the communities' concerns about alcohol and justice issues.

There is no indication from a policy perspective what role native title will play in the Tjurabalan trial even though, as one of the COAG sites, the trial will be based on a whole-of-government approach.

The Northern Territory government has integrated Indigenous economic development into its Territory-wide economic development strategy *Building a Better Territory*.[22] As part of this strategy the government seeks to 'enable Indigenous people to use their rights to land to advance their economic well-being and to boost Territory economic development'.[23] The strategies adopted to achieve this goal are firstly:

> Work with Indigenous landowners and their representatives to create a framework of investment certainty in relation to land tenure;

and secondly:

> Work with Indigenous landowners and their representatives to create economic and social development opportunities.

Each strategy outlines the actions needed to ensure their achievement.

The document also seeks to achieve a policy framework that co-ordinates policy programs across departments:

- a commitment to undertake a detailed examination of the various findings and proposals emerging from the Economic Forum.
- to establish a more coherent policy framework across the whole of the Northern Territory government in relation to Indigenous economic development at the Territory-wide and regional levels. This framework will identify the roles and responsibilities of individual departments and agencies in relation to program and policy responsibilities and will be available to all relevant stakeholders.
- the establishment of a permanent high-level task force on Indigenous economic development with nominated representatives from the NT government, industry, Commonwealth agencies, Land Councils and ATSIC. The role of this task force will be to identify key strategies and

21 *Tjurabalan and Region Indigenous Communities Join COAG Trial,* Joint media statement, Minister for Immigration and Multicultural and Indigenous Affairs, 2 July 2003.

22 *Building a Better Territory*, *The Economic Development Strategy for the Northern Territory,* June 2002.

23 *ibid*, p41.

directions, opportunities and barriers, establish and direct project teams where required, and deliver timely responses.[24]

The reconciliation process has caused States to rethink their policy objectives in many areas. No doubt, the legislative recognition of native title has also had an impact on the way governments are looking at their overall policies in relation to Indigenous people. For instance, since the recognition of native title, governments are more aware of regionalism as a basis for decision-making and are focusing on traditional decision-making and land management in their policy approaches. However, as is clear from the above discussion, native title has not been fully integrated into government policy making as a means of harnessing the power of Indigenous people's identity based on traditional laws and customs to achieve economic and social development.

In some states, governments are attempting to integrate native title negotiations with other government Indigenous policies by creating structural links between government agencies concerned with Indigenous issues and native title units. These initiatives are varied and include conducting regular liaison meetings, issuing internal memoranda on how native title issues should be dealt with, establishing protocols on communication between government departments, and installing representatives from relevant departments in the native title unit. These links are important in ensuring that native title negotiations are co-ordinated across government. However, they are not in themselves sufficient to ensure that native title negotiations are underpinned by policy objectives consistent with the broader Indigenous policy agenda. Nor do they necessarily direct native title negotiations to the economic and social development of Indigenous peoples.

What I urge in this Report is firstly, that native title policy is informed by the broader policy agenda directed to the economic and social development of Indigenous people and that secondly, the legal reocognition of inherent rights through native title is seen as a policy tool that contributes to this goal. However coordination of native title policy with broader Indigenous policies directed to economic and social development of Indigenous people should not weaken the capacity of specific Indigenous policy areas to pursue these goals. A whole of government approach to native title does not require that all native title issues be controlled by a single agency which amalgamates policy options, but rather that a multiplicity of policy options be directed to consistent goals.

For example, in Western Australia state departments and agencies have undertaken negotiations with Native Title Representative Bodies on a range of issues. These are outlined in the State profile. The Office of Native Title has overarching responsibility for whole-of-government coordination of native title matters. Whereas previously the NTRBs were able to achieve positive progress in relation to Indigenous land matters through bilateral discussions with particular departments, many of these discussions are now streamlined as part of native title negotiations with the Office of Native Title. While this may ensure consistency in the way native title is approached from claim to claim, it does not guarantee

24 <www.nt.gov.au/dcm/otd/publications/major_projects/economic_development_strategy/building_a_better_territory.pdf>.

that the native title negotiation is directed towards achieving economic and social development. In some cases streamlining in this way may mean that outcomes are delayed in their implementation pending the resolution of the claim. It may also mean that native title agreements are bolstered with outcomes which would have occurred in any case, and possibly earlier, as part of the State's planning process.

An example is including as a potential outcome of native title negotiations what was previously a commitment of the government to transfer lands from the Aboriginal Lands Trust (ALT) to Aboriginal communities. While its inclusion as part of a native title negotiation ensures that the policy is applied as a response to the particular needs of the group it should not be used as a bargaining chip in these negotiations. Nor should the implementation of this or any other policy directed to economic and social development be delayed as a result of its inclusion in the negotiation of native title.

The economic and social development of traditional owner groups requires a sound policy framework that offers a range of options which address the group's particular needs, plus criteria for evaluating their effectiveness. These can be achieved in a variety of ways. Native title is one of these ways and should be an integral component of a government's overall consideration.

Negotiations occur within a legal framework

The failure of many States to fully develop a policy direction for the negotiation of native title agreements means that the process takes place largely within a legal framework rather than a policy framework. Within the legal framework negotiation of native title takes place under pressure of a process in which litigation is either proceeding or pending. This is not to say that a range of agreements cannot be negotiated within this framework. However, the scope and content of those agreements are predominantly directed to addressing the legal issues that define the claim.

The imposition of the legal framework in the negotiation of native title to some extent is unavoidable. This is because the NTA requires all native title claims to be filed in the Federal Court as the first step in the process. The service of a claim is often the State's first notification that the traditional owner group seeks recognition of its traditional connection to a particular area of land. In addition, the amendments to the NTA mean native title applicants will not be entitled to the procedural rights of the future act provisions unless they satisfy the registration test established in the NTA. A precondition to this occurring is the filing of native title application in the Federal Court.

It is not argued in this Report that the legal rights of native title parties are not a necessary element of a native title policy in which the sustainable development of the group is paramount. Recognition of native title rights and interests could well provide to the group important assets on which development could be built, particularly where these native title rights and interests give the group control of the resources that are on the land. However, as outlined at the beginning of this chapter, the assets of the group are just one element of what is needed for it to achieve its own development objectives. The other elements are more likely to be addressed through negotiations directed to what is often

referred to as 'non-native title outcomes', through agreements which either complement or replace native title determinations. The policy framework advocated in this Report synchronises the three types of negotiations within the native title process towards the achievement of the group's development objectives.

The emphasis on the litigation model means that negotiations can suffer from the following shortcomings:

- The primary goal of the agreement is the settling of the native title claim once and for all
- Legal tests established under the NTA form the basis for negotiations
- The relationship between the State and native title claimants becomes adversarial

(i) Settling the native title claim once and for all

Because of the dominance of a litigation model in native title negotiations, the relationship between the State and the native title claim group begins with the filing of a native title claim and tends to end with the resolution of that claim either through litigation or by agreement of the parties. So too, throughout the negotiation process, time frames for negotiation tend to be regulated by the Court's requirement that the claim proceed at a particular rate. Even where the negotiations are directed to agreements which do not require a native title determination, there is an overriding concern to ensure that the native title claim is resolved with finality.

While the native title process provides an important trigger for the State to enter into a relationship with traditional owner groups who claim a continuing relationship with their traditional lands, negotiations structured around the resolution of a legal claim may not be conducive to the group achieving their development objectives.

In Chapter 1 I discuss an approach to negotiations in which time frames are responsive to the changing capacities of groups to achieve their development goals. The role of the State should be that of a partner assisting the group in this process. While the long term objective of the process is the independence of the Indigenous community, the State will continue to have a role until this objective is achieved. The resolving of a native title claim is not an indication that the group has achieved its development goals nor that the State no longer has a role in the capacity development of the native title claim group. The importance of appropriate time frames in the negotiation process was discussed in a review by the British Columbia Treaty Commission of the way in which treaties are negotiated in that province.[25]

The central recommendation of the review was that First Nations, Canada and British Columbia shift the emphasis in treaty-making to incremental treaties – building treaties over time. An incremental approach accords with a number of

25 British Columbia Treaty Commission, *Looking Back – Looking Forward*, BC Treaty Commission, Vancouver, British Columbia, 2001, p14. See Chapter 1 and 4 for further discussion of the review.

the principles of capacity development including a long term investment in the negotiation of agreements; ongoing learning and adaptation; the creation of partnerships; and development of long term relationships. Applying these principles to Australian native title negotiations could form the basis of a long term investment and partnership between government and traditional owner groups.

The Treaty Commission also noted the inadequacy of one-off agreements to address community development and governance. The review recommended that Canada and the British Columbia provincial governments provide contribution funding to allow First Nations to develop their human resources, governance and vision without the continuing pressure of tripartite negotiations.[26] Adapting these recommendations to the native title process would require restructuring negotiations so that they no longer revolve around a one-off agreement to settle native title claims.

The mediation of native title claims through the National Native Title Tribunal (NNTT) provides a forum in which to conduct negotiations directed to outcomes other than the settlement of a native title claim. The Tribunal's Three Year Strategic Plan for the period 2003-2005 indicates its willingness to develop 'broader and more comprehensive approaches to ensure that native title and related outcomes acknowledge the rights and interests of all those involved, and lead to lasting relationships'.[27] However it is important that the Tribunal's strategy also takes account of the capacity of native title agreements directed to 'related outcomes' to respond to the development needs of native title claimants, and the way in which the negotiation process must be structured to enhance this capacity.

(ii) Legal tests established under the NTA form the threshold for negotiations to occur

Agreements occurring within a litigation model are framed according to the legal tests which determine whether the rights asserted can be recognised and enforced by a Court. While State governments have generally indicated a willingness to negotiate an agreement even where these tests cannot be met, the tests still play a role in the negotiation process. Negotiation threshold tests, shaped by the legal tests, play a crucial role in determining whether, and if so how, the State will negotiate with traditional owner groups.

Negotiation threshold tests[28] differ from state to state but essentially require the claimants to provide to the state evidence that they are the biological descendants of the traditional owners,[29] that they can demonstrate continuing connection with the land of their forebears, and that they have continued to observe their traditional laws and customs. Through the connection report the state assesses whether the native title claimants have satisfied these three

26 *ibid,* p16.

27 National Native Title Tribunal, *Strategic Plan 2003-2005*, President's Introduction, <www.nntt.gov.au/about/strategic.html>.

28 Variously referred to as 'Connection Tests', 'Credible Evidence Test', 'Proof of Native Title'.

29 For a scientific-legal analysis of the "biological test" see L de Plevitz and L Croft "Aboriginality Under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) *QUT Law and Justice Journal* 104-120.

conditions. In addition, the state needs to be satisfied that the rights claimed have not been extinguished by the granting of other inconsistent rights over the land. The state is generally responsible for compiling a tenure history to determine whether the rights and interests claimed have been extinguished.

Some States, guided by a broader policy direction towards the economic and social development of traditional owner groups, proceed to negotiate with native title claim groups when they are certain that the group with whom they are negotiating are the traditional owners of the relevant land. Under this approach a State may enter into negotiations with the traditional owner group either through the mediation process offered under the NTA or by means of their own processes without waiting for the collection of evidence by the claimant group in relation to the continuity of their connection, the continuity of their observance of traditional laws and customs and the compilation of a tenure history by the state. Where a consent determination is part of the overall negotiation process, the evidence necessary to satisfy a Court can be gathered during negotiations: it need not delay the commencement or progress of negotiations between the State and the claimant group.

However Western Australia, Queensland, New South Wales and Victoria have all adopted processes which require the claimant group to provide the State with evidence in relation to specified criteria as a pre-condition to native title negotiations. In Western Australia the criteria are contained in *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*; in Queensland, the *Guide to compiling a Connection Report*; in Victoria, in the *Guidelines for Proof of Native Title*; and in New South Wales though not contained in a specific document the government refers to the *credible evidence test*.

These criteria are directly related to the legal tests by which native title rights and interests are proven to exist. The level of evidence required to meet the state's negotiation threshold differs from state to state and is not generally required to reach that presented in a contested hearing. Nevertheless the process can be likened to the settling of a legal claim whereby the state assesses the strength of the case against it and either settles or litigates in accordance with this assessment. I refer to this approach as the assessment model.

In my view native title negotiations should not be approached in this manner. Native title should be seen as an opportunity for both parties to satisfy important objectives: the State to engage with Indigenous people in a way which recognises and respects their traditional structures in order to satisfy important policy objectives; and the native title group to negotiate with the State in relation to securing rights and outcomes that address the particular needs of the group. Instead, the assessment model focuses the negotiation around the settlement of a legal claim. While the resolution of the native title claim may be one element of the negotiation process, the assessment model allows it to dominate the negotiation process.

The assessment model casts the State in the role of deciding whether it will negotiate the claim based on its assessment of the strength of the applicant's case. In contrast, the negotiation model assumes the right of claimant groups to a negotiated outcome based on their traditional connection to country. Where

the economic and social development of traditional owner groups is a priority of government, the question is not whether negotiations will proceed, but how they will proceed.

Government attitude towards negotiation has been a concern in Western Australia where the Office of Native Title has been reluctant in particular cases to engage in the mediation process both in terms of meaningful input and physical presence at formal mediation sessions convened by the Tribunal. The expressions of concern have not been limited to Native Title Representative Bodies. The Tribunal and the Federal Court have also expressed their disquiet. In a directions hearing in *Frazer v State of Western Australia*,[30] before French J in April 2003, many of the issues relating to the difficulties that Native Title Representative Bodies are experiencing in their negotiations with the State were raised.

The background was that although a group of native title applications in the Central Desert region of Western Australia had been referred to the Tribunal for mediation by the Federal Court, the negotiations had generally taken place between the applicants and the State of Western Australia without the involvement of the Tribunal. In a directions hearing a month earlier, the Court had sought submissions from the parties on the proper establishment and management of a negotiation timetable. The principal issue under consideration in the April hearing was the role of the Tribunal in the initiation and management of mediation. In the course of the proceedings, issues were aired relating to the State's guidelines and whether timely progress was being made.

In an affidavit filed on behalf of the State it was stated that although the relevant Land Council and the Court had identified the Martu application as a priority for mediation, it was not a priority for the State.[31] It was asserted on behalf of the State that:

> Determining whether there is a sufficient evidentiary basis upon which to found a negotiated outcome is an important step preliminary to any negotiations over the form of a determination of native title.[32]

The State also submitted that it would only be when the State was satisfied that connection could be made out from its own assessment of the material, that mediation of other matters contemplated in s. 86A(1) could proceed.[33]

French J did not agree. On the issue of the setting of priorities he said that:

> It is not open to any party, be it the State or a native title representative body or any other respondent, unilaterally to announce priorities for a particular region. This is an aspect of the mediation process. Any unilateral action by any party to an application which is not acceptable to others may result in a breakdown of the mediation process and its cessation by order of the Court.[34]

30 *Frazer and Ors v State of Western Australia* [2003] FCA 351.
31 *ibid*, at [6].
32 *ibid*, at [16].
33 *ibid*, at [17].
34 *ibid*, at [29].

His Honour also expressed concern about the delays that had occurred in the progressing of native title claims and stated his view that there was a need for 'a more systematic and focused approach'.[35]

In his decision French J attributed the cause of delays occurring in the mediation of native title claims to the 'gathering and collation of connection evidence, usually in the form of anthropological reports, and its assessment by the State'.[36] He also suggested that it may be preferable for the Court to hear:

> important elements of connection evidence from applicants themselves, in order to facilitate the preservation of that evidence, to give applicants an opportunity to tell their story to the Court at an early stage and to facilitate subsequent mediation.[37]

His Honour considered that this could be done either by reference to a suitably framed question of fact from the NNTT under s136D(1) NTA for a determination by the Court under s86D, or by the Court directing the hearing and determination of such issues.[38] His Honour also referred to the use of early neutral evaluation as an aid to mediation.[39]

A similar situation arose in *Karajarri People v State of Western Australia*[40] where a directions hearing was convened by North J on 2 October 2003 on the undetermined portion of the application. His Honour convened the Court because of his concern about the 'slowness of progress in the mediation'.[41] North J called for and received a mediation report from the Tribunal Deputy President, who had responsibility for the claim. His Honour described the report as 'disturbing' and as a consequence required the parties to give reasons on affidavit for the 'excessively long delay'.[42] Referring to the affidavit filed by the State in response to that direction, his Honour said that it appeared that the delay had been caused by the State's failure to 'make a response, as it had promised to do, to the then existing proposals of the applicants and the pastoralists'.[43] These proposals concerned the making of a consent determination by the parties. The matter has been adjourned.

While the Court's approach of directing the State to negotiate even when it is reluctant to do so ensures an ongoing dialogue between the parties it stops short of seeing negotiation as a legal right of Indigenous people to whom the State owes a fiduciary duty. In *Haida Nation v B.C. and Weyerhaeuser* the Court confirmed and expanded upon the fiduciary duty owed by the federal and provincial Crown to the Indian peoples of Canada. This duty gives rise to a legal right in the Haida and other Indian people to have the Crown enter into bona fide negotiations:

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35 *ibid,* at [32].
36 *ibid*, at [30].
37 *ibid*.
38 *ibid*.
39 Early neutral evaluation is currently being considered by the Goldfields Land and Sea Council and the ONT for one of the southern goldfields claims.
40 *Nangkiriny & Ors on behalf of the Karajarri People v State of Western Australia & Ors*, Directions, 2 October 2003, (Unreported).
41 *ibid,* p3.
42 *ibid*.
43 *ibid*.

> The fiduciary duty of the Crown, federal and provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.[44]

This fiduciary duty provides a much stronger basis for a Court to order a government to enter into meaningful negotiations than that available in Australia, where, in effect, the order to attend mediations and negotiate is a procedural matter unrelated to the substantive rights of the claimant group.

Given that a number of states in this country have adopted an assessment approach to negotiating with native title claimants, there are some important principles that, if adopted, would ensure minimal obstruction of the negotiation process:

1. the criteria required to meet the negotiation threshold should not be based solely on applying the stringent legal tests for native title;
2. the criteria should be clear and unambiguous;
3. the criteria should be consistently applied;
4. the criteria should not be burdensome and oppressive on the claimant group;
5. the claimant group should receive, in a timely manner, reasons why they have not satisfied the criteria.

1. The criteria required to meet the negotiation threshold should not be based solely on applying the stringent legal tests for native title

While a number of states require the claimant group to provide the State with evidence in relation to legal criteria as a condition precedent to commencing negotiation, there are varying degrees to which the legal tests are applied. In Queensland the recently revised *Guide to Compiling a Connection Report* does not include any substantive discussion about the underlying legal issues that must necessarily inform the writing of a connection report. However it states that 'the author of a connection report may need to consider a number of key legal concepts that have been discussed in recent High Court decisions, particularly the *Yorta Yorta*[45] and the *Ward* decisions.[46] This emphasis on legal criteria can only raise the threshold for the commencement of negotiations or, once negotiations commence, reduce the scope of the negotiations to specific native title rights and interests.

The particular impact of the *Ward* decision is reflected by the requirement in Queensland for a connection report which provides a list of the native title rights and interests claimed, and a schedule of activities demonstrating the traditional

44 *Haida Nation v B.C. and Weyerhaeuser* 2002 BCCA 462, at para 62.
45 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
46 *Western Australia v Ward* (2002) HCA 28.

law and custom of the native title claimant group.[47] No distinction is made in this context between a claim for an exclusive determination of native title under s225(e) NTA – that is, whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters to the exclusion of all others; or a non-exclusive determination under s225(c) and (d), that is, whether the native title rights and interests are co-existent with other interests.

Like Queensland, other states are revising their criteria for entering negotiations in response to these legal decisions. The effect of this is to increase the number of native title claimants who will be denied the right to enter into negotiations with the government. As a result, claimant groups will be denied access to a partnership with government essential to their sustainable development.

In Western Australia the *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title* were developed in response to a review of the native title claim process conducted in April 2001. The review undertook to develop a new set of principles to guide the state government's negotiations on native title determinations and agreements. At the time the WA government commissioned the review, 131 claims had been filed in the Federal Court in that state. Trial dates had been set for 34 of these claims and it was likely that all the remaining claims would end up in court.

The *Review of the Native Title Claim Process in Western Australia*, (the Wand Report) was released in November 2001.[48] It strongly endorsed the government's stated preference to resolve native tile claims by agreement. The report recommended that as part of the negotiation process towards consent determination, native title applicants should provide the state government with a connection report that satisfies ss 87 and 94 *Native Title Act.*

The report also pointed out that, although the government's assessment of native title for the purposes of s 87 NTA should be guided by legal principles, it should also be mindful of the context in which the assessment occurs, 'that of negotiation and mediation pursuant to a "special" process provided under the Act'.[49] Thus it recommends that in addressing sections 223 and 225 of the Act:

> it should not be necessary for native title applicants to establish native title to the extent required in a contested hearing of an application. In this context, the Government should be satisfied by a Connection Report based on credible evidence.[50]

The *Wand Report* also warned that the government should ensure that its assessment process 'does not operate as an alternative judicial process that is more appropriate for a Court than a negotiation'.[51]

The government announced its response to the *Wand Report* almost a year later in October 2002 and at the same time released its guidelines. At the time

47 *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, October 2003, p9.
48 P Wand and C Athanasiou *Review of the Native Title Claim Process in Western Australia* (the *Wand Report)*, September 2001.
49 *ibid*, p83.
50 *ibid*.
51 *ibid*, p12.

of the announcement the government stated that 'with the aid of these guidelines, claimants and their representatives will be able to make a realistic assessment of their prospects of success in mediation or litigation'.[52]

While the guidelines restate the government's preference for native title determinations to be achieved by negotiation,[53] their title[54] and content herald a change of emphasis in the State's approach away from negotiation and consultation to a more legalistic, assessment-based model. The guidelines say that the State expects that connection reports will contain evidentiary material in sufficient detail to establish that the native title applicants:

- are the persons or groups of persons who hold native title
- hold, under acknowledged traditional laws and observed traditional customs, native title rights and interests, the nature and extent of which are clearly identified for the purposes of the terms of a determination as referred to in section 225(b) of the *Native Title Act 1993* (Cth), in the claimed area; and
- have maintained a connection with the claimed area.[55]

While the guidelines assert that Aboriginal evidence is 'the most important evidence in determining the continued existence of native title rights and interests', they also state that 'The Government may wish to further test the Aboriginal evidence contained in the connection reports 'on a case-by-case basis'.[56] The guidelines are silent on the question of what is meant by 'evidence' e.g. whether it is to be oral, written, sworn or how it could be 'tested'.

These requirements in the government's response are substantively different from the Wand recommendations. The context in which the interaction between the parties is to occur clearly goes beyond that of 'negotiation and mediation pursuant to a 'special' process provided under the Act',[57] to a process whereby the State itself appears to usurp the Federal Court's judicial power under s 94A, that is, that the State can make a judgment on whether the claimants have established the elements of s 225.

The guidelines acknowledge that 'the law relevant to the evidence required to establish the existence and nature of native title is developing through the case law' and advise that the State undertakes to review and amend the guidelines in accordance with such developments.[58]

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52 *New guidelines to aid native title claim resolution*, media statement, Hon Eric Ripper MLA, Deputy Premier, 8 November 2002.

53 *Guidelines for the provision of evidentiary material in support of applications for a determination of native title,* Office of Native Title, Department of the Premier and Cabinet, Government of Western Australia, October 2002, p2.

54 The previous guidelines were called *General Guidelines, Native Title Determinations and Agreements*.

55 *Guidelines for the provision of evidentiary material in support of applications for a determination of native title* at para 1.4.

56 *ibid*, at para 3.4.

57 *Wand Report*, *op.cit*, p83.

58 *Guidelines op.cit,* at para 7.1.

The WA government has advised that the guidelines have been under review since the 2002 High Court decisions in *Ward*[59] and *Yorta Yorta*[60] and the Federal Court decision in *De Rose.*[61] This review process has served to increase the uncertainty surrounding negotiations with the State. In NSW the government has indicated to parties that it is reviewing its credible evidence test in view of these decisions. However, because it has never published the original test it is unclear how the review might alter the negotiations threshold.

In Victoria the *Guidelines for Proof of Native Title* provides a flexible approach to the application of legal tests as a threshold to negotiations. The extent of evidence required against each of the criteria is on a sliding scale depending on what kind of outcomes the native title claimants are seeking (see Table 1 in Chapter 2). Where the applicants seek a determination, a greater level of connection is required than if the applicants are seeking outcomes other than native title determinations or ILUAs under the future act provisions.

The Victorian government can exercise flexibility in the application of its *Guidelines* in a number of different ways, including:

- Accepting evidence in a variety of forms, as long as the collective result can be assessed;
- Guaranteeing independent expert assessment of all connection evidence;
- Providing claimants with feedback on the strength of the evidence and allowing the claimants to provide supplementary material;
- Wherever appropriate, assisting claimants to access information within government that is relevant to their claims; and
- Maintaining an open approach to the possible outcomes of mediation of claims, including non-native title outcomes.[62]

Consent determinations recognising native title rights and interests may possibly be subject to appropriate evidence being provided. The *Guidelines* also state that alternatively, it may be possible to recognise rights 'that do not equate to native title rights but nevertheless establish that a particular Indigenous group has the primary cultural right to a particular place or area and that such rights will be recognised under an Indigenous Land Use Agreement'.[63] The *Guidelines* state that the Victorian government will make every effort to avoid unnecessary expense or inconvenience in resolving native title matters.

This flexible approach to negotiation thresholds allows negotiations to proceed where there is insufficient evidence to support a native title determination. In this way outcomes can be tailored to the characteristics and needs of the particular group.

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59 *Western Australia v Ward* (2002) 191 ALR 1.

60 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALF 538.

61 *De Rose v South Australia* [2002] FCA 1342. *De Rose* was a first instance decision by the Federal Court. The matter was appealed to the Full Federal Court. On 16 December 2003, the Full Federal Court overturned the findings of the first decision.

62 Native Title Unit, Department of Justice, Guidelines for Native Title Proof, State Government Victoria, September 2001, p4.

63 *ibid,* p5.

The Victorian guidelines demonstrate a welcome improvement on other less flexible, more arbitrary approaches. Despite this flexibility the relationship between Victoria and the claimant groups still assumes that the State will have a discretion to enter into negotiations depending on its assessment of the claim against legal criteria. This can be contrasted to an approach that assumes negotiations will occur and allows discussions around whether outcomes can include a consent determination or not to be resolved as part of that process.

2. The criteria should be clear and unambiguous

Where a State assesses the native title claim against legal criteria prior to entering negotiations with the claimant group it is important that there is a clear understanding by the group of what is required to satisfy the government's test. This ensures efficient use of the group's resources in compiling the evidence required.

In NSW for example the information required to establish 'credible evidence' is not clear. There are no published policy statements articulating the requirements, although native title claimants are handed a written document setting out what the NSW government requires when mediations commence.[64] The NSW government has said that it relies on the definition of native title as set down in s223 *Native Title Act 1993* (Cth) and as interpreted by the High Court.[65]

The failure to provide clear and unambiguous criteria for negotiation thresholds means that the government is given complete discretion to refuse to enter negotiations, even if the criteria are substantially satisfied. While the government may exercise its discretion in good faith, the claimant group cannot always be sure that this has occurred. This distrust in turn affects the future relationship of the parties where there may be a perceived conflict of interest because the State is in the superior position of assessing the claimant's case.

3. The criteria should be consistently applied

While it is inevitable each application must be dealt with by government on a case-by-case basis depending on the nature of the rights and interests being claimed, the coherence of the group and the prior tenure history of the area, it is important that the criteria are consistently applied in each case. This ensures fairness between groups and prevents the government's own agenda for a particular area from subverting the negotiation process.

4. The criteria should not be burdensome and oppressive on the claimant group

Connection tests can be burdensome on claimant groups. Obviously the tests can drain scarce resources if too stringently applied. Some States have sought to alleviate the resource implications of connection reports in various ways. In Queensland for instance the *Guide* makes it clear that:

64 Confirmed by Native Title Services NSW 2 October 2003.

65 Conveyed in interview between Aboriginal and Torres Strait Islander Social Justice Commissioner staff and NSW government representatives, during consultation process, September 2003.

> For purposes of mediation, the State is willing to accept the first documented contact as the primary reference point from which an inference might then be made back to the time of sovereignty…It is also recognised that the data more pertinent to an anthropological inquiry can only be found in recorded studies undertaken well after the date of first contact.[66]

States can also assist in providing information relevant to the claim. State departments often have the relevant records for establishing occupation of a particular area. It is important that claimant groups be offered access to this information.

Another way in which connection reports can be oppressive to claimant groups is when they are required to hand over material that is culturally sensitive. Every effort must be made to deal with this material sensitively in accordance with the requirements of Indigenous culture.

5. The claimant group should receive, in a timely manner, reasons why they have not satisfied the criteria

Many Native Title Representative Bodies are experiencing considerable difficulty in establishing a satisfactory dialogue with the State native title unit and in obtaining advice on how to satisfy the negotiation threshold requirements. A number of NTRBs reported that they have submitted connection reports but have not received any analysis of these reports from the government despite promises that it would provide feedback. Another complaint is that feedback has solely consisted of a statement as to whether or not the material supplied is sufficient to warrant a consent determination. This has fallen short of the expectation held by all Representative Bodies that the government would provide a detailed analysis of the reports, particularly where they have failed to fulfil the requirements of the criteria.[67]

Where native title negotiations are conditional upon the claimant group satisfying specified criteria it is important that these criteria are applied in a fair and efficient way. Even in these circumstances, the assessment model limits the opportunity that negotiation offers governments keen to address the economic and social development of Indigenous people. Subjecting the negotiation process to a threshold test that reflects to varying degrees the legal tests required to prove a claim has the effect of shifting the emphasis away from these policy goals towards the goal of resolving the outstanding claim.

In contrast to the assessment model some States proceed to negotiate with native title claim groups prior to assessing the merits of their legal claim, so long as they are confident they are dealing with the traditional owner group. Underlying this approach is an understanding of the opportunity that native title presents to governments guided by a broader policy direction towards the

66 Native Title and Indigenous Land Services, Guide to compiling a Connection Report for Native Title Claims in Queensland, Natural Resources and Mines, Queensland Government, October 2003, p5.

67 The *Wand Report* recommended that the government should clearly communicate to the native title applicants any issues arising from the connection reports that need to be addressed. *Review of the Native Title Claim Process, op.cit*, p12.

economic and social development of Indigenous people. Negotiating with the native title group is an opportunity to implement that policy in a way that takes account of the relationship between economic growth and the social and cultural context in which growth occurs.

In South Australia and the Northern Territory the negotiation process is not conditional on the claimant group satisfying the State that they meet the legal tests for native title. In Northern Territory the longstanding recognition of traditional ownership as a basis for legally recognised rights and interests in land has contributed to a relationship of trust between the present government and those representing the interests of native title claimants, the Northern Land Council and the Central Land Council. Consequently the government is confident that the group with whom it is dealing are the traditional owners of particular areas.

In relation to negotiations directed to consent determinations the government requires anthropological evidence which might ultimately satisfy a court that the determination agreed between the parties can be made. However, the government is willing to continue to negotiate with a native title claimant group while such evidence is being gathered. The Northern Territory government has indicated that it does not intend to set guidelines for Connection Reports, but intends to pursue the question of guidelines in collaboration with the NTRBs.

In South Australia negotiation threshold issues are directed to ensuring that the negotiation process between the native title claim group and the government is productive rather than ensuring that the legal criteria for establishing native title is met. This requires that any overlapping claims are resolved, that the group is reasonably cohesive and stable, and that it is willing to negotiate.

While the Crown Solicitor's Office has indicated that the South Australian government has no Connection Report criteria for Consent Determinations,[68] it intends to develop such criteria over the next 12 to 15 months. One proposal for establishing connection criteria is through a side table of the State-wide ILUA process.

(iii) Adversarial relationship between the State and the native title claim group

The imposition of a legal framework in the negotiation of native title structures the relationship between the state and the claimant group as adversaries rather than as partners with a shared goal in the sustainable development of the group. While some states adopt a more congenial approach in negotiations directed to non-native title outcomes, emphasis on a legal framework makes the State a respondent to a claim in which the applicant group seeks to burden its (that is, the Crown's) radical title to the land.

Under the approach advocated in this Report, the relationship between agreements aimed at native title determinations (generally referred to as native title outcomes) and agreements aimed at other outcomes (non-native title outcomes) is complementary, both aimed towards a similar goal of providing a basis for the economic and social development of Indigenous peoples.

68 See <www.iluasa.com./news_consent.asp>.

Unfortunately, the complementarity of agreements aimed at native title and non-native title outcomes is not reflected in the practices and positions that some states adopt in native title negotiations. As indicated, states are generally willing to negotiate non-native title agreements, although the range of outcomes available under this approach is often not articulated at a policy level. Consequently the types of agreements negotiated as non-native title agreements vary enormously depending on the circumstances of the case. Where the State, as manager of the land which is the subject of the agreement, has particular priorities for that land, claimant groups may be able to negotiate agreements that contribute to their development goals. In many cases however, non-native title outcomes do not contribute to the development process. Claimants unable to meet the legal tests have no bargaining power to ensure better outcomes.

Negotiations occur within Land Management framework

Negotiations between the State and native title claimants are not only directed towards the resolution of native title claims. The other framework in which negotiations are conducted is where the State, as managers of land and resources, seeks to utilise land or permit the public or private interests to utilise land that is the subject of a native title claim. In these cases the future act provisions of the NTA provide processes for the conduct of negotiations between the State and native title claimants and an opportunity for States to negotiate with traditional owner groups as if these groups had legally recognised rights to the land. The State profiles show that, as land managers, States invariably adopt a pragmatic rather than an adversarial approach to these negotiations, finding practical solutions to address the differing interests of the parties. States are realising that the recognition of native title does not necessarily stand in the way of the State's economic development or the public's recreational and conservation needs.

Native title claimants whose land is the subject of future acts are also benefiting from these negotiations. Agreement-making in itself requires a level of organisation and decision-making that builds the capacity of the group for future negotiation and development. The group is treated by the State as an integrated entity with rights and responsibilities to the land, much like the State's role as land managers. In addition, these agreements can provide an important foundation for the ongoing development of the group including employment opportunities, training and skill development, infrastructure investment and utilisation of cultural knowledge. As these agreements multiply, so too the capacity of the group to manage and build upon their successes improves.

Out of this experience some States are developing their own processes for integrating native title with their land management role. Indeed in many cases the States have responded to native title in a way that expands the policy framework of their land management regimes.

In Queensland a number of processes and protocols have been developed by both the State and Indigenous groups in response to a mutual desire to get on with business. These are outlined in the State profile and include the *Protocol between the Queensland Government and QIWG*, the *Statewide Model ILUA*, the *Native Title Protection Conditions* and the *Draft Rural Leasehold Land Strategy.*

This approach to integrating native title into the land management regimes of the State is commendable. The development of the various protocols and processes through effective consultation and negotiation with Indigenous groups and relevant stakeholders ensures that land usage that affects native title groups can be managed to the advantage of all parties.

One area of land management where the Queensland government is not responding to the recognition of native title however, is in their management of national parks. In this area, the refusal of the state government to agree to joint management, even where the continuity of native title in national parks has been accepted, is a stalling point in a number of native title claims.

The practice of the NSW government in relation to national parks has been to use important sections of the *National Parks and Wildlife Act 1974* (NSW) only to a very limited extent in their negotiation of native title claims. In 1996, Part 4A was inserted into the *National Parks and Wildlife Act 1974* (NSW) to establish a regime loosely modelled on the Northern Territory variation of hand-back, re-lease to the Crown, and joint management. Part 4A allows existing lands which form part of a National Park to be transferred as freehold title to the local Aboriginal Land Council established under the *Aboriginal Land Rights Act 1983* (NSW). The freehold title is then leased to the Minister, and a joint board of management is established, the majority of which comprises the Aboriginal owners of the freehold title. For example, Mutawintji National Park in the far west of NSW was handed back to its traditional owners in 1998. The benefit of Part 4A of the *National Parks and Wildlife Act* is to confer a form of title on Indigenous people who may be traditional owners but who are unable to establish their native title rights and interests in land under the NTA.

Other state governments are extending their land management approach to incorporate, not only native title rights as they are legally defined, but a broader policy agenda. For example, in Western Australia, Conservation and Land Management (CALM) has developed policy on joint management of national parks, reflecting a willingness to move beyond the strict legal definition of native title rights. Prior to the High Court's decision in *Western Australia v Ward*[69] there had been a general expectation that native title could coexist with conservation regimes on reserves and that joint management arrangements would be negotiated following successive determinations. However, the finding by the High Court that the vesting of reserves extinguished native title reduced the likelihood of joint management being achieved through this course of action.

In July 2003 CALM released a consultation paper, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*. The paper proposed that title to conservation areas in WA could in future be held either as Crown land reserves or as inalienable freehold title held by an Aboriginal Body Corporate.[70]

69 *Western Australia v Ward* (2002) HCA 28.

70 *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*, Consultation Paper, Government of Western Australia, July 2003, at p14.

When the Premier announced the release of the discussion paper on 11 September 2003 he said that the paper was in the context of being 'part of our commitment to reconciliation'.[71] He continued:

> The spirit of the paper relates to my recent comments about reconstructing Aboriginal communities. That is bolstering employment and training opportunities for Aboriginal people, giving them management responsibilities as well as protecting and preserving Aboriginal heritage.[72]

The WA government has indicated to Native Title Representative Bodies that it intends to put the necessary amending legislation before Parliament in the next session. These announcements suggest that the management of national parks is seen by the government to be outside the confines of native title and within a broader policy ambit.

In South Australia the relationship between land management policies and native title is integrated into the broader process of the state-wide framework agreement. As indicated, side tables enable a more detailed discussion of particular land management issues such as fishing, mining, pastoral interests, and local government. By enveloping these negotiations in a larger policy framework in which native title is the key concern, native title negotiations are not subservient to the state's land management issues. Both Indigenous and state priorities can be addressed through this integrated approach.

It can be seen from the above analysis of state policy, that integrating native title into a state's land management regime is capable of generating many benefits for both parties. This is particularly so where governments are extending their land management regimes to incorporate native title. However, there are limitations to an approach in which agreements generated by the intersection of these two processes, land management and native title, are the only basis for the economic and social development of Indigenous people.

The first limitation is that the capacity of this approach to generate benefits for native title claim groups depends on whether the land the subject of the claim happens to also be the subject of the state's land management responsibilities. Indigenous priorities often take second place to the priorities of the State in its land management role. Unless there is a broader policy framework, such as that in SA, that posits the group's development as a goal in its own right, then development will not occur for those claimant groups whose land has no priority in the state's land management regimes.

The second limitation is that, even where there is an intersection between the state's land management regime and a native title claim, the land management regime may not be capable of providing an economic and social development basis. Many state land management regimes provide for consultation with Indigenous people where developments are proposed on their land, but very few provide Indigenous people with a right to negotiate or share the benefits of that development process. For instance, in the Wotjobaluk agreement in Victoria, traditional owners were only given a right to be consulted over development in the core area. This points to a flaw in the existing regimes which extend

71 'Native rights for WA parks', *The West Australian*, September 11, 2003, p1.
72 *ibid*.

negotiation rights to Indigenous people. Yet the economic development of traditional owner groups is greatly enhanced by the right of Indigenous people to negotiate with developers over the nature and extent of the development. Based on this right Indigenous people could negotiate partnerships in relation to enterprises in which Indigenous input would be mutually rewarding both for themselves and for developers. The right to meaningful negotiation is a way for Indigenous people to control culturally inappropriate ventures or practices, while at the same time enhancing the group's social and cultural integrity.

The Relationship between Native Title and existing Indigenous land regimes

Native title is just one of a range of land regimes aimed at recognising the land rights of Indigenous people. The unique characteristic of native title is that the rights that are recognised emanate from the traditional laws of Indigenous people, not from the laws of non-Indigenous people. However the development of the law of native title through amendments to the NTA and restrictive interpretations by judges has severely limited the extent to which rights and interests arising from Indigenous laws and customs are recognised. This has had the effect of limiting the capacity of native title law to provide a sound basis for the economic and social development of Indigenous people.

In some states the recognition of native title, even in its limited sense, has caused disruption and division between Indigenous groups which have already been allocated rights to land under state legislation and those entitled to native title rights. This is particularly so where the allocation of rights under the existing state scheme is not based on traditional connection to land but on the people's status as residents of a particular area or their historical connection to that area. Yet there has been little effort by government to address these divisions so as to integrate native title into the system of land distribution regimes that already exist.

NSW case study

NSW has had Aboriginal land rights legislation since 1983. The *Aboriginal Land Rights Act 1983* (NSW) was enacted following a long period of activism by Aboriginal people throughout Australia for recognition of their prior ownership of, and traditional connection to, land and waters. The NSW Government's actions in enacting the Aboriginal land rights legislation long before the legal fiction of *terra nullius* was overturned by the High Court in 1992, was a remarkable and significant step at the time.

The *Aboriginal Land Rights Act* establishes a three-tiered network of Aboriginal Land Councils in NSW consisting of the NSW Aboriginal Land Council at the State level, thirteen Regional Aboriginal Land Councils and 120 Local Aboriginal Land Councils. To be a member of a Local Aboriginal Land Council, an Aboriginal person must reside in the local area or have an association with that area (for example, a cultural connection to the area).[73] Membership does not rely on demonstrating a traditional connection to the land. A person may be a member

73 *Aboriginal Land Rights Act 1983* (NSW), ss53 and 54.

of more that one Local Aboriginal Land Council but can only have voting rights in one council at any time.[74] Local Land Councils elect representatives to their Regional Aboriginal Land Council[75] and the regional councils elect councillors to the NSW Aboriginal Land Council.[76]

Claims can only be made by Aboriginal Land Councils established under the Act.[77] Claims are made over vacant Crown land that is not required for an essential purpose or for residential land at the time the claim is made. Land granted to Aboriginal Land Councils may be sold, exchanged, mortgaged or otherwise disposed of. This enables the Aboriginal Land Council to use the land as leverage for the economic and social development of the local Aboriginal community.

In 1994 the Act was amended to accommodate the interaction between its provisions and the NTA. Land, the subject of a native title determination application, is excluded from claims under the ALRA as is land over which there has been a determination that native title exists (s36 ALRA). Land claimed under the ALRA after 28 November 1994,[78] and granted to an Aboriginal Land Council, is held subject to any native title rights and interests existing immediately prior to the grant. The Aboriginal Land Council is not permitted to sell, lease, mortgage or otherwise deal in the land pending a determination of native title being made in respect of the land (ss36 and 40AA ALRA). Native title may also exist in respect of land acquired by claim lodged under the ALRA before 28 November 1994, but in this case any native title rights and interests are subject to the rights of the Land Council. The native title rights are suppressed, but not extinguished, by land activities taking place under the ALRA.[79]

Since the recognition of native title in 1992, a degree of tension has emerged between groups whose rights are based in the land rights system and traditional owners who might benefit from a native title claim. This has been particularly problematic at the local community level where the nature of the distinction between the two systems continues to create many misconceptions and misunderstandings.[80] The tension between the two systems led, in part, to the NSW Aboriginal Land Council surrendering its Native Title Representative Body functions at the end of 2001.

The NSW government has not utilised native title as a tool for addressing the social and economic development needs of traditional owner groups. In its opinion, the long history of land settlement in NSW has all but extinguished native title in the state. For example, the Western Division covers 42% of NSW and most of it is subject to perpetual leases similar to those which the High Court found had extinguished native title rights and interests in *Wilson v Anderson*.[81] Most of the rest of the state is subject to freehold title which

74 *ibid*, s55.
75 *ibid*, ss63 and 89.
76 *ibid*, ss107, 118 and 123.
77 *ibid*, s36.
78 The date on which the *Native Title (New South Wales) Act 1994* (NSW) commenced.
79 NSW Department of Aboriginal Affairs, Review of the Aboriginal Land Rights Act 1983 (NSW) Discussion Topics, DAA Sydney 1999-2000b, p76.
80 *ibid*.
81 *Wilson v Anderson* [2002] HCA 29, 8 August 2002.

extinguished native title before 23 December 1996. The government therefore believes there is very little land in NSW over which native title continues to exist, largely because valid extinguishment, dispossession and the widespread dispersal of Aboriginal people through colonisation and settlement by non-Indigenous people means that a continuing connection cannot be proved. The grant of freehold land to Aboriginal people under the ALRA is seen by the government as a far better way of dealing with the injustices of dispossession than the Commonwealth's native title legislation which relies on traditional connection. A grant of land under the ALRA, NSW is also seen as a preferable way of settling native title matters.

This view accounts for the scant policy development of native title in NSW and its isolation from the state's wider policies aimed at achieving social and economic development outcomes for Indigenous people. It also explains why there continues to be very slow progress resolving native title applications in NSW.

While the government's position was a commendable response to the history of colonisation in NSW at the time, it fails to respond to the opportunity that native title can offer traditional owner groups in NSW. The underlying assumption of the NSW Act is that almost complete dispossession of Indigenous people has already occurred in NSW and that the best legislative response is to compensate for this through its own land rights scheme.

However by seeing compensation as the only legislative response to dispossession the ALRA can become a further instrument of dispossession for those groups who continue to maintain a traditional connection to their land, and who seek restitution of their traditional rights. While the NTA may not be relevant for all Indigenous people in NSW, it may still provide a means for that State to engage with native title in a way which strives to achieve ongoing economic and social development for Indigenous people.

Native title offers a process by which traditional owner groups are brought into a relationship with the State through the lodging of a native title claim. Within this process there is capacity for States to adopt policies which broaden the scope of their negotiations with native title claim groups so that agreements can give recognition to the ongoing connection of Indigenous people to their land and provide an alternative and additional basis for the recognition of Indigenous peoples' economic and social rights.

The table below provides a very general overview of existing or proposed State and Territory Indigenous land regimes. It indicates the beneficiaries of the particular regime, the nature of the interests granted, the body entrusted with the management of the title and some of the powers held by these bodies. By highlighting these elements a comparison is invited between the way in which land has been or is proposed to be distributed under various state regimes and the way in which it is distributed through native title.[82]

82 Table based on material contained in F Way and S Beckett, *Land Holding and Governance Structures Under Australian Land Rights Legislation* Discussion Paper 4, Australian Research Council Collaborative Research Project, University of New South Wales, Murdoch University, 1999.

Overview of State based Land Legislation Regimes

South Australia

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Lands Trust Act 1966 (SA)	Transfer of reserve land (no provision for non-reserve land) subject to consent of Aboriginal Council for the area (if established).	Traditional owners	Freehold title, alienable with Ministerial consent. Mineral rights depend on conditions applied to leases by proclamation of Governor.	Aboriginal Land Trust. Chairperson and two other members appointed by Governor. All members must be Aboriginal. More members can be added on recommendation of Aboriginal Councils.
Pitjantjatjara Land Rights Act 1981, Maralinga Tjarutja Land Rights Act 1984	Transfer of Anangu Pitjantjatjara and Maralinga Tjarutja lands (former reserve land).	Traditional owners	Freehold title (inalienable).	Anangu Pitjantjatjara body corporate and Maralinga Tjarutja body corporate.
Proposed amendments to National Parks and Wildlife Act 1972 (SA) introduce co-management on national parks in SA	Tier 1: Where NPWA Reserves established over Aboriginal land.	Traditional owners	Aboriginal people retain title. Interests defined by management plan .	Co-Management Board (Aboriginal owners and government) with majority Aboriginal owners.
	Tier 2: Crown owned, co-managed parks.	Traditional owners	Defined by management plan.	Co-management Board appointed by goverment.
	Tier 3: Crown owned, co-managed parks.	Traditional owners	Defined by management plan. No co-management board. Co-managed by agreement between Minister and body representing Interests of Aboriginal group.	Minister/Director of NPWS

Northern Territory

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Grant of scheduled land or unalienated Crown land (or Crown land alienated to Aboriginal people) the subject of successful claim by traditional owners to the land.	Traditional owners	Grant of freehold; inalienable; land may be leased; land may be surrendered to Crown.	Aboriginal Land Trusts for benefit of traditional owners. Members of Trust nominated by relevant land council and appointed by Minister. Land Trust dependent on Land Council for funding and advice.
Environment Protection and Biodiversity Conservation Act (Cth), Pt 15, Div 4, Subdiv G	Commonwealth Reserves established in NT over Aboriginal-owned land (under ALRA) ie Kakadu and Uluru.	Traditional owners	Ownership subject to lease-back as a National Park.	Territory govt under lease-back; co-managed by Boards of Management (Aboriginal majority).
Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park 1987 (NT)	Transfer of title by Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park 1987 (NT).	Ownership held by Peninsula Sanctuary Land Trust in trust for 'the group' (selected by NLC).	Traditional owners entitled to use and occupy. Ownership subject to lease-back as a national park in perpetuity and to plan of management. Receive annual fee in relation to the lease.	Co-management by Cobourg Peninsula Sanctuary and Marine Park Board and Parks and Wildlife Commission of NT.
Nitmiluk (Katherine Gorge) National Park Act 1989 (NT)	National Park over Aboriginal land (ALRA).	Traditional owners	99 year lease-back to Conservation Land Corporation as national park.	Nitmiluk National Park Board, 13 members (8 Aboriginal) Prepare plans of management.

Northern Territory

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Parks and Reserves (Framework for the Future) Bill 2003	Three regimes 1) Parks and Reserves to be scheduled to Aboriginal Land Rights Act 1976 (Cth) (Schedule 1 parks and reserves).	Traditional owners	Freehold subject to 99 year lease-back arrangements and joint management agreement.	Aboriginal Land Trusts
	2) Parks and Reserves over which Parks Freehold Title granted (schedule 2 parks and reserves).	Traditional owners	Park freehold title (s9 Bill); inalienable; subject to native title interests; subject to 99 year lease-back to Territory; subject to joint management agreement.	Park Land Trusts
	3) Parks and Reserves over which native title may still subsist.	Traditional owners	Dedicated Crown Land subject to native title interests; subject to joint management agreement; no extinguishment.	Native title holders; ILUAs; right to negotiate in relation to mining.

Victoria

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Six Aboriginal Lands Acts: - Aboriginal Lands Acts 1970 and 1991; - Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth); - Aboriginal Land (Manatunga Land) Act 1992; - Aboriginal Lands (Aborigines Advancement League) (Wall Street, Northcote) Act 1982; - Aboriginal Land (Northcote Land) Act 1989.	Transfer of freehold (some specify conditions for usage).	Specified organisations; residency conditions apply to membership of some organisations.	Transfer small areas of reserve or mission lands to trusts or Aboriginal organisations. Freehold with varying conditions applying eg land must be used for Aboriginal cultural and burial purposes.	Various, for example, Lake Tyers and Framlingham managed by Trusts; Manatunga Land to Aboriginal Cooperative; Ebenezer, Ramahyuck and Coranderrk Missions by their respective Aboriginal organisations.
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), Part 11A, ss21A - 21ZA pertaining to Victoria	Process for Local Aboriginal Community to advise Minister to make a declaration preserving Aboriginal place or Aboriginal object.	Local Aboriginal Community (specified in schedule to the Act).	Title to place or object.	Local Aboriginal community (usually established as a body corporate). Members not necessarily the traditional owners of the land declared to be 'Aboriginal place'.
National Parks Act 1975 (Vic)	No process for granting title.			

Queensland

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld) and its continuations to the Aborigines Act (1971)	Various 'protective' regimes allowed Minister to remove Aboriginal people to reserves.		Regulations governed behaviour on reserves, prohibited traditional rites and customs; government control over property and marriage. Reserves could be revoked to allow commercial exploitation of land.	Aboriginal and Islander Affairs Corporation trustee for surviving reserves.
Deed of Grant in Trust (DOGITs)	Grant of land (usually reserve land held in trust). No claim process.	Beneficiaries of trust are grantees, the Aboriginal community living on the land.	Grant of land in trust. Inalienable.	Trustee, usually community council (statutory body, an incorporated body, a group of individuals or a named individual).
Aboriginal Land Act 1991 (Qld) and Torres Strait Islander Land Act 1991 (Qld)	Aboriginal and Torres Strait Islander reserves, DOGITs etc transferred as Aboriginal and TSI land. Claims process for claimable land (incl available Crown land and transferred Aboriginal land). Must show traditional affiliation OR historical association OR economic or cultural viability. Preference shown for traditional affiliation where conflicting claims.	Grantees hold land for benefit of 'Aboriginal and Torres Strait Islander people and descendants'. Traditional owners and those with an historical association will potentially benefit from the legislation.	Deed of grant in fee simple or leasehold subject to Crown occupation and subject to native title.	Usually Community Councils as trustee appointed by Minister who must consider views of Indigenous people and, as far as practicable, act in a way that is consistent with Indigenous tradition.

New South Wales

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Land Rights Act 1983 (NSW)	Transfer lands from Aboriginal Lands Trust; Claims process based on the status of the land, eg unoccupied Crown land not needed for public purpose.	Members of a Local Aboriginal Land Council (LALC) (all Aboriginal adults on Council roll). Membership is based primarily on residence but non-residents can be members by traditional association.	Freehold, except Western Division where perpetual leasehold granted; subject to native title; Mining on LALC land requires consent other than for gold, silver, coal and petroleum.	Three tiers of management from Local Aboriginal Land Council to Regional Land Council to State Land Council.
National Parks and Wildlife Act 1974 (NSW)	Minister may declare place to be 'Aboriginal place' if significant to Aboriginal culture, or 'Aboriginal area' to preserve and protect area.			State govt manages 'Aboriginal place' and 'Aboriginal area'.
	Part 4A Claim process for claimable land (under ALRA) or for land of cultural significance (schedule 14 lands) in national parks.	Local Aboriginal Land Council or NSW Aboriginal Land Council.	Freehold subject to immediate lease-back, subject to plan of management, subject to native title.	Board of management with Aboriginal majority. Board subject to control of Minister. Aboriginal negotiating panel to identify Aboriginal owners; advise minister re cultural significance of land for schedule 14 lands.

Western Australia

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
No land rights legislation				
Reserves: Land Act 1933 (WA)	Power to Grant lease to Aboriginal persons; reserve land for benefit of Aboriginal inhabitants.	Aboriginal inhabitants, organisations and communities.	lease (fixed term or perpetuity)	nil
Aboriginal Affairs Planning Authority Act 1972 (WA)	Aboriginal Affairs Planning Authority (AAPA) can proclaim reserves for 'persons of Aboriginal descent'.	'persons of Aboriginal descent'	reserves	AAPA has duty to promote well being of Aboriginal persons of Aboriginal descent: s12.
	AAPA can transfer reserve land to Aboriginal Lands Trust.	Trust to acquire and hold land, whether in fee simple or otherwise, and to use and manage that land for the benefit of persons of Aboriginal descent: s 23.	Power to sell or lease subject to Minister's approval.	Aboriginal Lands Trust appointed by Minister (chairperson and 6 member of Aboriginal descent); Ministerial control over way Trust exercises functions.

Indigenous participation in policy formulation

The above discussion highlights the gaps in many State native title policies. Where native title negotiations are not directed through integrated policy objectives towards agreements which lay the foundation for economic and social development then the negotiations will instead be driven by other priorities, such as the need to resolve a legal claim or the land management priorities of the state.

One way of ensuring that development is at the forefront of the native title agreement is through the effective participation of Indigenous people in the formulation of native title policy. Effective participation occurs when Indigenous people are substantially involved in formulating the policy and have given their prior and informed consent to both the policy goals adopted and the way in which these goals are implemented and evaluated. In Victoria, a process has commenced in which many of these features are present.

Prior to the changes to the structure of ATSIC in 2003, it was envisaged that the ATSIC Office of Victoria would play a key role in the development of native title policy in that state. In November 2000 it signed a *Protocol for the Negotiation of a Native Title Framework Agreement for Victoria*. The other parties were the Victorian Attorney General (on behalf of the State of Victoria) and the Mirimbiak Nations Aboriginal Corporation as the NTRB for Victoria.

The Protocol provided for the negotiation of a Native Title Framework for Victoria and the resolution of native title claims through mediation and negotiation rather than litigation. The Protocol noted that the Framework was to provide for the development of Indigenous Land Use Agreements (ILUAs) that permit recognition, protection, and exercise of native title rights and interests, as well as providing for a simplified future acts regime. The Protocol also allowed for negotiation of broader outcomes including the provision of employment, training and enterprise development opportunities to Indigenous communities.

The ATSIC Victorian State Office began drafting the Framework in 2001, with a final draft completed in September 2002. The draft Framework recognised that the Victorian government's native title policy provided for a 'whole of government' approach to native title issues. In the Framework, ATSIC identified key policy initiatives required to ensure the achievement of native title and land justice outcomes for Aboriginal people in Victoria.

The Framework identified mechanisms in existing statutes that had the potential to operate effectively within the native title regime. It also identified other statutes that required significant amendment or review to ensure compatibility with the provisions of the *Native Title Act 1993* (Cth). For example:

- Amendments to the *National Parks Act 1975* (Vic) to provide for Aboriginal joint management arrangements for national parks;
- A review of the cultural heritage legislation[83] to ensure greater consistency with native title group aspirations and the *Native Title Act*;

83 This includes a Victorian Act, the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Part IIA: Victorian Aboriginal Cultural Heritage 1987)* (Cth).

- Various amendments to the *Fisheries Act 1995* (Vic);
- A state-wide Aboriginal land rights regime for Victoria; and
- Greater use of regional Indigenous land management institutions (within or outside a land rights regime), including appropriate funding.

The final draft of the Framework prepared by ATSIC Victoria was presented to the Victorian Government's Attorney-General, at a meeting on 26 September 2002. At that meeting, the State Government agreed to consider the draft Framework and to provide a response within six weeks of the meeting date. The Victorian Department of Justice has advised me of the Attorney-General's response to the *Framework* stating:

> … a number of the proposed policy initiatives had been addressed by Government in the context of native title policy development and implementation. These include provision for the establishment of co-operative management bodies over national parks and other crown lands, an increased say in cultural heritage protection, group access to certain natural resources, transfers of culturally significant land, and administrative funding (all of which form part of the Wotjobaluk in-principle agreement). These outcomes have all been possible without the need for legislative amendment. Pro-forma ILUAs have also been developed to facilitate agreements under the future act regime. At the same time, the Attorney-General acknowledged that the native title process would not address all Indigenous land aspirations in Victoria, and that other initiatives identified in ATSIC's *Framework* would be considered in the context of a policy framework aimed at responding to these broader aspirations.[84]

The *Victorian Indigenous Land Justice Strategy* which builds upon ATSIC's *Framework*, was proposed by the ATSIC Victorian State Advisory Committee and the ATSIS Victorian State Office to formalise the pursuit of Aboriginal land aspirations in Victoria. It covers matters such as native title, land ownership and acquisition, natural resource management and cultural heritage protection. The need for such a policy arose because of:

a) the limited extent to which Aboriginal land rights (whether in the form of native title, input into publicly-owned natural resource management decisions, authority over Aboriginal heritage) could currently be exercised; and

b) the significant hurdles to expanding this through the native title process because of the High Court's decision in *Yorta Yorta* and other cases.

The aim of the Strategy is to achieve meaningful land outcomes for Indigenous Victorians, both in terms of the extent of their land holdings, and the level of Indigenous involvement in land management decision-making. It also aims to improve the coordination of Commonwealth and Victorian government agencies with overlapping responsibilities in this area. These objectives are generally consistent with the COAG Reconciliation Framework[85] and the Ministerial

84 Correspondence from Department of Justice, Victoria to Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 January 04.

85 <www.pmc.gov.au/docs/reconciliation_framework.cfm>.

Reconciliation Action Plans that have been developed and endorsed by various Ministerial Councils in the last two years.[86]

In 2003 ATSIC and ATSIS began working in partnership with relevant agencies to pursue the strategy. The agencies include the Indigenous Land Corporation (ILC), the National Native Title Tribunal (NNTT) and Victoria's Native Title Representative Body (Native Title Services Victoria), as well as Caring for Country (CFC), a Victorian community initiative which administers several ILC and National Heritage Trust funded programs in Victoria.

The *Victorian Land Justice Strategy* proposes to encompass a number of existing initiatives at State and Commonwealth levels, namely:

- ATSIC's Native Title Framework for Victoria (discussed above);
- Outcomes from native title determination applications (eg *Yorta Yorta*, *Wotjobaluk*);
- Indigenous Land Corporation's Regional Indigenous Land Strategy for Victoria (RILSV);[87]
- Caring For Country's Strategy for Aboriginal Managed Land in Victoria (SAMLIV). This strategy presents information on Aboriginal owned and managed lands throughout Victoria, discusses a state-wide framework for Indigenous land and water management, and contains recommendations on sustainable resource management policies and programs as they relate to the Indigenous people of Victoria;
- The State's existing land rights legislation;
- Commonwealth and State cultural heritage arrangements;
- The State government's proposed Dispossession Policy; and
- National/state park management arrangements.[88]

The ATSIS Victorian State Office has in recent weeks hosted a number of "Land Justice Information Forums" around the state, at which each of the five Commonwealth agencies (ATSIC, NNTT, ILC, NTSV and CFC) provided information on the respective roles of their organisations in relation to native title, land acquisition, land management, natural resource management and other land related issues.

At a meeting between ATSIC, ATSIS and the Victorian Attorney-General on 24 June 2003, the Victorian government announced its intention to develop a Cabinet submission on Indigenous land justice in Victoria. The details are yet to be released by the government. The announcement has implications for ATSIC's Victorian Indigenous Land Justice Strategy as it is expected that the Cabinet submission will address many of the issues that ATSIC intends to pursue through its strategy (that is, land claims settlement, cultural heritage reform).

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86 See for example, the Environment and Heritage Ministers *'Action Plan to Advance Reconciliation'* at: <www.ephc.gov.au/heritage/action_plan_herit.html>. See also *'Environment Australia's Reconciliation Action Plan'* at <www.ea.gov.au/indigenous/fact-sheets/rap.html>.

87 <www.ilc.gov.au> then follow the prompts to Land Acquisition.

88 See for example, <www.parkweb.vic.gov.au/resources/13_0202.pdf>.

ATSIC Victoria now does not expect the Victorian government to sign the Native Title Framework.[89] Nevertheless, the Framework continues to be a valuable document given the usefulness of the intense consultation process involved in developing it. For ATSIC and ATSIS the Framework continues to reflect the issues which claimants around the state want on the table when negotiations begin.

The Framework and the Victorian Indigenous Land Justice Strategy provide the basis of a comprehensive policy framework for native title negotiations and are consistent with the government's broader Indigenous policies. They present an opportunity for the Victorian government to demonstrate its commitment to partnerships with Indigenous people not only in the implementation of government policy but also in its formulation.

The conduct of a series of Indigenous Economic Fora in the Northern Territory is another way of ensuring Indigenous participation in native title policy-making and getting Indigenous comments and perspectives on government proposals. The Northern Territory government's positive response to the forum held in Alice Springs in March 2003 indicates its intention to ensure that participation through the forum will result in policy initiatives and changes in line with the views expressed.

As discussed above, NSW's native title policy is less developed than other states, partly based on its conviction that the NSW Act adequately provides the Indigenous people of NSW with a basis for economic and social development. Of the native title policy that does exist, none has been formulated with the effective participation of Indigenous people.

In Western Australia in early 2001, the Government conducted a number of policy reviews in relation to native title processes. The *Review of the Project Development Approvals System (*the *Keating Review 2002)*[90] sought to develop a system of government decision-making that is coordinated and integrated, clear and unambiguous, and that is balanced between community and developer needs. However, in doing so the Review failed to engage with Indigenous interests and presented native title rights as an impediment to development.[91] The *Technical Taskforce on Mineral Tenements and Land Title Applications*,[92] aimed at expediting the processing of the backlog of mineral tenement applications of land under native title claim also utilised the review process to reach its conclusions. The most substantial review, in terms of focussing on native title, was the *Review of the Native Title Claim Process in Western Australia* (the *Wand Report*),[93] which reviewed the WA government's

89 Consultations with ATSIC Victoria, October 2003.

90 <www.doir.wa.gov.au/documents/investment/PremiersProjectApprovalsFinalReport(1).pdf> accessed 18 December 2003.

91 I made submissions to this Review in 2001 and available at <www.humanrights.gov.au/social_justice/native_title/submissions/independent_review.html>.

92 P Wand and C Athanasiou, *Technical Taskforce on Mineral Tenements and Land Title Applications, Final Report,* Government of Western Australia, 2001.

93 *Review of the Native Title Claim Process in Western Australia,* Report to the Government of Western Australia, September 2001.

native title negotiating principles. The *Wand Report* developed a set of principles to guide the government's negotiations on native title determinations and agreements, taking into account other states' practices, resourcing, the role of connection reports, and the relevant legal framework.

While some of these reviews allowed extensive consultation with Indigenous people, they did not amount to effective participation which includes the prior and informed consent of Indigenous people to the policy goals adopted, their implementation and their evaluation.

Queensland, through utilising an agreement-making approach to policy development, ensures a greater level of participation than the consultation model adopted in policy reviews. Substantial Indigenous participation in the development of particular native title policies, mainly those directed to the State's land management practices, occurred in the development of the protocol agreed between the Queensland government and the Queensland Indigenous Working Group in 1999. However the protocol, as well as other framework agreements developed in Queensland, remains within the confines of a land management approach and does not provide an overall policy direction for native title negotiations.

Only South Australia has extended the agreement-making model for policy development to native title negotiations generally through its State-wide ILUA.[94]

Legal recognition of native title rights and interests may provide an important asset that contributes to the achievement of the group's development objectives. However there are other aspects of native title negotiations which create a positive benefit for native title claimants. This chapter has noted both the deficiencies of some state models of dealing with native title. While uncovering positive and workable models where policy on social and economic development has been soundly based on negotiations with Indigenous people conducted in an atmosphere of equality and respect. The native title framework if properly and fully used can provide such an atmosphere.

94 See the case study on the South Australian Statewide ILUA in Chapter 2.

Part 2: Evaluation of Commonwealth native title policy

The Commonwealth government's native title policy has a significant influence on the capacity of native title agreements to contribute to the economic, social and cultural development of native title claim groups. Two avenues through which Commonwealth policy penetrates native title agreement making are:-

- the Commonwealth's participation in native title litigation
- the Commonwealth's funding of participants in the native title process

The Commonwealth also negotiates native title agreements through the future act processes of the NTA where the Commonwealth proposes developments over land the subject of a claim. While some important agreements have resulted from these processes, the discussion below focuses on the effect of Commonwealth policy on agreements between parties to native title litigation.

Commonwealth's participation in native title litigation

The Commonwealth participates in native title litigation either as a party with a property interest in the land affected by the claim, or as the administrator of the NTA with a policy interest in the Court's interpretation or application of the legislation to the claim before it. As at 1 June 2003, the Commonwealth was a party to 191 native title applications out of 620 in total.[95]

Negotiate not Litigate

As a party to litigation, the Commonwealth is in a position to decide whether it will consent to a native title determination being made by a court or whether it will require the native title parties to prove their case through a contested hearing. As a matter of policy the Commonwealth has stated a preference to negotiate with native title parties so as to resolve the native title claim rather than proceed to a hearing. These negotiations are directed towards agreeing upon the terms of the order that the Court should make in relation to the claim. Once the parties have agreed to these terms it is within the discretion of the Court to make the orders sought.

As indicated in my discussion of State and Territory policies[96] a preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title agreements respond to policies directed to the economic and social development of the native title claim group rather than to the demands of the legal system. While negotiations aimed at identifying the terms of a consent determination are subject to the requirement that the Court needs to be satisfied that it can make the orders sought, there is sufficient scope within the process to allow parties to focus their negotiations on determinations which facilitate this policy goal.

95 According to the NNTT, as at 1 July 2003 there are 622 applications in the Federal Court, and 362 have been formally referred to the NNTT for mediation.

96 See Chapter 2.

For instance in the *Yorta Yorta*[97] case the High Court left open the question of whether a change in the way in which a community acknowledges and observes their traditional laws and customs constitutes a break from those laws and customs or whether it constitutes an adaptation to changing circumstances. Parties have considerable latitude to prefer an approach that allows recognition of native title.

There is also scope in negotiations over how to describe the native title rights and interests held by the group, allowing descriptions which give recognition to more economically productive rights and interests through a native title determination.

In this regard the *Yorta Yorta* case allowed for the recognition of rights that, while based on traditional laws and customs, had evolved and changed over time to manifest in a contemporary form. This principle allows the parties a great deal of scope in defining the contemporary form that traditional rights can take. In the *Miriuwung Gajerrong* decision[98] the High Court's concern that native title rights were described to a high degree of specificity arose from the need to compare these rights with other rights that had been created or presently exist over the land. Through this comparison the question of extinguishment could be resolved. However the Court did not require as a matter of principle that native title rights be defined in a specific way, either as rights to use the land or as rights to carry out activities on the land. Rights that are broadly defined, including rights to exclusive possession, are capable of recognition as native title rights.

Within these legal parameters, there may be scope for the parties to direct negotiations towards consent determinations which provide a strong basis for the group's ongoing economic development. For instance, where possible preference should be given to recognising the group's right to control and commercially develop resources on the land rather than to non-exclusive use of resources. The recognition of the group's decision-making powers and structures in relation to the land is also capable of recognition by a court and forms a powerful basis for the ongoing social and cultural development of the group.

This is not to argue that there is unlimited scope for the Commonwealth and other parties to agree to consent determinations of this nature. For instance a Court could not make orders by consent in which it is clear that native title had been extinguished as a result of the operation of the NTA. I argue above, in my evaluation of State and Territory native title policies, that because of the limitations in the capacity of the NTA to give legal recognition to rights that provide a basis for the development of the group, States should negotiate agreements with native title claimants which address this deficiency. This can occur either through agreements which complement the native title determination, or by agreements which replace the determination with a comprehensive set of outcomes and processes on which development can be based.

97 *Members of the Yorta Yorta Aboriginal Community v Victoria & o'rs* [2002] HCA 58 (12 December 2002).

98 *Western Australia v Ward and o'rs* [2002] HCA 28 (8 August 2002).

However, where there is an opportunity to give legal recognition to traditional owners inherent rights through consent determinations and particularly where such rights can provide a basis for or contribute to the economic, social and cultural development of the group, then governments, both State and Federal, should conduct the negotiations in such a way as to maximise this opportunity.

The Commonwealth government's native title policy does not direct its negotiations with native title claim groups to this end. The policy objectives are as follows:

- certainty of rights recognised,
- consistency with the common law,
- compliance with the *Native Title Act 1993* (Cth), and
- transparency of process.[99]

The Attorney-General's speech to the Geraldton Native Title Representative Bodies Conference in 2002[100] gives further elucidation on what these four principles mean in their application to negotiations concerning consent determinations:

- Certainty of rights requires that native title rights be very specifically described because a consent determination describes the rights and interests that are binding against the whole world, (paragraph 29).
- In relation to consistency with the common law, a consent determination cannot recognise rights not recognised by the common law, (paragraph 31).
- In relation to compliance with the NTA, consent determinations must be consistent with and comply with the requirements for determination set out in the NTA, (paragraphs 32 to 34).
- In relation to transparency, all parties to a consent determination should be given the opportunity to be satisfied that it properly represents the legal position, including connection material (paragraph 38).

This explanation confirms that in relation to the negotiation of consent determinations the government's policy is to apply the law in a narrow legalistic way. The effect is that their negotiations can limit the potential of native title determinations to contribute to the economic, social and cultural development of the group.

Such an approach accounts for comments received from many NTRBs about the delay and obstruction caused by the Commonwealth in many of the cases in which it seeks to have an effect upon the way in which the NTA is interpreted and applied.

The Commonwealth's reluctance to agree to a consent determination in the Wotjobaluk application illustrates this point. In this matter the Victorian government and the Wotjobaluk people, after several years of negotiations,

99 <www.ag.gov.au/www/nativetitleHome.nsf/HeadingPagesDisplay/Native+Title+Litigation?OpenDocument>, accessed 24 December 2004.

100 The Hon. D Williams, Native Title: 'The Next 10 Years – Moving Forward by Agreement', paper presented at the *Native Title Conference 2002: Outcomes and Possibilities*, Geraldton, Western Australia, 3-5 September 2002.

had reached in-principle agreement around November 2002. An element of the overall agreement was consent to a determination that native title existed over approximately two percent of the claim area and did not exist over any other part. The native title rights in the two percent area were limited to non-exclusive rights to hunt, fish, gather and camp along the banks of the Wimmera River, in accordance with all existing laws and regulations.

Yet despite the moderate terms of this determination the Commonwealth delayed its agreement for a further year only offering in-principle support on 21 November 2003 with the release of a media statement by the Attorney-General. The terms of that statement were:

- The proposed settlement will provide substantial certainty over a large area of the Wimmera in Victoria, including a formal court determination that native title does not exist over 98% of the claim area;
- The rights proposed to be recognised over 2% of the claim area are similar to those enjoyed by the public; and
- Negotiations are continuing and the Commonwealth's final agreement is subject to an appropriate negotiated outcome being reached with all the other parties.

The Attorney-General concluded the media release with the claim that the Government's in-principle agreement highlights it willingness to give effect to its policy of seeking to reach outcomes through negotiation rather than litigation wherever possible.

The media release more importantly reveals the terms on which the Commonwealth is willing to give effect to its policy of agreement. These are not terms which seek to maximise the economic, social and cultural opportunities for traditional owner groups through recognition of their inherent rights. The emphasis is rather on the limited opportunities available to native title claimants through the recognition of their rights, for example 'rights similar to those enjoyed by the public' on recreational land. The choice of words and the primary emphasis on 98% of the area not affected by native title demonstrates the Commonwealth's policies of agreement-making.

A further illustration of the Commonwealth's reluctance to negotiate consent determinations with native title parties is the matter of *Wik Peoples and the State of Queensland and Others and* Another, where His Honour Justice Drummond expressed concern and frustration at this attitude:[101]

> Look, I am just very concerned about the Commonwealth's attitude. There doesn't seem to be any indication – I mean, I'm not aware of what the problems are so far as the Commonwealth is concerned, and there's no sign of any movement as between the Commonwealth and the applicants to resolve those concerns. …but I say the Commonwealth has the capacity to be a huge spanner in the works because, while it's possible that the time may come, contrary to the view I've taken earlier, to hive off issues for determination by litigation and making a consent determination in

101 Federal Court of Australia, No. QG 6001 of 1998 *Wik Peoples and State of Queensland and Others and Another*, Transcript of Proceedings, Friday, 6 September 2002, p5.

> relation to the balance of the matter if that looks appropriate, that can't be done if the Commonwealth doesn't decide that it wants to do something and take some action to doing that something.

In particular, the following exchange records His Honour's frustrations with the Commonwealth:[102]

> HIS HONOUR: … it would be very unfortunate if the reason this determination can't be made by consent and this enormously ancient Wik case Part B can't be resolved is that the Commonwealth, of all parties, is responsible for the delay.
>
> MR SWAN (for the Commonwealth): Your Honour, you can be assured that the Commonwealth will take serious note of the comments you have made this morning.
>
> HIS HONOUR: No, that's just words, Mr Swan. I've made these comments on about three prior occasions, and I'm still being assured solemnly that I can be certain about these things. …The time has come for the Commonwealth to put its cards on the table. Does the Commonwealth say that…it considers the only way that Wik Part B can be resolved…is by litigation?"
>
> MR SWAN: That's certainly not in accordance with my instructions, your Honour.

Later:

> HIS HONOUR: The time has come when I am no longer prepared to accept the repeated assurances from those at the bar table appearing for the Commonwealth that I can be assured that all is well as between the Commonwealth and the applicants.

The outcome of that particular hearing was that His Honour directed the applicants to deliver, by 24 January 2003, the applicants proposals for the trial of the issues outstanding as between the applicants and all parties who had not indicated that they were prepared to agree on a draft consent determination.

Justice Drummond has since retired and Justice Cooper is now the judge of the Federal Court that is handling this matter. Justice Cooper expressed similar concerns about the Commonwealth's delay in bringing the matter to a satisfactory conclusion in September 2003. Cooper J was concerned that the Commonwealth's delay was costing taxpayers because the Commonwealth was also funding all the other parties and respondents (except the State).

The following exchange in September 2003 records similar frustrations to those of Justice Drummond more than a year earlier:[103]

> HIS HONOUR: Mr Baden Powell, is the Commonwealth in any of these? [Negotiations to reach a consent determination]
>
> MR POWELL: Yes, your Honour. It does have an interest in the areas the subject of negotiations for proposed determination. We have no objections

102 *ibid*, pp5-6.

103 Federal Court of Australia, Cooper J, No. QG 6001B of 1998, Q 6029 of 2001, Q 6005 of 2003, QG 6016 of 1998, QG 6119 of 1998, QG 6155 of 1998, Q 6008 of 2003, Q 6009 of 2003, Q 6010 of 2003, Directions Hearing, Extract of Transcript of Proceedings, Monday, 15 September 2003, pp16-17.

> to the proposed course of action from the applicants. The Commonwealth has a preference for a mediated outcome for the matter generally. The Commonwealth would prefer a longer period of time if that's possible and we would appreciate your Honour extending the period perhaps even beyond the end of November.
>
> HIS HONOUR: Why? What does the Commonwealth want to say? Come on, the biggest litigant in Australia, more resources than anybody else, why can't you make the time?
>
> MR POWELL: We will make the time available, your Honour—-
>
> HIS HONOUR: Yes.
>
> MR POWELL: — but we also want to have enough time to consider the terms of the draft determination as well as connection issues. But we will endeavour to meet the time-frame proposed by Mr Hunter but would appreciate any further – a further time that the Court may extend.
>
> HIS HONOUR: Well, all right. What's the issue i[n] relation to the Commonwealth in this sense? Is there particular land holdings that are subject to the claim that the Commonwealth has an interest in or is it simply administering the Act the Commonwealth has got the interest in? So what is it the Commonwealth wants the extra time for?
>
> MR POWELL: There are some drafting issues and there's also the question of connection, your Honour.
>
> HIS HONOUR: Has the Commonwealth been participating in the attempts to mediate this matter?
>
> MR POWELL: Yes, your Honour.
>
> HIS HONOUR: And these matters of connection haven't been addressed in the mediation process.
>
> MR POWELL: They have but it's also a matter of obtaining instructions as well, your Honour. They have been addressed to a certain extent in mediation.

Mr Hunter, representing the claimants, expressed his clients' concerns about the delays being caused by the Commonwealth, to which his Honour replied:

> HIS HONOUR: No, I'm not – nobody is suggesting the Commonwealth wants to derail. I'm simply saying that the Commonwealth really has got the resources, has been on notice for this claim for a long time and you've sat here and you've heard how everybody else is keen to get on with it and believe that they are close. The last thing that the Commonwealth would want would be for it all to fall over now simply because it lost momentum.
>
> And the last thing I know the Commonwealth would want – would want it to go to trial having regard to the resources that would be involved in a lengthy Court proceeding. So that the Commonwealth has got as much reason to get this matter resolved as everybody else at the Bar Table and I'm sure that those instructing you would want you to —-
>
> MR POWELL: That is indeed the case, your Honour.
>
> HIS HONOUR: — expressed that view, I'm sure. All right. Well, the Commonwealth, I would have thought, can do as well as the pastoralists and can make known by the end of November what its attitude is in relation to these matters.

His Honour then directed the parties to present their views on particular issues by the end of November 2003. The matter is now listed for a further directions hearing in February 2004. By that time it will be almost four years since the Wik People presented the Queensland Government with the terms of a consent determination.

Integrating Native Title Policy into Commonwealth's Indigenous Policy

The failure of the Commonwealth to direct the negotiation of native title agreements towards the economic, social and cultural development of the group puts native title policy development at odds with the Commonwealth's broader Indigenous policy direction.

The Commonwealth's Indigenous Policy can be found on OATSIA's website.[104] The Office has a Statement of Corporate Directions which outlines its vision, objectives and strategies.[105] OATSIA's vision is '[a]n Australia where Indigenous Australians share equality of opportunity and social and economic wellbeing with their fellow Australians, where they are free from discrimination, and where their cultures and heritage are respected and sustained'.[106]

OATSIA's Statement of Corporate Directions also contains a number of specific objectives and strategies. One objective is to '[a]ddress disadvantage to ensure Indigenous Australians are able to participate fully in Australia's social and economic life'.[107] One of the strategies for achieving that objective is '[e]xploring opportunities for Indigenous people to gain economic and social benefits from land use and ownership'.[108]

Two important mechanisms for achieving this goal have emerged out of the reconciliation process. These are, firstly a whole-of-government approach to Indigenous policy and secondly, partnerships between government and Indigenous communities. These two policy frameworks are discussed in the context of native title in Chapter 1.

In November 2000, the Council of Australian Governments ('COAG') agreed that all governments would work together to improve the social and economic well being of Indigenous people and communities.[109] The framework is based on three priority areas for government action:

- Investing in community leadership and governance initiatives;
- Reviewing and re-engineering programs and services to ensure they deliver practical measures that support families, children and young people. Governments should look at measures for tackling family violence, drug and alcohol dependency and symptoms of community dysfunction; and
- Forging greater links between the business sector and Indigenous communities to help promote economic independence.

104 <www.immi.gov.au/oatsia/publications/directions_statement.htm> accessed 23 December 2003.
105 *ibid*.
106 *ibid*.
107 *ibid*.
108 *ibid*.
109 <www.pmc.gov.au/docs/reconciliation_framework.cfm> accessed at 23 December 2003.

Consistent with these broader objectives, COAG agreed in April 2002 to trial working together with Indigenous communities in up to ten regions to provide more flexible programs and services based on priorities agreed with communities.[110]

Yet in neither the COAG trials nor the policy programs initiated through the Commonwealth government's response to reconciliation has consideration been given to the potential of native title to contribute to the policy goals of providing Indigenous people with a foundation for their economic and social development. Nor does the Commonwealth's native title policy reflect these broader goals so integral to practical reconciliation.

The failure to align native title policy with the government's broader Indigenous policy objectives means the opportunity to harness the power of Indigenous peoples own cultural and social structures to bring about economic transformation is lost.

Also lost is the opportunity to ensure that any economic development that does occur is sustained by the social and cultural values of the group. The concept of sustainable development recognises that economic development is not just the exploitation of resources wherever they happen to exist, but also must take account of the relationships in which development occurs, including the cultural values of the community.

The relationship of Indigenous people to their land is widely recognised as a basis for their cultural values and identity and as such must be taken into account in the policies aimed at achieving sustainable economic development. Obvious examples of economic development founded on the traditional cultural values of a community are the initiatives around tourism and Indigenous art. However the notion of sustainable development does not require that industries be restricted to particular types, but that all developments, from mining to tourism, take account of the needs of the cultural values of a community and occur with their informed consent.

Native title provides an important frame of reference by which participation and economic development can transform the conditions of Indigenous peoples lives. Yet its capacity to contribute to this process has been hampered, first by a legal framework that operates to restrict rather than maximise these outcomes, and second by the failure of government to integrate native title into the range of policy options available in achieving this goal.

Commonwealth funding of native title system

The second avenue through which Commonwealth policy affects native title agreement making is the Commonwealth's funding of participants in the native title system. The amount of funds provided to participants and the relative allocation of funds between participants determines whether the native title process can contribute to the economic and social development of Indigenous peoples.

Chapter 2 of my *Native Title Report 2001* criticised the way in which the Commonwealth distributes funds to institutions and individuals within the native

110 <www.icc.gov.au> accessed 23 December 2003.

title system. My criticisms were twofold. First, the Commonwealth fails to provide sufficient funds to NTRBs to carry out their statutory functions so as to ensure the recognition and protection of native title. Second, the distribution of funding between the institutions within the native title system favours those institutions whose role is to manage the resolution of native title over and above those institutions whose role is to represent the interests of native title holders. The result of this inequity is that the priorities of the former institutions dominate the native title system. In particular I criticised the way in which the funding prefers a litigation model over a negotiation model, there being insufficient funds for the latter to be fully developed while funds are being devoted to ensure the Federal Court is equipped to dispose of native title cases within a short period of time. However, as outlined above this process is frustrated by the Commonwealth's own delays.

The inequities of the Commonwealth's distribution of funds to participants in the native title system have not been addressed. As shown in the outline of the Commonwealth's funding regime above, there has been no response by the Commonwealth to either my criticisms or to the criticisms of other participants in the system, including State governments and industry.[111]

Respondent funding

In 2002-2003 over $10million was provided to respondent parties, other than State and Commonwealth parties, to participate in native title proceedings. A threshold issue for evaluating the merits of funding such respondents is determining what interests they have in those proceedings. There is no doubt that a respondent with interests in the land the subject of a native title claim would have an interest in the claim. However the NTA and the common law have guaranteed that respondent's interests cannot be affected by a native title claim because upon the creation of the respondent's interest, no matter whether it is an easement over the land, a license to carry out activities on the land, or a freehold title to the land, native title is extinguished wherever there is an inconsistency between the two sets of interests. Even where there is no inconsistency the non-extinguishment principle applies to ensure that the activities that the respondent carries out on the land are in no way affected by native title rights and interests. In this sense co-existence can be interpreted as a euphemism for a hierarchy of interests in which native title is subservient to, and ineffectual against, all other interests.

Noel Pearson, in the Mabo Lecture addressed to the Native Title Representative Bodies Conference in Alice Springs in 2003 put it this way:[112]

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111 On 9 October 2003, the Western Australian Deputy Premier released a media statement, *Commonwealth must rethink native title funding,* in which he criticises the Commonwealth for the 'chronic under-funding of native title representative bodies' and calls on the new Attorney-General to address the issue as a matter of urgency. In support of his statement the release also cites examples of other stakeholders drawing attention to the under-funding of NTRBs. These included the Deputy President of the NNTT, mining company Rio Tinto, the former First Assistant Secretary of the Native Title Division in the Attorney-General's Department and the Hon. Eric Ripper, Deputy Premier, Government of Western Australia, 9 October 2003.

112 Pearson, N, *Where We've Come From and Where We're At with the Opportunity that is Koiki Mabo's Legacy to Australia,* Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June 2003.

> [N]ative title could never result in anyone losing any legal rights they held in land or in respect of land. Where native title existed in its own right under the common law or where native title co-existed with other tenures – the native title could not result in the extinguishment or any derogation whatsoever of any rights granted by the Crown or by legislation. So why wouldn't non-indigenous Australians embrace a title which could never dispossess them of their own accrued rights and titles?
>
> We forget this second point too easily. In fact it is probably not even a matter of forgetting, because we have never planted this point in our own heads in the first place – and we have never succeeded in getting Australians to understand this truth: the truth that native title is not about anyone else losing any legal rights that they have accumulated in the 200 years since colonisation. We have never convinced anyone of the truth that native title is all about the balance, it is all about the remnants, it is all about what is left over – and no finding of native title can disturb the rights of any other parties other than the Crown.[113]

Later he posed the question:

> So if all of the rights and interests of the third parties are guaranteed at law and can never be affected by a finding of native title – why are third parties allowed to become parties to native title claims? Why are they treated by governments and the courts as if they have rights and interests that are at stake – when they do not? Why are they funded by the Commonwealth Government to represent themselves in these claims?[114]

The result of providing financial support to third parties to participate in proceedings in which their interests cannot be affected is to encourage a litigation approach to native title, not a negotiation approach. This is contrary not only to the Commonwealth's own policy on native title but also to that of the States. As Pearson points out:

> Experience has shown that if there is a third party that (a) has all of his rights and interests already guaranteed at law – and therefore he can never lose anything, and (b) has all of his costs paid for by the Attorney General of the Commonwealth – then of course these third parties are not going to be amenable to negotiated settlement of claims, and will resist recognition until the cows come home, or the native titleholders have surrendered most of their rights.[115]

It is noteworthy, that information provided by the Attorney-Generals department to the Senate Estimates Committee at a hearing on 13 February 2003,[116] supports Pearson's analysis, with an increasing proportion of respondent funding directed towards litigation:

113 *ibid*, p3.
114 *ibid,* p6.
115 *op.cit.*
116 Senate Legal and Constitutional Legislation Committee, QoN 236 and QoN 238, 31 May 2002.

Table 1: Proportion of Commonwealth grants to respondents for agreements/litigation

	00/01	01/02	02/03	Totals
Agreement	84%	90%	52%	84%
Litigation	16%	10%	48%	16%

This table identifies the substantial percentage increase in funding of respondents for litigation in 2002/03. This is contrary to the purported commitment of the Commonwealth to negotiate agreements rather than litigate.

A further issue is the different levels of accountability required from NTRBs compared to those receiving Commonwealth assistance as third parties to native title claims. For example, NTRBs are required to prepare annual reports that are tabled in Federal Parliament and comply with strict funding guidelines imposed by ATSIS. This is not the case for respondent recipients of the Commonwealth's financial assistance. In addition numerous independent reports have been commissioned on the efficiency and effectiveness of the NTRBs, but no assessment has been carried out as to the efficiency, effectiveness or accountability of the funding provided to respondent parties.

In the Torres Strait, the Attorney-General's funding for respondent parties has allowed the Queensland Seafood Industry Association (QSIA) to be a party to all the land claims, even though it has no interest above the high water mark. QSIA was also represented in the recent Darnley Island case[117] in which the question of the effect of public works was litigated, even though it was arguing identical points to those put by the State. This kind of involvement where there are no interests at stake, increases costs, and raises longer term tensions.

Funding to Native Title Representative Bodies (NTRBs)

The failure of the Commonwealth government to respond to the many calls to increase the funding of NTRBs is not only contrary to the government's own policy of preferring negotiation over litigation, it is also contrary to its human rights obligations.

As indicated in my previous discussions of State and Commonwealth policies, their preference for negotiation over litigation is the first step in ensuring that native title agreements can be directed to the broader policy goal of addressing the economic and social development of the native title claim group rather than the demands of the legal system. While the subject of native title negotiations may be quite different, ranging from consent determinations, agreements ancillary to a determination, to agreements which do not include a native title determination, the relationship between these three levels of negotiation is clarified by understanding their common underlying purpose – the economic and social development of the traditional owner group.

117 *Erubam Le (Darnley Islanders) 1 v State of Queensland [2003]* FCAFC 227 (14 October 2003).

In order to achieve this purpose NTRBs must have the capacity, both in terms of resources and skills to engage in negotiations at all three levels. Obtaining a native title determination by consent of the parties is just one way of securing the group's development base. Where consent determinations are insufficient for this purpose, agreements negotiated to augment a court determination should ensure that, as a package, the two elements of the agreement (the determination element and the non-determination element) achieve the development objective. Further, agreements with traditional owner groups who are unable to meet the legal tests for a native title determination or whose native title rights and interests have been extinguished by previous grants could nevertheless achieve similar outcomes through agreements that addressed development needs.

The under-funding of NTRBs means that, in representing the native title claim group, they are compelled to put their scarce resources into the immediate demands of the native title system rather than fully engage in the various levels of negotiation triggered by the native title process. Consequently NTRBs cannot maximise the capacity of native title agreements to lay the foundation for the achievement of Indigenous peoples' human rights.

The underfunding of NTRBs is reflected in the stringent grant conditions imposed by ATSIS, the body administering the funds. The grant conditions stipulate that purpose of funding is to enable NTRBs to perform functions and exercise powers in accordance with Division 11, Part 3 of the NTA and the NTRB strategic plan.[118] In addition to this general requirement, the funding guidelines specifically prevent NTRBs from using funding to cover costs associated with economic development or land management activites,[119] nor support reference groups or steering committees in relation to land or waters where native title has been recognised.[120] These limitations on the use of funding may not apply if the NTRB can demonstrate that these activities are related to their functions and powers under the NTA. However, as highlighted in Chapter 2, ATSIS retains discretion to determine funding allocations.

Subjecting funding to these conditions fails to appreciate the complementarity between the various levels of agreement making triggered by the native title process. Further, it restricts NTRBs to processes and negotiations prescribed by the NTA rather than allowing them to utilise other mechanisms for the realization of rights and interests, i.e., heritage legislation. As discussed above, consent determinations are just one way of securing the traditional owner group's development base and, depending on the strength of the claim, may be insufficient for this purpose. The capacity of NTRBs to negotiate more comprehensive agreements which complement or replace native title determinations is severely limited.

118 Aboriginal and Torres Strait Islander Services, *2003-04 General Terms and Conditions of Grant to bodies recognised as Native Title Representative Bodies under the Native Title Act 1993*, ATSIS, 2003, para 5.1.

119 *ibid,* para 6.2(h).

120 *ibid,* para 6.2(j).

NTRBs are also concerned that ATSIS will introduce six monthly funding which will further restrict their ability to freely represent their constituents and further strain their resources in terms of financial reporting and their ability to attract and retain experienced professional and administrative staff. In addition, short-term funding cycles undermine the ability of NTRBs to establish long term vision and planning. The Commonwealth Grants Commission in its 2001 *Report on Indigenous Funding* identified a 'long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals'[121] as a key principle for improving the allocation of resources to meet Indigenous need. Capacity development as discussed in Chapter 1 also emphasizes the importance of a long term investment in achieving development goals. Limited funding cycles therefore create significant barriers for enabling long term planning for NTRBs and implementing capacity development initiatives.

In my *Native Title Report 2001* I argued that native title, as an expression of inherent rights, and as a vehicle for economic and social development, should not be subjected to short term funding grants. To do so is to confuse it with temporary programs directed to community services. Native title is not a special measure or service program. It is not a temporary measure that can be removed once the disadvantage it aims to redress is overcome. It is the recognition of Indigenous laws, culture and land. As an expression of inherent rights its continuous funding should be guaranteed.

Yet the imposition of these conditions is a response to the critical under-funding of NTRBs. Without enough money to go around, hard decisions must be made as to how expenditure will be prioritised. In recognition of this situation many State governments are contributing their own funds to NTRBs so as to ensure that developments and projects within their state are not impeded and their policy goals in relation to native title can be met.

The Western Australian government has recently made funding available to NTRBs for an extra Future Act officer in each region. This initiative was one of the recommendations made by the WA Technical Taskforce on Mineral Tenements and Land Title Applications to expedite the processing of the backlog of mineral tenements applications on land under native title claim.[122] Funding is dependent on the NTRB entering into a regional heritage agreement with the State to expedite the granting of prospecting and exploration licenses. There has been reluctance on the part of NTRBs to enter into this funding arrangement on the grounds that the amount of the grant is arbitrary, it does not reflect the true costs of employing an additional officer and there are concerns about the terms of the agreement.

Queensland, as mentioned in Chapter 2 is also providing funding for NTRBs to employ additional staff to deal with future act matters and become involved in capacity building, assisting the native title group to set up their own process for response, such as the issuing of notices and holding of meetings. Assistance

121 Commonwealth Grants Commission, Report on Indigenous Funding 2001, Commonwealth of Australia, Canberra, 2001, pxix.

122 *Technical Taskforce on Mineral Tenements and Land Title Applications*, *Final Report*, Government of Western Australia, 2001, p19.

from the Queensland government has also been received for authorisation meetings, and for the meetings necessary to negotiate ILUAs and other agreements. These have included aspects of the pilot South-West Petroleum Project and the Regional Forestry Agreement. The National Native Title Tribunal has also provided financial and logistical assistance for the holding of consultation or information meetings or mediation conferences.

The South Australian government confirms that the Aboriginal Legal Rights Movement (ALRM) has received insufficient funding from ATSIS to enable them to negotiate.[123] As a result the South Australian government has provided funds totalling $5.4 million to 30 June 2003, plus an additional $1.5 million for the current financial year. The South Australian government considers that negotiated outcomes are more cost effective than the $4 million it took to litigate the De Rose Hill native title claim.

The South Australian government has also provided funding to ensure that the State-wide ILUA process can be sustained. To this end it has provided one-off funding to the Congress of Native Title Management Committees, which provides instructions to the ALRM and has significant involvement in the ALRM's policy. The future funding of the Management Committees is considered critical by the South Australian government for ensuring that Indigenous people in South Australia have a culturally appropriate vehicle for providing the ALRM with instructions for advancing the negotiation of their native title claims.

The inadequate funding of NTRBs relative to their functions has had the cumulative effect of undermining their capacity to fully and effectively engage in the native title process. In addition, the distribution of funds to other institutions and individuals within the native title system also affects the way in which NTRBs must allocate the scarce resources they do receive. Of increasing concern is the way in which the Commonwealth's allocation of funds to third parties wishing to participate as respondents in the native title claim process is funnelling NTRBs resources towards litigation rather than addressing the needs of the claimant group.

Funding to Prescribed Bodies Corporate

As mentioned in Chapter 2, as at 30 May 2002, a total of 20 corporations have been determined to be Prescribed Bodies Corporate (PBCs) and registered on the National Native Title Register, thereby becoming Registered Native Title Bodies Corporate (RNTBCs).[124]

Under the *Native Title Act 1993* (Cth), RNTBCs are the legal entity that hold or manage native title on behalf of native title holders after a determination by the Federal Court that native title exists. The number of RNTBCs is expected to grow as the number of determinations of native title increases over time. Yet there is a lack of resources for prescribed bodies corporate. This is a significant

123 State of South Australia (Indigenous Land Use Negotiating Team), *Submission to Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, October 200, available at <www.aph.gov.au/senate/committee/ntlf_ctte/report_19/submission/sub06.doc> access 22 December 2003.

124 Senate Estimates Committee Question on Notice No. 244, 31 May 2002. The source of the figures is the Native Title Registrar, National Native Title Tribunal.

flaw in the native title system. It inhibits native title holders from achieving broader social, economic and cultural development for their community despite having a determination that their native title continues to exist.

In answer to questions on notice from Senator McKiernan about funding for RNTBCs and whether financial provisions are made to enable them to effectively carry out their legal obligations, on 31 May 2002 the Attorney-General's Department provided the following answer:

> Part 11, Division 3 of the *Native Title Act 1993* (Cth) allows NTRBs to provide certain services to RTNBCs (for example, facilitation and assistance services) if the RNTBC requests the NTRB to provide those services and their provision would be in accordance with the NTRB's prioritisation policy.
>
> ATSIC grant conditions allow NTRBs to use ATSIC grant funding to perform their statutory functions in respect of RNTBCs and to assist with the establishment costs for new PBCs (i.e. corporations set up by native title holders to perform functions of a RNTBC, but which have not yet been registered on the National Native Title Register). ATSIC grant conditions preclude NTRBs from meeting the ongoing operating costs of RNTBCs.
>
> ATSIC is currently conducting a research project to obtain data on the structure and projected activity of RNTBCs Australia-wide. It is expected that this data will inform the development of strategies to assist RNTBCs to deliver on their responsibilities.[125]

The report noted that PBCs 'have two fundamental purposes: firstly, protecting the native title, and secondly, delivering the necessary certainty required in the management of property interests'.[126] The Executive Summary of the report provides an insight into some of the issues confronting PBCs and RNTBCs.

> RNTBCs have a range of important statutory functions under the Act and the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (PBC Regulations). Both trustee and agent RNTBCs broadly have the functions of:
>
> - managing the native title;
> - entering into native title related agreements; and
> - holding in trust and investing monies paid to the native title group resulting from dealings in their native title, as well as other functions at the general direction of the native title group members.
>
> One of the most important statutory functions of RNTBCs is to consult with, and obtain the consent of, relevant native title holders before making native title decisions that would affect their native title rights or interests.
>
> Only associations incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) can be nominated by the native title holders to hold or manage the determined native title.

And specific corporate governance and regulatory compliance obligations under this *Act* must be met for RNTBCs to maintain their status as legally incorporated

125 Senate Estimates Committee Question on Notice No. 244, 31 May 2002.

126 Anthropos Consulting Services, Seantore Brennan and Rashid (2002) *ATSIC Research Project into the issue of Funding for Registered Native Title Bodies Corporate,* for ATSIC Native Title and Land Rights Centre, Canberra, October 2002.

associations under the *Act*. If not, they will not be in a position to properly discharge their statutory functions.

> Thus the native title management regime establishes two distinct but interdependent categories of activity for RNTBCs which require resourcing for their statutory performance… These two categories are (a) the performance of their statutory functions as set out in the *Native Title Act 1993* (Cth) and the PBC Regulations, and (b) meeting their specific regulatory compliance obligations as required under the *Aboriginal Councils and Associations Act 1976* (Cth).

The report notes that the costs associated with establishing and registering RNTBCs are considerable and that the nature and extent of such costs has never been given any detailed consideration. Currently, the establishment costs for most RNTBCs are being met by the NTRBs and by state-funded organisations such as community councils. Even if NTRB funding includes an amount for establishing RNTBCs it is still hopelessly inadequate. In some cases there are no resources to meet establishment costs for RNTBCs.

In relation to funding, the report notes:

- NTRBs have statutory functions that permit them to assist RNTBCs if requested;
- Present funding of NTRBs is inadequate to enable the NTRBs to effectively perform all their statutory functions;
- Since 1998 NTRBs have been required to prioritise the performance of their statutory functions;
- Priority is being given to claims related work and as a consequence, NTRBs are not able to provide RNTBCs with any assistance, in some cases including with establishment costs;
- Under current funding conditions NTRBs are not able to support the operating costs of RNTBCs or to assist RNTBCs to meet their compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth);
- It was initially envisaged that NTRBs would be able to support RNTBCs;
- It could be argued that ATSIC could remove the restriction on NTRBs from supporting RNTBCs;
- ATSIC's view is that the funding made available solely for the performance of NTRB statutory functions which includes meeting PBC establishment costs;
- ATSIC maintains however, that the funding for NTRBs was never intended to support the ongoing costs of RNTBCs or for meeting their statutory functions.

The report provides an insight into the dilemna facing ATSIS when inadequate funding requires it to choose between funding organisations at the expense of another, both of which are integral to the operation of the native title system.

> In addition, ATSIC argues that the funding provided by Government was significantly less than identified as being needed in the Parker Report,[127]

127 Parker, P, *Review of Native Title Representative Bodies,* Aboriginal and Torres Strait Islander Commission, 1995.

> and less than the funding sought in Cabinet submissions. ATSIC sought increases of $22.2M in 1995-96 (and received $13.95M) and $37M in 1996-97 (receiving $27.7M). Over the past five financial years, Government funding to ATSIC for native title has remained at similar levels – $40.8M in 1996-97 and $42.5M in 2000-01. In light of these funding constraints, the effects of which have only increased since the 1998 amendments to the *Native Title Act 1993* (Cth) increased NTRB statutory functions, and the need to prioritise the recognition of native title, ATSIC subsequently decided that it was only prepared to fund RNTBC establishment costs, rather than the ongoing costs of performing functions and meeting regulatory compliance requirements".[128] (Anthropos *et al* 2003:3)

The losers in the difficult choice facing ATSIS are the PBCs:

> "RNTBCs currently receive no government funding to perform their statutory functions under the *Native Title Act 1993* (Cth) or meet their regulatory compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth). Nor do NTRBs receive adequate funding for the discharge of their statutory functions under the *Native Title Act 1993* (Cth), which impacts particularly on their capacity to provide assistance to RNTBCs. As a result, existing RNTBCs are, on the most part, essentially dysfunctional, have no infrastructure and are unlikely to be meeting existing regulatory compliance requirements under the *Aboriginal Councils and Associations Act 1976* (Cth). They are accordingly vulnerable to failure and being wound up. This would put at risk both the protection and management of native title, and the certainty required by land and resource management stakeholders." (Anthropos *et al* 2003:4)

The report advocates that:

- NTRBs be given additional funding to assist native title holders in the incorporation, nomination and registration of RNTBCs; and
- RNTBCs be funded either directly or indirectly so that they have the capacity to meet their minimum regulatory compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth) and perform their statutory functions under the *Native Title Act 1993* (Cth), so as to deliver the certainty required by Government and other parties in dealings concerning native title.

It is the role of Prescribed Bodies Corporate to turn the results of negotiations into workable models for the sustainable development of the traditional owner group. Therefore they must be properly resourced in order to manage the native title assets, and to govern and lead the group into a self-determining entity. Without funding, PBCs will fail in the most important task of ensuring that the needs and aspirations of the group are identified and addressed so that sustainable development can occur.

128 *op.cit,* Anthropos Consulting Services, p3.

Native Title Representative Bodies and Prescribed Bodies Corporate are the major entities through which the economic and social development of native title groups will occur. Native Title Representative Bodies are the interface between the legal and political system that decides who gets what out of native title. Their capacity to negotiate the best result for traditional owners, either through the courts or through the government, depends on their being properly resourced.

Chapter 4

Native Title and Agreement Making: a Comparative Study

The failure in Australia to perceive native title and land rights as the basis on which to address Indigenous economic and social development has been evident at the legal, policy and administrative levels. Legally, the increasingly narrow interpretation of native title by the High Court has, as Noel Pearson has pointed out, stripped native title of much economic meaning or benefit.[1] Pearson has characterised the conceptualisation of native title by the Australian courts as discriminatory, and has noted the stark contrast to the decision of the Supreme Court of Canada in *Delgamuukw*[2] 'which affirms that communal native title involves the right to possession, of the surface and the subsurface'.[3]

As discussed in Chapter 3 the policy position at federal Government level has been to apply and reinforce this increasingly narrow judicial interpretation of native title, including opposing in the courts, recognition of native title (for example sea rights) and subjecting agreements recognising native title to critical scrutiny even where such agreements are based on consent.[4] It was also discussed in Chapter 3 how many state Governments are conducting native title negotiations within this narrow legal framework by focusing primarily on the settlement of native title claims rather than the economic and social development of the traditional owner group.

The restrictive and legalistic approach to agreement-making in respect of native title and land rights, as well as sitting awkwardly with initiatives such as the Council of Australian Governments' (COAG) 'whole of government' approach to service delivery, contrasts unfavourably with more holistic and constructive approaches being developed overseas.

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1 N Pearson, *Where we've come from and where we're at with the opportunity that is Koiki Mabo's legacy to Australia,* Mabo Lecture*,* Alice Springs Native Title Conference, 3 June 2003, available at <www.capeyorkpartenships.com> accessed 19 November 2003.

2 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

3 Pearson, *op.cit*, p10.

4 See for example the discussion in Chapter 3 about the Commonwealth government's delay in giving its consent to the in-principle native title agreement between the Wotjobaluk people and the Victorian Government concerning land in western Victoria.

This chapter raises the question of how native title, land rights, and agreement-making with Indigenous peoples are being handled both at juridical and policy levels in other comparable common law countries. The lens through which these international comparisons are viewed is that of the human right to development and the international discourse on sustainable development outlined in Chapter 1. By analysing other approaches to Indigenous rights and economic development the situation in Australia is illuminated so that lessons can be learned from similar experiences.

In pursuing such international comparisons, it should be noted that there is a tendency in Australia to discount the experience of other countries as not being sufficiently relevant, and to resent international comparisons or attention.[5] Indeed, Justice Kirby has cast doubt on the relevance of the findings of other courts in respect of native title matters. In the course of the *Fejo* case he noted:

> ..care must be exercised in the use of judicial authorities of other former colonies and territories because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organization of the indigenous peoples concerned and applicable geographical or social considerations.[6]

While the differences highlighted by Justice Kirby must be fully taken into account before implications are drawn from international comparisons, there are dangers in taking an unduly parochial view. The Chief Justice of New South Wales, James Spigelman, in noting that within a decade British and Canadian decisions in many areas of law may become 'incomprehensible' to Australian lawyers, warned that the "Australian common law tradition is threatened with a degree of intellectual isolation that many would find disturbing."[7] Similarly barrister Stephen Churches, who argued the *Teoh*[8] case, has noted that the challenge for Australian common law is to accept the restraint of universal values and standards. He notes that:

> The alternative is to leave Australia increasingly in the position of a minority, operating under a private code, when every dictate of common sense requires that, in an interlocked and shrinking world, we be involved in fashioning international standards and showing the way in applying them.[9]

This chapter is developed on the basis that it is useful to examine the experience of comparable countries, especially in the context of the ongoing failure to significantly reduce Indigenous disadvantage in Australia. The two international examples considered here are Canada and the USA, given that there are a number of relevant similarities in the history, legal context and constitutional arrangements between Australia, the USA and Canada. The federal nature of the three countries, and their shared common law traditions, are sufficient to

5 See G Marks "Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies" (2002) 2(1) *Human Rights Law Review* 19.

6 *Fejo v Northern Territory* [1998] HCA 58, at [101].

7 Quoted in G Williams, "At law, spectre of the dinosaur", *Sydney Morning Herald*, 2/07/2000.

8 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.

9 S Churches, "Treaties and their Impact on the Practitioner", unpublished paper presented to the Conference on *The Impact of International Law: Recent Developments and Challenges*, University of Sydney, November 1997, p10.

ensure that comparisons can validly be drawn, and that such comparisons have the potential to provide perspectives on developments in respect of native title and agreement-making in Australia.

Canada

The situation in Canada with respect to Aboriginal rights, self-governance and agreement-making, while differing in important respects from the Australian situation, nevertheless provides useful and relevant comparisons.

The legal and constitutional context

The early history of colonial relations in North America revolved around various alliances and treaties between the Imperial power and Indigenous peoples. Specific recognition of Indigenous peoples and their rights to their lands and territories was provided by the Royal Proclamation of 1763, which prohibited the private sale of Indigenous lands and required that Aboriginal lands could only be acquired by the Crown, and only with the consent of the Aboriginal peoples concerned (the Proclamation did not cover all of modern Canada, for example, it did not include British Columbia). The Proclamation enshrined the basic position in what was to become the nation of Canada that the settlement of native title issues would be on the basis of entering into treaties and agreements. This has remained a defining characteristic of the Canadian situation. An extensive reserve system was established with the purpose of furthering the protective policy of the Royal Proclamation (and enabling the Christianisation of Indigenous peoples).[10] The reserves were carved out of traditional territories, and have remained an important feature of Indigenous life in Canada, providing a secure land base for many tribes.

In contrast to Australia where the federal and state governments have concurrent jurisdiction in respect of Indigenous peoples, with confederation the federal government of Canada became responsible for 'Indian Affairs', with existing laws consolidated in the 1876 *Indian Act,*[11] the principal legislation affecting Indigenous people. The Indian Act provided *inter alia* that Indigenous land had to be surrendered before it could be disposed of, was exempt from tax and that Indigenous peoples could exercise a limited degree of local self-government. Under the Act, wide discretionary powers are held by the Minister for Indian Affairs and Northern Development over Indigenous lands, assets and moneys, band elections and council by-laws. The federal agency responsible for Indian Affairs is the Department of Indian and Northern Affairs (INAC). This department has the responsibility for the funding of delivery of services to Aboriginal and Inuit communities, and broad responsibility for the Northwest Territories and the Yukon.

10 S Dorsett and L Godden, *A Guide to Overseas Precedents of Relevance to Native Title*, Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), Canberra, 1998, p16.

11 S91(24) of the *Constitution Act* 1867.

The *Indian Act* has had few amendments since it became law in 1876 and is widely recognised as being out of date and failing to meet the needs of contemporary relations between the First Nations and the Canadian Government. The provisions of this Act were not designed to allow for First Nations communities to be fully participating partners in Canada. Given the broad consensus that thorough change is required, legislation has been developed on the basis of widespread consultations. The legislation is known as the *First Nations Governance Act*.[12] The Bill is currently before Parliament. This new Act would provide bands operating under the *Indian Act* with more effective tools of governance until the negotiation and implementation of self-government arrangements.

The provision in the *Indian Act* (s.18(1)) that reserves shall be held by the Crown for the use and benefit of the respective Indian bands has formed one basis of the Supreme Court of Canada's determination that the federal government owes a fiduciary obligation to the Indigenous peoples (see below).

Treaties

The process of reaching agreements with the Indigenous peoples in Canada about the surrender of lands to make way for mining, agriculture etc, and the concomitant reservation of lands for Indigenous groups, were effected by agreements and in particular by treaties, including a series of treaties known as the "numbered treaties" going through to Treaty No. 11 in 1921. The basic terms of the treaties were similar, in that they provided for:

- Reserves and the full beneficial interest in the land and resources therein;
- The right to hunt, trap and fish throughout the tract of land surrendered until occupied; and
- Promises of social and economic development aid.[13]

These treaties, in contrast to those in the US (see below), are not seen as being encompassed by international law, nor as being between sovereign States. While they can override provincial laws, they do not prevail over federal laws. They have been characterised by the Supreme Court as *sui generis* in nature. However, they do create enforceable obligations and they recognise pre-existing rights.

Constitutional protection

In marked contrast to Australia, the rights of Canada's Indigenous people are protected in the Canadian Constitution. In particular, this protection is afforded through s35 of the *Constitution Act, 1982* which was inserted at the time of patriation of the Constitution in 1982. Section 35 recognises and confirms existing Aboriginal and treaty rights. (Note, the term "Aboriginal" includes the Indian, Inuit and Métis peoples). This protection includes rights that exist or may be acquired by way of land claim agreements. In addition, section 25 of the

12 *First Nations Governance*, Bill C-7, 2002.

13 R Bartlett, "Canada: Indigenous Land Claims and Settlements" in B Keon-Cohen, ed. *Native Title in the New Millennium,* AIATSIS, Canberra, 2001, p356.

Constitution guarantees that rights and freedoms provided for by the *Canadian Charter of Rights and Freedoms* cannot be construed to abrogate or derogate from any Aboriginal treaty or other rights.

As a result of s35, Aboriginal rights can no longer be extinguished without consent, and legislation may only infringe on Aboriginal rights if it passes stringent criteria of justification laid down by the Supreme Court in the *Sparrow* decision.[14] The justification test specifically refers to "the unique contemporary relationship, grounded in history and policy, between the Crown and Canada's Aboriginal peoples".[15] Section 35 provides strong constitutional protection of the rights of Indigenous peoples in Canada.

Native Title

Notwithstanding the influence of Canadian and Australian jurisprudence on each other in relation to native title, there are significant differences in the approaches taken by the respective courts. These differences have become more marked as the Australian courts have tended over recent years to take less cognizance of the decisions of other common law jurisdictions. As Canadian lawyer Stuart Rush has pointed out:

> There has been a strong tradition between the Australian and Canadian appeal courts to apply each other's decisions in cases involving Aboriginal law. Since *Mabo* there has been a steady drift, however, of the Australian High Court away from reliance on Canadian decisions. This trend is at odds with the common historical and judicial roots between the two nations.[16]

Canadian law distinguishes between "Aboriginal rights" and "Aboriginal title". The concept of Aboriginal title was set out in the *Calder case*[17] of 1973 which found that Aboriginal title is part of Canadian law. Aboriginal title is a legal right to occupy and possess certain lands, the ultimate title to which is with the Crown. It is inalienable and upon surrender it gives rise to a distinctive fiduciary obligation on the part of the Crown to deal with the land for the benefit of the surrendering Indians. Apart from the issue of fiduciary obligation, this is a similar doctrine to native title in Australia, although, perhaps significantly, the Canadian courts emphasise "use and occupation" as the basis of Aboriginal title, differing somewhat from the Australian High Court's basis of native title as "custom and tradition".

The policy response to *Calder* was for the Canadian Government to enter into a process for comprehensive land claims negotiations and settlements, thereby minimising litigation (see below). The nature of Aboriginal title was explored more fully in the *Delgamuukw*[18] case. Before considering that case, it is necessary to distinguish the doctrine of Aboriginal rights from that of Aboriginal title.

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14 *R v Sparrow* (1990) 70 D.L.R. (4th) 385.

15 *ibid,* at 900.

16 S Rush, "Aboriginal Title and the State's Fiduciary Obligations", paper presented at the *Conference on Land and Freedom*, Newcastle, Australia, July 1999, p36. Available at <www.newcastle.edu.au/centre/cispr/conferences/land/> last visited 17 November 2003.

17 *Calder v Attorney-General of British Columbia* (1973) 34 D.L.R. (3d) 145.

18 *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

Aboriginal rights

Canadian law recognises a distinction between Aboriginal rights and Aboriginal title. Aboriginal right are activities integral to the distinctive cultures of Indigenous Canadians – such rights are not necessarily linked to title, nor do they need to be proved back to sovereignty, as is the case with title. That is, Aboriginal rights may exist independently of a claim of Aboriginal title. In Australia, no difference is made between a right to land and other analogous rights. The Canadian approach is set out in the decision in *Van der Peet:*

> Aboriginal rights arise from prior occupation of land, but they also arise from the prior social organization and distinctive cultures of Aboriginal peoples on that land… Courts must not focus so entirely on the relationship of Aboriginal peoples with the land that they lose sight of the other factors relevant to the identification and definition of Aboriginal rights.[19]

Such an approach encompasses a distinct Indigenous polity and society. It may provide for greater flexibility in approach than in Australia, recognising that Aboriginal rights are to be perceived widely and as arising from a prior and distinctive society. Under such a doctrine, Aboriginal rights may even survive a grant to non-Indigenous interests of a fee simple title as they are not tied exclusively to land ownership. The Canadian courts have been highly protective of Aboriginal rights, and have resisted attempts to extinguish such rights. Further, following the constitutional protections of 1982, it is not possible to extinguish Aboriginal rights that still existed in 1982. As Canadian lawyer Louise Mandell has pointed out:

> no extinguishment argument has prevailed in Canada although some of the same arguments have succeeded in Australia, notwithstanding that British common law is applicable in both jurisdictions.[20]

Extinguishment of course is at the heart of the discrimination against native title found in the doctrine of native title. As Mandell points out:

> The colonization doctrines are promoted through extinguishment arguments. There can be no co-existence, or reconciliation if extinguishment is a precondition. To extinguish means to terminate – to bring to an end – to wipe out – to destroy.[21]

The discriminatory doctrine that native title can be extinguished unilaterally by government is shared by the common law of the US, Australia and Canada. However, the Canadian courts place a high onus on the Crown to justify extinguishment. They have been stringent in assessing "clear and plain" intent. The onus is high to take into account the far reaching consequences of extinguishment for the Indigenous groups. This appears to be in marked contrast with recent examples of extinguishment in cases before the High Court of Australia.

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19 *R v Van der Peet* [1996] 2 SCR 507 at [74].

20 L Mandell, "Is White Might Right?" Paper presented to *Land and Freedom Conference* July 1999. Available at <www.newcastle.edu.au/centre/cispr/conferences/land/> last visited 17 November 2003, p10.

21 *ibid*, p4.

Delgamuukw and Aboriginal title

The Supreme Court in *Delgamuukw* identified the basic legal characteristics of Aboriginal title. These characteristics include:

- Aboriginal title is a right to the land itself. It is not limited to the right to carry on traditional practices or activities. Rather, Aboriginal title is a broad right to the exclusive use and occupation of land.
- being more than the right to engage in specific activities, Aboriginal title confers the right to use land for a variety of purposes, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of Aboriginal societies (with the limitation that the activities cannot be inimical to the attachment to the land).
- the title includes the resources on the land, such as oil, gas and timber etc.
- Aboriginal title arises from prior occupation – Aboriginal rights are not dependent on any legislative or executive instrument for their existence.
- Aboriginal title is a collective right held by all members of an Aboriginal nation, suggesting that Aboriginal peoples, as distinct and organised societies, must have decision-making processes that are integral to the exercise of self-government (although this issue was not conclusively decided in *Delgamuukw*).
- Aboriginal title is a proprietary title that can compete on an equal footing with other proprietary titles.

Besides developing a title which is broader, more robust and of greater utility for the holders of the title than the Australian version, *Delgamuukw* also places stringent conditions on interference with Aboriginal title, including the need to justify any interference in terms of the Crown's fiduciary obligations.

Noel Pearson has criticised the trend of the Australian courts to ignore the *Delgamuukw* decision:

> A search of cases in *Ward* and *Yorta Yorta* reveals that hardly any cases are canvassed in support of the court's conclusions on the state of Australian law. There is absolutely no reference in either of these Australian cases to what is the seminal Canadian decision on native title, and in my view the most important decision on the subject since the High Court's decision in *Mabo,* namely the decision of the Supreme Court of Canada in *Delgamuukw*. Given that *Delgamuukw* dealt with the very issues that were at issue in *Ward* and *Yorta Yorta,* it is startling to consider that no reference is made to it in Australian law.[22]

Implications

The significantly stronger doctrine of Aboriginal rights and title developed in Canada, the constitutional protection of Aboriginal rights, the stringent tests in respect of interference with such rights and the Crown's fiduciary obligations,

22 N Pearson, "Land is Susceptible to Ownership", paper presented at the *High Court Centenary Conference*, October 2003. Available at <www.capeyorkpartnerships.com> accessed 17 December 2003.

along with a policy position of negotiating rather than litigating native title settlements, places the Indigenous peoples of Canada in a strong position in respect of developing agreements, in particular comprehensive settlements of native title claims.

The Comprehensive Land Claims Settlements Process: General outline

The policy response to the recognition of Aboriginal title in the *Calder* decision of 1973 was contained in the federal government's *Statement on Aboriginal Claims*, August 1973.[23] Comprehensive land claims negotiations are based on the assertion of continuing Aboriginal title to lands and natural resources. The federal policy stipulates that land claims may be negotiated with Aboriginal groups in areas where claims to Aboriginal title have not been addressed by treaty or through other legal means.

The thrust of the 1973 Comprehensive Claims Policy, which was reaffirmed in 1981, was to exchange claims to undefined Aboriginal rights for a clearly defined package of rights and benefits set out in a settlement agreement. Section 35 of the *Constitution Act, 1982* recognises and affirms Aboriginal and treaty rights that now exist *or that may be acquired* by way of land claim agreements.

Significant amendments to the Comprehensive Claims Policy were announced in December 1986, following an extensive period of consultation with Aboriginal and other groups. The revised policy improved the negotiation process, allowed for greater flexibility in land tenure, and provided a clearer definition of the topics for negotiation. These changes have contributed to the achievement of settlements in recent years. The 1986 Policy allows for the retention of Aboriginal rights on land which Aboriginal people will hold following the conclusion of a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement. Since 1995, Canada has explored new approaches to achieving certainty with regard to lands and resources as an alternative to the traditional approach based on exchange and surrender of Aboriginal land rights. From 1995 self-government arrangements (see below) can be negotiated simultaneously with land and resources as part of a comprehensive land settlement. Importantly, such self-government rights can be constitutionally protected under s.35 of the *Constitution Act.* In 1998 the federal government affirmed that treaties, historic and modern, will continue to be the foundation of the relationship between the Aboriginal people and the Crown.

Objectives

The primary goal of the Canadian government in the Comprehensive Claims settlement process is to negotiate modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians; thus equitably reconciling the protection of Aboriginal and non-Aboriginal interests through the negotiation process by:

23 See R Bartlett, *Canada: Indigenous Land Claims and Settlements,* in B Keon-Cohen, *op.cit,* pp356-362.

- providing economic opportunities for Aboriginal groups, building new relationships with government, promoting partnerships between Aboriginal groups and their neighbours in managing lands and resources;
- ensuring that comprehensive land claims respect the fundamental rights and freedoms of all Canadians, Aboriginal and non-Aboriginal; and
- ensuring that the interests of the general public and existing legal interests are respected under these agreements and, if affected, are dealt with fairly.

Results

Initially the Provinces were reluctant to participate in such negotiations, but the federal government was able to proceed in respect of the territories of the Yukon and the Northwest. In respect of the Inuit people of the western Artic a series of negotiations and agreements led to a final umbrella agreement in 1993. This umbrella agreement became the basis for the negotiation of claims, settlements and self-government agreements with individual Yukon First Nations, with settlements and agreements now having been reached with the majority of the fourteen First Nations of the area.

Negotiations began in 1980 with the Inuit of Central and Eastern Artic, leading to a final agreement in 1993 covering an area of two million square kilometres and nineteen thousand Inuit. The new territory of Nunavut came into being in 1999. While a final agreement was initialled in 1990 concerning the Denes and Métis of the Northwest Territories in 1990, it was not ratified because of concerns by the Dene-Métis about the "complete extinguishment" clause in the agreement.

In Quebec, which had no history of treaties or agreements before 1975, an agreement was signed with the Cree and Inuit of northern Quebec providing for the surrender of native title, the return of approximately one per cent of traditional lands to the Cree and Inuit, and significant financial compensation. Fishing and hunting rights to some of the land surrendered were guaranteed. Further agreements have been made with other groups in Quebec in subsequent years. In British Columbia a Treaty Commission was established (see below) and a number of agreements have been made, including with the Nisga'a.

These comprehensive land claim settlements provide for grants of freehold with rights to minerals (generally a percentage of traditional lands) or in some cases freehold title excluding minerals. Traditional rights are maintained *throughout* the traditional lands, although the form of such rights in fishing and hunting varies between agreements. For example, in some agreements this might be a preference or priority to Indigenous hunting, in others a guaranteed quota.

The Nunavut Comprehensive Land Claim Settlement[24]

Nunavut is the result of the largest land claim settlement in Canada's history, and follows years of negotiation between the Government of Canada and the Tungavik Federation of Nunavut (TFN), which represented Inuit of the eastern Arctic.

From the beginning, Inuit negotiators sought the creation of the Nunavut territory, and their own territorial government, as part of their claim. In 1993, the Parliament of Canada passed legislation to enact the settlement. The *Nunavut Land Claim Agreement Act* gave Inuit control of more than 350,000 square kilometres of land, of which 36,000 square kilometres includes mineral rights. It also provides Inuit with more than $1 billion over 14 years.

The *Nunavut Act,* the legislative framework for creating Nunavut, is an extension of the land claim settlement. The territory encompasses 2 million square kilometres, or one fifth of Canada's land mass. Nunavut Tunngavik Inc (NTI) administers the claim settlement benefits on behalf of Inuit. NTI has established several regional development corporations that are involved in activities ranging from shrimp fishing to tourism. It is also encouraging mining exploration on Inuit lands. Inuit hold mineral rights in areas that show good prospects for future royalty payments. These efforts will strengthen the Nunavut economy and reinforce the territorial government's drive to make the territory self-sufficient.

In recognition that Inuit make up about 85 percent of the territory's total population of 25,000, the settlement includes preference for Inuit-owned businesses bidding on government contracts in Nunavut. At present, 270 businesses are eligible for contract preference. Inuit in Nunavut who earn their living as hunters have also benefited from the claim settlement. Over the past three years, the Nunavut Hunters Support Program has invested $6 million in improvements to subsistence hunting. More than 1,400 Inuit Elders over the age of 55 will benefit from the Elders Benefit Program, which will provide an income supplement to improve their quality of life.

The Nunavut land claim settlement also provides for the establishment of the Inuit Heritage Trust to regulate the activities of archaeologists in Nunavut. Archaeological excavations pose a serious concern for Inuit who have seen ancestors' artefacts, and even their bones, removed to museums throughout the world. The trust is also working to conserve Inuit oral history, part of which includes finding Inuit place names throughout Nunavut.

Culturally, politically, economically and socially, the Nunavut land claim settlement helps Inuit in the territory realize their potential by enabling them to make their own choices.

Process

Negotiation of land claim settlements in the Northwest Territories usually involves three parties: the Government of Canada, the Territorial Government, and the Aboriginal group making a claim. The goal of negotiators is to balance the range of concerns and needs expressed by all those involved. Each negotiation is unique, and reflects the needs, desires, and processes of those at the table. However, most negotiations proceed through several distinct stages:

24 The source of the following material is a fact sheet *The Nunavut Comprehensive Land Claim Settlement* provided by the Department of Indian and Northern Affairs Canada on its website at <www.ainc-inac.gc.ca/nu/nunavut/index1_e.html> accessed 11 December 2003.

Submission of claim: The Aboriginal group prepares a description of its claim that identifies the general geographic area of its traditional territory.

Acceptance of claim: The Government of Canada reviews the claim and advises the Aboriginal group whether Canada is prepared to open negotiations. If the answer is no, reasons are provided in writing. If the answer is yes, the claim is accepted, and the process proceeds to the next step.

Framework Agreement: At the first stage of negotiation, the groups involved agree on issues to be discussed, how they will be discussed, and on deadlines for reaching an Agreement-in-Principle.

Agreement-in-Principle: This is the stage at which the parties negotiate the issues set out in the Framework Agreement. Reaching an Agreement-in-Principle (commonly called an 'AIP') often takes longer than any other stage in the negotiation process. The AIP should contain all the major elements of the eventual Final Agreement.

As with treaty negotiations (for example in British Columbia) significant financial resources are provided by the Canadian Government to assist the Indigenous participation in the negotiations. Such expenditure is justified by the government on the basis that it is important for the national good that land issues be settled by agreement, and because negotiation will overall prove to be less costly than litigation.

Comprehensive Agreements – issues and contemporary developments

One major issue of concern in some agreements has been the extinguishment of Aboriginal title by surrender. For example, in accordance with then federal policy, with Federal/Provincial Agreements and with the legislation establishing the British Columbia Treaty Commission, Indigenous peoples in British Columbia were required to extinguish approximately 95% of their traditional territory as a necessary condition of treaty-making. Writing in 1999, Mandell commented:

> The governments still demand a surrender as a basis for treaty made in 1999. The very word surrender [as used in earlier treaties] has been replaced by the word "certainty" but it is surrender nevertheless. Surrender implies passivity, loss of objectivity and loss of control. It is another form of assimilation.[25]

However, recent agreements have seen a move towards outcomes that do not require surrender or extinguishment of title, but rather an undertaking not to exercise rights other than those agreed (see the Dogrib example below). This development may have important implications for native title agreements in Australia, where extinguishment has been central to some agreements.[26]

25 Mandell, *op.cit*, p22.

26 eg the Dunghutti agreement concerning Crescent Head NSW, and the Wotjobaluk in-principle agreement in Victoria involving extinguishment of native title on most of the area of the claim.

Treaty-making in British Columbia – an incremental approach

Although the objective of comprehensive agreements is to achieve certainty by reaching a final settlement of land claims in an area or region, experience in British Columbia has led to the adoption of an incremental approach to agreement-making, rather than attempting in the one negotiation process to settle all matters conclusively. The lessons learned in British Columbia, and the incremental approach now being developed there, have clear implications for the process of negotiating agreements with native title claimants in Australia.

British Columbia Treaty Commission

The modern process of negotiating treaties in British Columbia began in the 1990's. In 1993, the federal and provincial governments and the First Nations Summit launched the British Columbia treaty process and established the British Columbia Treaty Commission (BCTC). The BCTC coordinates the start of negotiations, monitors progress, keeps negotiations on track, provides information to the public and allocates funds to support First Nations' participation. The Commission proposed that the basis for treaty making between First Nations, Canada and British Columbia should be a new relationship based on mutual trust, respect and understanding, through political negotiations. This approach was expected to lead to earlier opportunities for agreements or treaties. However, the experience of the intervening years has shown that building new relationships is a more complex and time-consuming undertaking than was initially recognised.

Problems

A major review of the treaty process by the Treaty Commission has revealed that urgent action is necessary to make the treaty process more effective. As a result of its review, the Treaty Commission suggests that treaties are best built over time rather than moving directly to one-off final settlements. In this way, when a final treaty is signed, the new relationships necessary for success will largely be in place. The current negotiating process is expensive and it takes a long time to achieve results. In the meantime, it does not provide stability on the ground for First Nations, governments or third parties. Nor does it necessarily improve social and economic conditions for First Nations and other British Columbians. This leads to growing frustration and reduces support for treaty-making.

Solutions – an incremental approach[27]

A working group looked at what could be achieved in the short term as the parties progress towards comprehensive agreements. The focus is now on process efficiencies and, in particular, options to build treaties incrementally. The central recommendation in the Treaties Commission Review was that First Nations, Canada and British Columbia shift their emphasis in treaty-making to building treaties incrementally over time so that when a final treaty is signed, the new relationships necessary for success will largely be in place.

27 In Chapter 1, I discuss how an incremental approach allows the group to learn from prior experiences thus contributing to capacity development within the group.

What does building treaties incrementally mean? While there is not yet clarity on what incremental treaty-making means in practical terms, the working group noted that it is a process for building treaties by negotiating over time a series of arrangements or agreements. These can be linked to treaties which can be implemented prior to a final treaty. This concept is in its early formulation and requires further elaboration.

It should be noted that an incremental approach to treaty-making is not a move away from comprehensive treaties. It is not about maintaining the status quo by only negotiating arrangements that are currently available under existing policy, programs and legislation. Instead, it reflects a commitment by all parties to be innovative and to strive for results on the ground. This should create a more stable social and economic environment sooner, which in turn contributes to building a new relationship between the parties.

The British Columbia experience has shown the fundamental necessity of building relationships on an incremental basis and of linking social and economic development to settlement of land claims or native title issues. It is through this process that viable relationships and partnerships can lay the basis for economic and social development. As the BC Claims Task Force Report noted, "Early implementation of sub-agreements may provide the parties with an opportunity to demonstrate good faith, build trust and establish a constructive relationship".[28]

Thus, interim measures and other agreements that bring the parties closer to a new relationship and that serve as the building blocks of comprehensive treaties are a key means by which the parties can build treaties incrementally.

It is recognised that the success of incremental treaty building will, in large measure, depend on the parties having a clear and shared vision of where they are going in treaty negotiations. If the parties are negotiating a series of arrangements and agreements that will ultimately form a comprehensive treaty through an incremental approach, they need to have a plan or vision of how those components will all come together. Most of the subjects that eventually form part of the treaty may be appropriate for an incremental arrangement or agreement. These could include:

- Land and resource protection
- Land and resource acquisition
- First Nation access to land and resources
- First Nation involvement in land and resource management and planning
- Governance arrangements
- Cultural resources and activities
- Fiscal arrangements
- Economic development initiatives

28 The First Nations of British Columbia, the Government of British Columbia and the Government of Canada *The Report of the British Columbia Claims Task Force* Part 2: Scope – What the Negotiations Should Include, June 28, 1991.

Conclusion

It can be seen that an incremental approach does not mean a limited or restricted approach, or that only minor issues should be dealt with initially. The difficulties of developing final settlements, including recognition of the capacity limitations of Indigenous groups, and the fact that other priorities might at times intrude into the process, can be accommodated in an incremental approach. Indeed the development of governance structures and effectiveness and capacity building can form part of the process of developing agreements. In this respect the potential unfairness of groups having to conclude final agreements when they may not yet have the capacity to do so can be avoided. Support for capacity building can indeed be part of the process of incremental agreement making and the establishment of appropriate relationships that build self-government of native title claimants.

Self-government

Aboriginal peoples in Canada have long expressed their aspiration to be self-governing, to chart the future of their communities, and to make their own decisions about matters related to the preservation and development of their distinctive cultures. Aboriginal peoples also maintain that they have an inherent right of Aboriginal self-government, a right which should be recognised by all Canadians. The trend in Canada is to bring land claim settlements and agreements about self-government together in an integrated process.

Status of Self-government

The government of Canada recognises the inherent right of self-government as an existing right within section 35 of the *Constitution Act, 1982*. It has developed an approach to implementation that focuses on reaching practical and workable agreements on how self-government will be exercised, rather than trying to define it in abstract terms. Acknowledging that the inherent right of self-government may be enforceable through the courts and that there are different views about the nature, scope and content of the inherent right, the government takes the position that litigation over the inherent right would be lengthy, costly and would tend to foster conflict. The government's policy position is that negotiations between governments and Aboriginal peoples are clearly preferable as the most practical and effective way to implement the inherent right of self-government.

The Canadian position is that the inherent right of self-government does not include a right of sovereignty in the international law sense, and will not result in sovereign independent Aboriginal nation states. In this sense the legal underpinnings of self-government differs from the US doctrine of inherent, if limited, sovereignty (see below). Implementation of self-government is intended to enhance the participation of Aboriginal peoples in the Canadian federation, and ensure that Aboriginal peoples and their governments do not exist in isolation, separate and apart from the rest of Canadian society. However, not all Indigenous groups accept this unqualified incorporation into the Canadian nation state. For example, the Six Nations Confederacy, also known as the Iroquois, have consistently asserted their independence and sovereignty, and continue to do so. The Iroquois state:

> We are the proper subjects of international law, not Canadian law. We seek only the rightful recognition of our historic, current and future rights as one of the original confederations of nations of North America.[29]

The fact that self-government is acknowledged to be an inherent right, and the fact that it can fall within the scope of the comprehensive settlements process and receive Constitutional protection means that self-government, while falling short of sovereignty, is an entrenched right in Canada, and evidences a significant application of the right of self-determination to the Indigenous peoples of Canada.

Negotiating Self-government

Given the different circumstances of Aboriginal peoples throughout Canada, implementation of the inherent right is not uniform across the country nor does it result in a "one-size-fits-all" form of self-government. The Canadian Government proposes to negotiate self-government arrangements that are tailored to meet the unique needs of Aboriginal groups and are responsive to their particular political, economic, legal, historical, cultural and social circumstances. The government enters into negotiations with duly mandated representatives of Aboriginal groups and the provinces concerned, in order to establish mutually acceptable processes at the local, regional, treaty or provincial level. It is the government's view that tripartite processes are the most practical, effective and efficient way of negotiating workable and harmonious intergovernmental arrangements.

It is considered essential that the individuals negotiating on behalf of Aboriginal peoples be duly mandated by the group they are representing, and that support be maintained throughout the negotiation process. The onus to resolve any disputes regarding representation within or among Aboriginal groups rests with the Aboriginal groups concerned.

The approach to self-government differs between the various Indigenous peoples of Canada. Many First Nations (Indian tribes) have expressed a strong desire to control their own affairs and communities, and deliver programs and services better tailored to their own values and cultures. They want to replace the outdated provisions of the *Indian Act* with a modern partnership which preserves their special historic relationship with the federal government. All First Nations want other governments to recognise their legitimacy and authority.

On the other hand Inuit groups in various parts of Canada have expressed a desire to address their self-government aspirations within the context of larger public government arrangements, even though they have, or will receive, their own separate land base as part of a comprehensive land claim settlement. The creation of the new territory of Nunavut is one example of such an arrangement on a large scale.

Métis and Indian groups living off a land base have long professed their desire for a self-government process that will enable them to fulfill their aspirations to

29 See D M Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" in S J Anaya (ed) *International Law and Indigenous Peoples*, the Library of Essays in International Law, Ashgate, Dartmouth, 2003, p107.

control and influence the important decisions that affect their lives. The federal government is prepared to enter into negotiations with the Provinces and Métis and Indian groups residing off a land base. Negotiation processes may be initiated by the Aboriginal groups themselves and will be tailored to reflect their particular circumstances and objectives.

Scope of Negotiations

Under the federal approach, the central objective of negotiations is to reach agreement on self-government. Aboriginal governments and institutions require the jurisdiction or authority to act in a number of areas in order to give practical effect to the inherent right of self-government. Broadly stated, the government views the scope of Aboriginal jurisdiction or authority as likely extending to matters that are internal to the group, integral to its distinct Aboriginal culture, and essential to its operation as an Aboriginal government or institution. Under this approach, the range of matters that the federal government sees as subjects for negotiation could include all, some, or parts of the following:

- establishment of governing structures, internal constitutions, elections, leadership selection processes
- membership
- marriage
- adoption and child welfare
- Aboriginal language, culture and religion
- education
- health
- social services
- administration/enforcement of Aboriginal laws, including the establishment of Aboriginal courts or tribunals and the creation of offences of the type normally created by local or regional governments for contravention of their laws
- policing
- property rights, including succession and estates
- land management, including zoning, service fees, land tenure and access, and expropriation of Aboriginal land by Aboriginal governments for their own public purposes
- natural resources management
- agriculture
- hunting, fishing and trapping on Aboriginal lands
- taxation in respect of direct taxes and property taxes of members
- transfer and management of monies and group assets
- management of public works and infrastructure
- housing
- local transportation
- licensing, regulation and operation of businesses located on Aboriginal lands

There are a number of other areas that may go beyond matters that are integral to Aboriginal culture or that are strictly internal to an Aboriginal group. To the extent that the federal government has jurisdiction in these areas, it is prepared

to negotiate some measure of Aboriginal jurisdiction or authority. In these areas, laws and regulations tend to have impacts that go beyond individual communities. Therefore, primary law-making authority remains with the federal or provincial governments, as the case may be, and their laws would prevail in the event of a conflict with Aboriginal laws. Subject matters in this category include:

- divorce
- labour/training
- administration of justice issues, including matters related to the administration and enforcement of laws of other jurisdictions which might include certain criminal laws
- penitentiaries and parole
- environmental protection, assessment and pollution prevention
- fisheries co-management
- migratory birds co-management
- gaming
- emergency preparedness

The particular situation of Métis and Indians living off a land base in terms of self-government arrangements is relevant to a number of situations in Australia where Indigenous people may have limited, if any, land rights or native title. Although not having a land base or only a limited land base, such Aboriginal communities remain a distinctive society and indeed may represent a significant proportion of the total population in a region. In such situations a clear desire for a greater degree of autonomy and self-government, with increased participation and control in respect of programs and services, is evident (the Western Division of NSW may be a case in point). In Canada, the government recognises the need for flexibility in developing self-government arrangements. As such, negotiations may consider a variety of approaches to self-government off a land base including:

- forms of public government;
- devolution of programs and services;
- the development of institutions providing services; and
- arrangements in those subject matters where it is feasible to exercise authority in the absence of a land base.

Importantly, the government is prepared, with agreement from the Provinces, to protect rights in such agreements, even though they are not necessarily tied to a land base as constitutionally-protected section 35 treaty rights.

Mechanisms for Implementation

The Government anticipates that agreements on self-government will be given effect through a variety of mechanisms including treaties, legislation, contracts and non-binding memoranda of understanding. Implementation of the inherent right of self-government with constitutional protection would be a continuation of the historic relationship between Aboriginal peoples and the Crown. Self-government rights could be protected under section 35:

- in new treaties;
- as part of comprehensive land claim agreements; or
- as additions to existing treaties.

Financial Arrangements

The federal government's position is that financing self-government is a shared responsibility among federal, provincial and territorial governments, and Aboriginal governments and institutions. Specific financing arrangements will be negotiated among governments and the Aboriginal groups concerned. The Government will normally require that an agreement on cost-sharing between the federal government and the relevant provincial or territorial government be secured prior to the commencement of substantive negotiations.

Responsibility for Negotiations within the Federal Government

Within the federal government, the Minister of Indian Affairs and Northern Development has a mandate to enter into negotiations with First Nations, the Inuit, and Métis groups north of the sixtieth parallel. The Federal Interlocutor for Métis and Non-Status Indians has a mandate to enter into negotiations with Métis south of the sixtieth parallel and Indian people who reside off a land base. In addition, Ministers of other federal government departments have mandates to enter into sectoral negotiations in their respective areas of responsibility. A Federal Steering Committee co-ordinates implementation of the inherent right of self-government within the federal government and maintains an overview of all self-government activities across the federal government. The Committee ensures the participation in negotiations, as required, of all federal departments and agencies.

Relationship to Other Processes, in particular Comprehensive Land Claim Settlements

The federal government is prepared, where the other parties agree, to deal with implementation of the inherent self-government right in combination with other processes, particularly the negotiation of Comprehensive Land Claim Settlements. The government is also prepared to enter into negotiation processes building on the relationship already established through existing treaties. Finally, wherever feasible and appropriate, existing tripartite arrangements, such as the British Columbia treaty negotiation process will be used to facilitate the negotiation process.

Approval of Negotiated Agreements

Within the federal government, Cabinet approval will be sought for Agreements-in-Principle and Final Agreements, and Parliamentary approval sought for self-government treaties and any implementing legislation that may be required. This is indicative of the importance attached to Indigenous self-government in Canada.

The Government will require evidence that negotiated agreements have been ratified by the Aboriginal group concerned in a way that demonstrates clearly the group's consent. While the specific ratification mechanism can be negotiated, it will have to ensure that all members have an opportunity to participate, that

they have all relevant information available, and that the procedures for ratification are transparent and recognised as binding.

The Canadian situation is characterised by a dynamic participatory environment, based on acknowledgement of rights and negotiation between equals. The progress in settlement of land claims, the development of self-government, and the integration of land, governance and social and economic programs, are exemplified by the recent Tlicho (Dogrib) agreement.

"Dogribs dealt a new deal"

In September 2003 the newspaper *Indian Country Today* ran a story headed "Dogribs dealt a new deal" about the signing of a treaty by the Tlicho (previously known as Dogrib) Indian nation with the Canadian Government.[30] The treaty signing was a historic moment not just for the Tlicho people, but also for the development of integrated land claims and self-government agreements.

The Indian Affairs Minister Robert Nault noted that the settlement did not extinguish any Aboriginal rights. It also allowed for further revisions in the future if required. He said that Canada leads the world as far as Aboriginal and treaty rights are concerned.

At the signing of the Treaty he was reported as saying:

"This is unique to Canada. No where else in the world is anyone attempting to combine three levels of government, federal, territorial and Aboriginal. In Canada, we believe in treaty and Aboriginal rights, that there is another level of government that is constitutionally protected".[31]

Representatives of the Dogrib Treaty 11 Council, the Government of the Northwest Territories, and the Government of Canada signed the Tlicho Agreement on 25 August 2003. The Prime Minister of Canada, Jean Chrétien, attended the ceremony. He observed:

> This agreement will serve as a model for other indigenous communities in Canada and in other countries: a model for implementing self-government. The agreement defines rights and shows the world how diversity creates strengths and how partnership builds success.[32]

The Tlicho Agreement is the first combined land claim and self-government agreement of its kind in the Northwest Territories. The Agreement will create the largest single block of First Nation owned land in Canada, and provide new systems of self-government for the Tlicho First Nation. The Tlicho will gain more effective tools and new law-making powers to protect and promote the Tlicho culture and way of life, and enhance the economic growth and well-being of their communities.

30 "Dogribs dealt a new deal", *Indian Country Today*, 8 September 2003. Available at <www.indiancountry.com>. Last visited 18 November 2003.

31 "Tlicho Agreement 'represents what is best about Canada'" *NWT Plain Talk* Fall 2003 p1 at <www.ainc-inac.gc.ca/nt/pt/pdf/fal03_e.pdf> accessed 11 December 2003.

32 *ibid*.

Details of the Agreement:

Land and resources

- The Tlicho agree not to exercise or assert any Aboriginal right, other than any rights set out in the Agreement, or any Treaty 11 right, other than certain specified rights.
- All laws of general application will continue to apply to Tlicho Citizens and the Tlicho Government.
- The Agreement is not intended to affect any Aboriginal or treaty rights of any other Aboriginal peoples.
- Subject to existing rights, the Tlicho Government will own a single block of approximately 39,000 square kilometres of land, including the subsurface resources, adjacent to or surrounding the four Tlicho communities.
- The Tlicho Government will receive approximately $100 million, which will be paid over a period of years. As well, it will receive a share of resource royalties received by government annually from the Mackenzie Valley.

Governance

- On the effective date, the Dogrib Treaty 11 Council, the Dogrib Rae Band, and the Wha Ti First Nation, Gameti First Nation and Dechi Laot'i First Nation bands will cease to exist and will be succeeded by the Tlicho Government.
- The Tlicho Government will have a wide range of law-making powers on Tlicho lands and over Tlicho Citizens off Tlicho lands. There will be certain types of laws the Tlicho Government cannot enact.
- The Tlicho Government generally will be tax exempt regarding its government activities, like other governments in Canada.
- Tlicho laws will not displace federal or territorial laws – Tlicho laws will be concurrent. In the case of conflict with a federal law, the federal law will prevail, to the extent of the conflict. In most instances, a Tlicho law will prevail over a territorial law, to the extent of the conflict.
- An intergovernmental services agreement between the Tlicho, the Government of the Northwest Territories and Canada will provide a single delivery system for health, education, child and family and other social programs and services to Tlicho Citizens and other persons in Tlicho communities. The first intergovernmental services agreement will be in effect for 10 years.

The agreement also contains extensive provisions about public government in the Tlicho communities, mineral resources, water rights and licences, wildlife harvesting and heritage protection. In these areas the agreement provides that the Tlicho have significant rights and responsibilities.

Tlicho is seen as just the start. When the agreement-making process is complete – perhaps within five years – virtually the entire Northwest Territory will live under

some form of Aboriginal government. The Dogrib model will not be copied exactly across the North, but regardless of the structure, each government will probably want powers similar to those of the Dogrib. That means changes for the territorial government in the capital, Yellowknife. While Aboriginal governments will have control over local services such as education and health, they will contract with the territorial government to actually deliver them.

Implications from Canadian Law and Practice for the Australian Situation

There have been a number of positive developments in Canada over recent years in terms of integrating the social and economic development of Indigenous people with the recognition of Aboriginal rights through the development of comprehensive land claim settlements.

Given the on-going social disadvantage and distress of Indigenous communities in Australia, the continuing string of judgments negative to native title rights in the Australian courts, and the at times hostile and obstructionist behaviour of federal and some state governments, the argument to take close note of Canadian developments is compelling. The opportunity that native title can present to governments endeavoring to break the cycle of poverty that pervades Indigenous communities is evidenced by Canadian responses to land claims which integrate economic and social development into the cultural values of the group. This is the type of development envisaged in the preamble to the Declaration on the Right to Development as a comprehensive economic, social, cultural and political process.

The scope and creativity of Canadian responses to land claims, self-government and social and economic development has not been imagined in Australia to date. A number of comparisons have been made throughout the text above, but the following points appear of particular relevance:

Jurisprudence

Canadian jurisprudence should be carefully considered at both legal and policy levels for its potential application to the Australian situation. This is not to say that Canadian practice should necessarily be followed in Australia, but where Canadian decisions give a more expansive interpretation of Aboriginal rights and a higher level of protection, there is a responsibility on Australian authorities, as a fellow common law jurisdiction, to give close consideration to applying the higher standards in Australia. Such an approach is an obligation, at least moral and political, arising from the settlement, without the consent of the Indigenous peoples, of Australia and the consequent dispossession and distress. Australia, as a good international citizen, should meet standards of law and practice in respect of its Indigenous peoples no lower than those applied in comparable nations such as Canada and the United States.

Stuart Rush, noting the drift of Australian courts away from taking cognisance of relevant Canadian decisions, has commented that:

> It may now be time for the High Court to return to those traditions of judicial comity established between the appellate courts of our two countries. It would seem reasonable to urge the Australian High Court to adopt fiduciary principles established in Canadian law, most recently in

Delgamuukw, to forge a broader reconciliation with Aboriginal people where their native title is imperilled.[33]

Constitutional entrenchment

It is incongruous that of the three federations, Australia, the US and Canada, it is only in Australia that the Constitution fails to provide protection to the nation's Indigenous peoples.

Self-governance

There have been major developments in Canada in respect of governance and self-government, which has represented a major policy area for the Canadian Government. A number of self-government agreements have been put in place, with the current trend being to negotiate land claim settlements and self-governance as part of the one major comprehensive settlement. Given the somewhat hesitant steps in Australia in respect of regional agreements, whole-of-government service delivery and regional planning arrangements, there are clear lessons about the need for a clear framework and defined objectives, adequate resources and consultation, and coordination between Aboriginal groups and state and federal governments. Canada would appear to be leading the way in terms of imaginative, well-resourced and practical agreement-making as a basis for economic and social development.

Land claims

The basic Canadian response to the recognition of on-going Aboriginal rights and title in Canada has to been to avoid litigation and instead move down the path of comprehensive land claim agreements. Where necessary, major political changes have also been achieved, for example establishing the territory of Nunavut. While the comprehensive agreements were originally based on surrender of native title rights in return for certainty of defined rights, freehold and compensation, recent developments have shown that surrender or extinguishment of title is not necessarily a part of such agreements.

Bartlett has concluded that the Canadian approach is positive and has worked better than the Australian approach. He states that:

> The policy and practice in Canada is dramatically different from that in Australia. The Canadian policy of reaching settlements by agreement has worked and is working…. The objectives of securing a bridge between traditional and contemporary approaches to development, and providing certainty and clarity for land and resource management, are being achieved. Moreover, such objectives are being achieved without the gross denial of equality, or the ludicrously wasteful expenditure of the processes of the NTA [*Native Title Act*].[34]

Perhaps it is time for Australia to consider pursuing its own comprehensive settlements process which would incorporate land rights and customary rights, governance through self-government models with significant powers, multi-level government arrangements and social and economic development programs.

33 Rush, *op.cit*, p36.
34 Bartlett (2001), *op.cit*, p362.

However, unless ownership and management of the resources that go with the land – timber, water, minerals and wildlife, are vested in the traditional owners, there is little to build agreements or governance models on. One thing that Canadian (and US) experience suggests, perhaps above all else, is a radical re-thinking in Australia of the scope of native title so that it has real content and utility. The current trend in Australia to reduce the scope and content of native title over much of the country (in those parts where it has not been extinguished) to something akin to a usufructuary right is leading Australia into a moral and political dead end. Legitimate Indigenous interests and rights in land as a basis to build (or re-build) society presently have little scope for expression or development.

The United States of America

The legal context – Indians as sovereign nations

While the basis for the colonisation of what is now the United States and the dealings with the Native American, or Indian,[35] tribes and nations is a complex history of treaty negotiations, alliances, warfare, massacre and dispossession, the fundamental relationship between the USA and Native Americans was declared in a trilogy of Supreme Court cases under Chief Justice Marshall in the early nineteenth century.[36] These cases identified the legal basis for Native American sovereignty and self-government. In *Cherokee Nation v Georgia*, the Supreme Court characterised the Cherokee as '…a distinct political society…capable of managing its own affairs and governing itself".[37] Marshall CJ defined a tribe as a "domestic dependent nation" and noted that:

> ..[Indians] are in a state of pupillage; their relation to the United States resembles that of a ward to his guardian. They look to our government for protection.[38]

In *Worcester v Georgia,* Chief Justice Marshall reiterated his analysis, describing the tribal nations as "independent, political communities, retaining their original

35 According to the US Code devoted to Indians (Title 25) which consolidates all federal laws in respect of Indians and Indian lands, the term "Indians" refers to Eskimos, Aleuts and native North Americans (inhabitants of North America prior to European discovery). An Indian tribe is defined as a body of Indians of the same or similar race united in a community under one leadership or government, and inhabiting a particular territory. The term "tribe" is not always used with this meaning. It is sometimes used interchangeably with "nation" or "subtribe." The terms also vary from statute to statute. See <www.law.cornell.edu/uscode/>. Accessed 4 November 2003.

36 *Johnson v McIntosh,* 21 US (8 Wheat) 543 (1823); *Cherokee Nation v Georgia* 30 US 1 (1831); *Worcester v Georgia* 6 Pet 515 (1832).

37 *Cherokee Nation case* at 16.

38 *ibid*, at 17.

natural rights".[39] He explained that the relationship of the United States and the tribes, *vis a vis* the sovereign authority of the state governments, involved the protection of tribes as nations. The concept of guardianship however did not destroy the recognition of inherent sovereignty. As Marshall CJ put it, "protection does not imply destruction of the protected", and he stated that:

> a weaker state, in order to provide for its safety, may place itself under the protection of one more powerful, without stripping itself of the right of government, and ceasing to be a state.[40]

Through these decisions, "tribes were brought within the framework of American jurisprudence as sovereigns."[41] The decisions effected an historic compromise. The Indians were recognised as the "rightful occupants of the soil" but the Crown had an "absolute title...to extinguish that right". The Chief Justice did not delude himself that this rule was just. In his oft quoted words in *Johnson v McIntosh*:

> We will not enter into the controversy, whether agriculturalists, merchants, and manufacturers have a right, on abstract principle, to expel hunters from the territory they possess, or to contract their limits. Conquest gives a title which the Courts of the conqueror cannot deny.[42]

These foundational cases have been relied upon in Canada, Australia and New Zealand. They are the basis of the doctrine of native title as developed in these jurisdictions. Accordingly, "Aboriginal title is the right of people in the new world to occupy and use their native area".[43]

Marshall CJ noted the importance of treaties with Indian tribes, and the place of treaties in American constitutional arrangements whereby treaties are part of the supreme law of the land. Thus treaties form another inter-locking base of the American recognition of Native American sovereignty. Despite treaties not being fully honoured in some instances, a number of treaties are still in effect today. Although not all tribes are covered by treaties, the principles of sovereignty upon which treaties are concluded and implemented can be extended to all tribes on the basis of the "equal footing" doctrine.[44] The third leg of Native American sovereignty lies in the United States *Constitution* itself, in particular the Commerce Clause providing Congress with the power to "regulate Commerce with foreign Nations, among the several States, and with the Indian Tribes".[45] Indians are thereby given explicit and separate recognition in the *Constitution*.

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39 *Worcester case* at 559.

40 *ibid*, at 552.

41 C Tebben, "An American Trifederalism Based upon the Constitutional Status of Tribal Nations" *University of Pennsylvania Journal of Constitutional Law*, (2003) 5(3) 318-356.

42 *Johnson v McIntosh,* 21 US (8 Wheat) 543 (1823) at 573, *cf Coe v Commonwealth* (1979) 24 ALR 118.

43 *Lac Courte Oreilles Band of Lake Superior Chippewa Indians v Voight* 700 F.2d 341 (1983).

44 The equal footing doctrine was a policy applying to new states as they were admitted to the Union. Unlike earlier colonisation policies, that viewed new colonies as inferior to the founding state, the equal footing doctrine allowed new states equal rights with the original states in all respects.

45 U.S. *Constitution*, art.1, para 8, cl 3.

At the legal, constitutional and policy levels, the United States has recognised and continues to recognise an on-going, if impaired or diminished, sovereignty and a right to self-government inhering in Native American tribes. This relationship has been characterised as a part of US federalism:

> tribes have a federal relationship with the national government, based on treaties, constitutional provisions and Supreme Court precedent.[46]

Sovereignty today

While the ability of Native American nations to exercise this sovereignty has waxed and waned over time, depending in part on the prevailing policies and attitudes of Congress (particularly Congress's doctrine of plenary power over Indian Tribes which provides *inter alia* the power to unilaterally abrogate Indian treaties). Despite too, inconsistent decisions by the courts, the sovereign status of Native Americans has persisted. This is reflected in a number of facets of contemporary constitutional arrangements for Indian affairs in the USA, and approaches to policy, programs and agreements. In effect, the federal system of government in the US is based on three sovereign entities, the federal government, the states and the Indian Tribes, and US federalism reflects the ordered sharing of power between these distinct sovereign entities.

On April 29, 1994, at a meeting with the heads of tribal governments, President Clinton reaffirmed the United States' "unique legal relationship with Native American tribal governments", and issued a directive to all executive departments and agencies of the federal government that they should implement activities affecting Native American tribal rights or trust resources in a knowledgeable, sensitive manner respectful of tribal sovereignty.[47] This policy is also reflected in the US Department of Justice's *Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (1999), which declares that "our Constitution recognises Indian sovereignty by classing Indian treaties among the 'supreme law of the land'. It reiterates that trust responsibility 'includes the protection of the sovereignty of each tribal government'.[48]

The Department of Justice summarises the US legal and constitutional position of Indian Tribes thus:

1) the Constitution vests Congress with plenary power over Indian affairs;
2) Indian tribes retain important sovereign powers over their members and their territory, subject to the plenary power of Congress; and
3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where Congress has provided otherwise.[49]

This recognition of Indian sovereignty has major policy and program implications and practical effects for the implementation of policies. These include areas

46 View of Richard Monette, discussed in Tebben, *op.cit*, p330.
47 See <www.usdoj.gov.otj/sovtrb.htm>, accessed 4 November 2003.
48 *ibid*.
49 *ibid*.

such as child welfare, gaming, and tribal jurisdiction in respect of law enforcement and courts. The Supreme Court has identified "traditional notions" of the extent of tribal sovereignty, including the power to:

- make substantive laws to regulate internal affairs
- create tribal court systems, set criminal penalties for tribal members
- tax oil and gas extraction on reserves
- tax non-Indian leasehold interests on reserves

Title 25 of the United States Code consolidates all federal laws in respect of Indians and Indian lands. At the state level, voluntary agreements or compacts between tribal authorities and state governments cover a wide range of key social and economic issues including environmental protection, criminal jurisdiction, traffic and safety, child protection and education. These are explicitly based on respect for the sovereign rights of Indian Tribes. This provides a basis of equality, mutual respect and co-existence which has barely begun to emerge in Australia.

International law, US Indian law and the *Mabo* decision

US law in respect of Indians is both based on and reflects international law. Although the *Mabo* decision[50] was influenced by contemporary international human rights instruments and standards, especially in respect of the norm of non-discrimination,[51] and by the jurisprudence of the International Court of Justice in respect of the doctrine of *terra nullius,*[52] it is the interweaving of international law and United States law (especially the Marshall US Supreme Court decisions in respect of Indigenous rights) that is more deeply embedded in the *Mabo* decision.

This is significant, especially given the present tendency of Australian courts to pay limited attention to overseas developments in the recognition of Indigenous rights. In *Mabo,* Brennan J noted (with Mason CJ and McHugh concurring), the effect on the development of the common law of Australia's accession to the Optional Protocol to the *International Covenant on Civil and Political Rights*:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[53]

The somewhat ambivalent expressions of the Australian courts have tended to see international law as a *source* of Australian common law, rather than as *part* of it. In contrast, as Felix Cohen has shown, US law in respect of Indians *reflects* international law.[54]

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50 *Mabo v Qld (No 2)* (1992) 175 CLR 1.
51 *ibid* at 42.
52 *ibid* at 40-41(citing the *Western Sahara case* (1975) ICJ 12. See also Toohey J's judgment at 181-182.
53 *ibid* at 42.
54 F Cohen, "The Spanish Origins of Indian Rights in the Law of the United States", (1942) 31 *Georgetown Law Journal* 1.

As Cohen demonstrated, US Indian law cannot be adequately comprehended without an appreciation of its international law nature. The basic concepts of Indian law are based on a long tradition of recognition of Indigenous rights in international law. Cohen showed that US Court opinions going back to Marshall owed much to international jurists such as Grotius and Vattel, who in turn called upon a legal tradition going back to the Spanish jurist Francisco de Vitoria. Indeed, Vitoria is generally seen as responsible for identifying guardianship as part of the relationship between coloniser and Indigenous group. Guardianship, or fiduciary obligation, is a key element of US Indian law.[55] Cohen saw the doctrine of domestic dependent nations as reflecting the twin international legal traditions of attribution of sovereignty to Indigenous peoples and the guardianship principle.

While guardianship may seem a somewhat dated concept, in the form of the doctrine of fiduciary obligation it demonstrates a willingness to protect the interests of Indigenous peoples as a necessary concomitant of the acquisition of their territory. Guardianship, or fiduciary obligation, have provided invaluable protections in the US and Canada to native interests, protections which have been unavailable in Australia, thus leaving Indigenous people and their resources open to discrimination and exploitation. The extinguishment of native title in the Torres Strait Islands where the Crown has undertaken capital works is a recent example – the Islanders had assumed that the state would protect Indigenous peoples' rights and interests, and not seek their extinguishment.[56]

Native title rights

Because of the importance of Indian rights reserved under treaty in the US, the distinction needs to be drawn between such treaty rights, which are known as *recognised* title, and Aboriginal, or Indian, title known as *unrecognised title.* It is the latter unrecognised or Aboriginal title that most closely corresponds with native title in Australia, but with some important differences.

This Indian title, emerging from the Marshall decisions and considered by the courts over the years, is a right of occupancy extinguishable only by the US federal government (without compensation). To be protected by the government, this right need not be "based upon a treaty, statute or other formal government action".[57] In the US, the states cannot extinguish native title, whilst in Australia native title can be extinguished by state or federal governments (absent any protection provided by the *Native Title Act*).

In the US, Indian title must be exclusive. This not necessarily the case in Australia, given the "bundle of rights" approach. Whilst this may appear to be advantageous to Indigenous Australians, the exclusive nature of Indian rights does take this doctrine closer to a property right, and Indian groups continue to press for common law rights in resources such as timber on their lands. There has been some success in this regard. In the *Shoshone* case, the Supreme

55 As well, international law considerations entered US Indian law through the application of the law of the previous sovereign in parts of the USA (principally Spanish law).

56 *Erubam Le (Darnley Islanders) 1 v State of Queensland* (2003) FCAFC 227.

57 *United States v Santa Fe Pacific Rail Co.* 314 US 347 (1941).

Court held that the tribe's Aboriginal title was as 'sacred as the fee',[58] that minerals and timber constitute elements of the land itself, and that for all practical purposes the tribe owned the land and is entitled to compensation for the timber and minerals. Such an outcome would be difficult to achieve in Australia, as it would be necessary to prove the customary use of minerals and timber at the time of sovereignty.

On the matter of establishing the point in time from which evidence of occupation must be shown, the American courts do not require evidence of occupation from the date of sovereignty, but rather evidence of exclusive and continuous occupation 'for a long time'. This allows for the effect of historical circumstances after the somewhat arbitrary dates of sovereignty. As Lee and Godden observe:

> The date of establishment is a fundamental point of distinction between Aboriginal title in the United States and the doctrine of native title laid down in *Mabo v Queensland (No 2)*.[59]

Policy history and framework[60]

The early days of colonisation in North America saw many treaties negotiated by the British and Spanish with Indian tribes. The British Government's *Royal Proclamation of 1763* gave the Crown the sole right to purchase Indian lands. After independence, the US, under the federal treaty making power, continued to make treaties with Indian tribes. It was during these early years of American independence that the US Supreme Court developed its doctrine of "domestic dependent nations". During this period US Indian policy revolved around the apparently contradictory policies of non-interference of Indian nations and forced removals.

Many treaties during the removal period were concerned with the transfer of land. The practice of removal continued until 1861 when the expansion of settlement beyond state boundaries into Indian country led to a change in policy from one of removals to reservations. Treaties were signed to reserve land for permanent Indian occupation. Indian conflict with the US army in the late 19th century often revolved around attempts to force Indians onto these reserves. It should be noted that in reserving lands for Indians, other rights were seen to be reserved as well, including hunting and fishing rights, and rights to water. The Supreme Court affirmed that rights in addition to occupancy were reserved to tribes in treaties with the US government, noting that:

> the treaty was not a grant of rights to Indians, but a grant of rights from them – a reservation of those not granted – and the right[s were] intended to be continuing against the United States as well as against the States and its grantees.[61]

58 *United States v Shoshone Tribe of Indians* 304 US 111 (1968), as discussed in Dorsett and Godden, *op.cit*, p62.

59 *ibid.*

60 This section draws in part on the historical overview provided by Dorsett and Godden, *op.cit,* pp2-6.

61 *United States v Winans* 198 US 371, 381-82 (1905).

Treaty-making ceased in 1871. Between 1871 and 1928 policy moved from one of 'measured separatism' to one of assimilation which was promoted through breaking up reservations by way of allotments to individual Indians and with 'surplus' land being sold to white settlers.[62] The end result was that Indian tribal lands which were estimated at 138 million acres in 1887 were reduced to 52 million acres by 1934. Many reservations now represent a 'Swiss cheese' picture of Indian and non-Indian holdings. The allotment policy provides a cautionary tale in respect of proposals to individualise native title and land rights holdings in Australia.

By 1928 allotment was recognised to have been a disaster which led to increased poverty. Congress moved to protect remaining tribal lands by the *Indian Reorganisation Act* 1934. However, from 1945 policy and consequent legislation sought to reverse tribal self-government and to end the trust relationship between the federal government and tribes. Criminal and civil jurisdiction over Indian country was passed to a number of States by federal legislation. By the mid-1960's, this 'termination' philosophy was in decline as failed policy and Congress began to include Indian tribes in legislation designed to rebuild the social infrastructure of the nation and provide economic opportunities for economically-depressed areas.

Self-determination era

Commencing in 1961 and continuing to the present, US Indian policy has been firmly based on the principle of self-determination, with recognition of the powers and status of tribal self-government, and with the passage of important legislation enhancing and protecting Indian rights and interests.

In particular, the policy of self-determination was mandated by the *Indian Self-Determination and Educational Assistance Act* of 1975,[63] by which Congress committed:

> to the maintenance of the federal Government's unique and continuing relationship with and responsibility to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct and administration of those programs and services.[64]

The US Department of Justice notes that President Clinton's important executive memorandum of 1994 built on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents had affirmed the fundamental policy of federal respect for tribal self-government.

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62 The *General Allotment Act* 1887, known as the *Dawes Act.*

63 Public Law 93-638.

64 Quoted in Christine Zuni Cruz, "Human Rights and Nationhood in the International Context: Self-Determination and Indigenous Nations in the United States: International Human Right, Federal Policy, and Indigenous Nationhood", paper presented at the *Native Title Conference Native Title on the Ground* Alice Springs June, 2003, p2 found at <www.aiatsis.gov.au/rsrch/ntru/conf2003/papers/zunicruz.pdf> accessed 11 November 2003.

Administration

The principal federal agency in respect of the administration and implementation of Indigenous policy and programs is the Bureau of Indian Affairs (BIA). The BIA describes its mission as fulfilling its trust responsibilities and promoting self-determination on behalf of Tribal Governments, American Indians and Alaska Natives.[65] It has responsibility for the administration and management of 55.7 million acres of land held in trust by the United States. Developing forestlands, leasing assets on these lands, directing agricultural programs, protecting water and land rights, developing and maintaining infrastructure, providing for health and human services, and economic development are BIA responsibility, in cooperation with the American Indians and Alaska Natives.

As federal policy has evolved away from subjugation into one of partnership and service, so has the BIA's mission changed, culminating in the passage of landmark legislation such as the *Indian Self-Determination and Education Assistance Act* of 1975 and the *Tribal Self-Governance Act* of 1994 which have fundamentally changed how the BIA and its constituency do business with each other. However, the relationship between the Indian tribes and the BIA has often been fraught. In particular, there has been controversy concerning the BIA's administration of trust funds collected for the use of tribal allotment lands, as well as the general problems arising from imposed grant-driven programs that do not adequately reflect the priorities of Indigenous communities nor contribute to long term capacity building. As one commentator has described the situation:

> The tribes' relationship with the bureau is often described as a love/hate relationship. On the one hand, the bureau is the symbol of the tribes' special relationship with the federal government. On the other hand, tribes have suffered from bureau mismanagement, paternalism, and neglect. It is the hope and objective of many tribal peoples and government officials that tribes can enter into a more equal relationship with the bureau and that the bureau can truly function in an advisory capacity as opposed to dictating policy to tribes.[66]

Another key US agency in respect of Indian affairs, the Justice Department, affirms that it is committed to strengthening and assisting Indian tribal governments in their development and in promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Justice Department consults with tribal governments concerning law enforcement priorities in Indian country, supports duly recognised tribal governments, defends the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigates tribal government corruption when necessary, and supports and assists Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

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65 See BIA website at <www.doiu.nbc.gov/orientation/bia2.cfm> Accessed 6 November 2003.

66 CL Henson, *From War to Self-Determination – A History of the Bureau of Indian Affairs,* American Studies on Line, at <www.americansc.org.uk/Online/indians.htm>. Accessed 6 November 2003.

The Indian Health Service (IHS) within the Department of Health and Human Services (DHHS) is the other major Federal agency concerned with Indian affairs.

Self-Governance

Self-Governance evolved from the vision of Tribal leaders historically seeking to reduce or eliminate the bureaucratic control of the United States government over the Tribes. Essential elements to achieve this objective include bringing decision-making authority and financial resources back to the Tribal level. The ability of Tribal governments to determine their own destiny and future creates a more meaningful government-to-government relationship between Tribes and the United States.

In the 1980s Congress launched the "Indian Self Governance" program because of concerns with the performance of the BIA and other agencies.[67] Congress decided that adequate federal agency reforms were not going to take place and the only answer was to circumvent the agencies by providing the funds directly to the tribes themselves. An Office of Self Governance was established within the Department of the Interior to oversee the transfer of responsibility and funds for federal programs to Tribal governments, including pooling funds into block grants.

Self-Governance legislation mandates Federal departments and agencies to transfer federally administered programs, services, functions, and activities, or portions thereof, to Self-Governance Tribes. Indian Tribes do not need Self-Governance in law simply to administer existing federal programs; pre-existing law allows Tribes to assume and operate federally-designed programs, services, functions, and activities. Rather, Self-Governance is designed to provide Tribes with the flexibility to re-design and re-prioritize federal programs and to reallocate federally-appropriated funds to programs that best meet Tribal priorities. The Self-Governance Project is characterized as "contracting and compacting", whereby Indian nations take over the management and delivery of programs otherwise within the domain of the federal government.[68]

Planning, Negotiation and Implementation of Self-Governance

Self-Governance provides maximum flexibility for Tribal governments to design programs and services, as well as to allocate funds to address Tribal priorities and concerns. In contrast, when the BIA and the Indian Health Service provide direct services or manage Self-Determination grants or contracts, the program design and funding level decisions are made by the Federal bureaucracy. Most BIA and HIS guidelines, policies and regulations are prepared for national application and are not tailored to a specific Tribe, reservation, or to local

67 Self-Governance was permanently authorized within the Department of Interior (DOI) under Title IV of Public Law 103-413, and within the Department of Health and Human Services (DHHS) – Indian Health Service (IHS) under Title V of P.L. 106-260. Additionally, Title VI of P.L. 106-260 authorized the Secretary of DHHS to conduct a study to determine the feasibility of a Tribal Self-Governance demonstration project for appropriate programs, services, functions, and activities (or portions thereof) of any agency or other organizational unit of HHS, other than the HIS.

68 eg under Public Law 93-638.

conditions. Over the years, the programs and organizational structures of Tribal government have evolved to correspond to these Federal programs and their funding mechanisms and regulations. Tribal structures, therefore, have mirrored the Federal bureaucracy.

Under Self-Governance, along with pre-existing Tribal responsibilities, Tribal governments become the primary policy-makers for the programs and services, funding allocations, and administrative structures on their reservations. Generally speaking, this requires a reorganisation of Tribal governance structures, although some Tribal governments with Compacts of Self-Governance have maintained essentially the same administrative structures and programs that existed previously. Where Tribal reorganization for Self-Governance is undertaken, it needs to be determined by the particular needs and unique situation of each individual Tribe. The importance of education and communication with Tribal members is high. Tribal members need to clearly understand what Self-Governance means, how the trust and treaty relationship is protected, and how Self-Governance will change and benefit Tribal operations. Lack of information and misinformation among Tribal members has been the greatest threat to Self-Governance implementation.

Negotiating Self-Governance

The Self-Governance negotiation process results in an agreement between Tribal and BIA/HIS representatives. For the federal government and the Tribes, negotiations are managed by either the Office of Self-Governance or the Office of Tribal Self-Governance staff. The resulting Compact of Self-Governance and Annual Funding Agreement will determine the future relationship between the Tribes and the BIA/HIS in terms of roles, responsibilities, programs retained by the BIA/HIS, and BIA/HIS programs, services, functions and activities assumed by the tribe.

Not all Tribes have joined the Self-Governance project, and during the initial "demonstration" phase a number of Tribes have stayed with the traditional BIA program delivery mechanisms. This situation has allowed for comparisons to be made of the results of moving to Self-Governance agreements and contracts.

Self-Governance has resulted in establishing a "new partnership" between Tribal governments and the federal government, a process similar to that used in earlier times to negotiate agreements, including treaties, between Indian Tribes and the United States. The benefits of the new relationship have been identified by an Indian leader before a Congress hearing. Melanie Benjamin, chief executive at Mille Lacs, spoke for many tribes in identifying five points of impact on program operations that get at the heart and soul of Self-Governance:

> First, we can now design programs as we see fit. If we have a better way to provide chemical dependency treatment by using a sweat lodge, we can do it. Second, we can also reprogram funds as we see fit based on changing needs. For example, if we have an exceptionally dry season as we recently had, we can allocate more funds to fire protection. Third, the Mille Lacs Band can participate in rulemaking. Title IV [of the 1994 Indian Self-Determination and Educational Assistance Act, Title IV being short for the Tribal Self-Governance Act of 1994] was the first Indian law that required negotiated rulemaking and for the first time brought federal and

> tribal officials together to develop the rules. Fourth, we are using our funds more efficiently. Our local needs determined by us dictate the use of our funds, not a federal official located in Minneapolis or Washington. Finally, our compacts with the federal government reflect a true government-to-government relationship that indicates we are not viewed as just another federal contractor.[69]

Implementation

To implement Self-Governance, both the federal government and Tribes have developed internal Self-Governance structures. Self-Governance has both revitalized the historic relationship between Tribes and the United States and provided new responsibilities to each party. Both the Federal agencies and Tribal Governments have had to review their historic roles in the government-to-government relationship and, in many areas, each has developed plans to restructure, reorganize, or develop new internal procedures and/or governmental structures in order to implement Self-Governance.

Tribal Self-Governance Structures

Actual Self-Governance implementation falls primarily on the Tribes. As a tribally-driven initiative, Tribal leaders need to maintain their leadership role in areas involving legislative, executive, and judicial activities. Self-Governance implementation depends extensively on the ability of Tribal Governments to carry out their responsibilities and obligations in an effective and efficient manner.

Under typical contracts, when Tribes encounter difficulties in carrying out contract functions, they can simply inform the BIA or HIS, who are obligated under statute and regulation to provide technical assistance to the contracting Tribe. Self-Governance Tribes, however, are expected to perform the responsibilities that they have agreed to. This is not to say however that Self-Governance Tribes cannot request assistance from Federal agencies for areas of legitimate policy and administrative concerns which are important to carrying out the Tribe's Compact responsibilities and obligations. However, under Self-Governance Tribes cannot turn difficult tasks and decisions over to Federal officials to decide on their behalf after that program has been transferred.

Governmental structures among Self-Governance Tribes vary greatly depending on the individual needs of each tribe, their constitutions, and their leaders and members. From the beginning of Self-Governance, Tribal leaders have taken the lead in generating discussions and forcing policy decisions from both tribal and federal governments. To assist in this leadership role and to implement Self-Governance, almost all participating Tribes have established their own Offices of Self-Governance. Tribal Governments have created positions of Self-Governance Coordinators who are responsible for monitoring Self-Governance activities for their Tribes. The Coordinator position is typically located in the executive offices of Tribal Governments so that timely information can be provided for policy, legal, and management decision-making.

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69 Quoted in "Self-governance tribes termed the "true trust reformers" *Indian Country Today*, October 20 2003. Available at <www.indiancountry.com> last visited 11 November 2003.

Significance of Self-Governance

Overall the introduction of Self-Governance is seen to have been positive, especially in terms of economic and social programs. However, some problems were identified in the Preliminary Findings of a Self-Governance Process Evaluation in 1995. This study noted that thirty three Indian governments had engaged in negotiations and concluded at least one and sometimes two Compacts of Self-Government with the United States between 1990 and 1995. The study also noted that the principles guiding the original negotiation of these compacts, as defined by Indian leaders in 1986 and 1987, emphasized the establishment of a government-to-government framework with the United States on a tribe-by-tribe basis. Emphasis was placed on the importance of these agreements being between each Indian government and the United States government as a whole instead of Indian governments dealing with individual agencies.

The Self-Governance Process Evaluation also noted two earlier studies. Both studies were positive about outcomes, including the creative and effective activities of Indian governments. The new study measured the increase or decrease of self-governing powers in Indian governments as a result of the Self-Governance Project. Two problems that showed up from these studies were firstly, that Compacts had not always resulted in each Indian government arranging a government-to-government framework with the United States. Rather Indian governments were engaged in negotiating Compacts on an agency-by-agency basis resulting in a pattern of relations similar to previous contracting. Secondly, Indian governments were emphasizing social and economic development at the expense of political development, suggesting the possibility of future weakening of the Indian governments and their becoming dependent on federal agencies.

Overall, Baseline Measures Reports from participatory Indian governments and the study conducted by the Department of the Interior (1995) confirmed that Indian governments had made major progress toward social and economic development as a direct result of the Self-Governance initiative. Dr Manley Begay Jr, of the Native Nations Institute for Leadership, Management and Policy (NNILMP)[70] has noted that the systematic evidence arising from the self-governance project makes it clear that 'contracting and compacting' has been successful in both promoting economic development and enhancing tribes' experience in the business of self-governance.[71]

Some of the research findings cited by Begay include significant improvements in productivity and better prices for the product from forestry programs which were shifted from Bureau of Indian Affairs-employed forestry workers to Aboriginal-employed workers; and positive results from tribal contracting and compacting for Aboriginal health services. In areas such as child foster care

70 The Institute is at the University of Arizona, Tucson, Arizona, USA.

71 M Begay Jr, "Corporate and Institutional Strengthening for Effective Indigenous Self-Governance on the Ground – Policy Lessons from American Indian Nations", paper presented at the *Indigenous.Governance Conference*, Canberra, 3-5 April 2002. Available at <www.reconciliationaustralia.org>.

and wildlife management, Aboriginal programs have so out-performed state governments' that "non-Indigenous governments are now turning to the Indian nations for advice and counsel".[72]

Dr Begay points out the significance of the change in approach taken by the federal government to achieving successful long term outcomes for Indian communities. He observes that:

> Federal economic initiatives in Indian country have long been dominated by a 'planning and projects' mentality. Sustained and systemic economic development, however, does not consist or arise from building a plant or funding a single project. Economic development is a process, not a program.[73]

Begay sees the improved performance under Self-Governance as being built around recognising and enhancing tribal sovereignty or self-rule, concepts that have come to be encompassed in the term 'governance'. He identifies the block funding available under Self-governance as critical, as it minimizes micromanaging the allocation of funds, and, importantly, it permits the allocation of activity and resources in accord with what he terms '*Aboriginal* priorities'.[74]

Governance, as demonstrated in results from the implementation of the Self-Governance policy, is thus seen as the principal driver and prerequisite for sustainable economic and social development for Indian tribes. These results have been closely studied by NNILMP's sister project, the Harvard Project on American Indian Economic Development. The Harvard Project set out to understand why some tribes had been able to break away from long term poverty and economic stagnation, with all the attendant social problems, while others had not. Stephen Cornell of the Harvard Project has observed that among the key research findings of the Project is the critical role of self-governance – "In the United States at least, genuine self-rule appears to be a necessary (but not sufficient) condition for economic success on indigenous lands".[75] Cornell and Taylor have observed that on the basis of twelve years' research:

> The evidence is compelling that where tribes have taken advantage of the federal self-determination policy to gain control of their own resources and of economic and other activity within their borders, and have backed up that control with good governance, they have invigorated their economies and produced positive economic spillovers to states.[76]

However, in a discussion very relevant to Australian development, Cornell seeks to identify the meaning of self-government, noting that it is significantly different to mere administrative control. The key findings of the Harvard Research point to five factors as the key determinants of tribal economic success:

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72 *ibid*, p5.
73 *ibid*.
74 *ibid* (emphasis in original).
75 S Cornell, "The Importance and Power of Indigenous Self-Governance: Evidence from the United States", paper presented at the *Indigenous Governance Conference*, Canberra 2002. Available at <www.reconciliationaustralia.org>.
76 S Cornell and J Taylor, *Sovereignty, Devolution and the Future of Tribal State Relations,* Malcolm Wiener Centre for Social Policy, June 2000, p6. Available at <www.ksg.harvard.edu/hpaied/docs/PRS00-4.pdf>.

Sovereignty

In every case examined where there has been sustained economic performance, the major decisions about governance structures, resource allocations, development strategy and related matters are in the hands of the Indian nations concerned.

Governing institutions

Self rule is not enough, it has to be exercised effectively, which means stability in the rules by which governance takes place, and keeping politics out of day-to-day business and program management. As well, there has to be fair, effective and non-politicized resolution of disputes, which in the US at least means strong and independent tribal courts. It is necessary to put in place capable tribal bureaucracies that are able to effectively deliver services and implement decisions.

Cultural match

The Harvard Project has identified the need to develop tribal governing institutions that have credibility within Indian society, that "resonate with indigenous political culture". As Cornell points out, historically outsiders, typically the US Government, have designed and imposed tribal governing institutions, and accordingly these institutions are ineffective in managing sovereign societies. However, the evidence is that there is no one model that applies across all Indian nations, and that the solution to "cultural match" has to be worked out according to the particular situation of each group and its response to the need to build institutions on an indigenous base.

Strategic thinking

Despite the pressures to look for short term outcomes, the Project has noted the key importance of longer term strategic thinking and planning, including a systematic examination not only of assets and opportunities but also of priorities and concerns.

Leadership

The Project noted the key role of leadership in terms of persons who envision a different future, recognise the need for foundational change, are willing to serve the tribal nation's interests instead of their own, and can communicate their vision to other community members.

In summary, the Harvard Project, without diminishing the importance of "economic" factors (resources, distance to markets etc) found that the primary requirements for developmental success were political rather than economic, focusing around issues of governance, or more broadly speaking, "nation building" or "nation re-building":

> Nation-building refers to the effort to equip indigenous nations with the institutional foundations that will increase their capacity to effectively assert self-governing powers on behalf of their own economic, social and cultural objectives.[77]

77 Cornell (2002), *op.cit*, p8.

In summary, whilst the move towards tribal Self-Governance cannot be characterised as one of linear improvement, and there have been problems associated with it, there seems to be general agreement that it is a significant step forward. For those Tribes that are able to address their own governance issues the potential for economic and social progress and enhanced cultural well-being, including vitality of language and custom, is very high. There is also widespread support amongst Indigenous and Government parties for the expansion of the Self-Governance approach to other significant areas of Indian affairs, particularly in respect of health programs.

As the Harvard Project has shown, the possibilities for nation building, or rebuilding, are now present in a situation where Indigenous peoples can negotiate a new relationship with the federal government through the agency of Tribal Self-Governance.

Negotiated settlements

In 1871 Congress decreed that no further treaties were to be entered into with Indian Tribes, although existing treaties were to be honoured. Nevertheless, Congressional practice thereafter was to seek consent in some form for actions affecting Indian lands or interests. Thus 'agreements' replaced treaties and the practice has been to use negotiated settlements to resolve complex issues. Such negotiated settlements have covered matters such as gaming on Indian reserves, child welfare, and in the case of Alaska, major Aboriginal title and land claim issues. Self-Governance Compacts are more recently seen as a step towards resuming full treaty-type relations.

The negotiated settlements are of relevance to the Australian situation. The best known US settlement in respect of land is the Alaska Native Claims Settlement of 1971. The *Alaska Native Title Claims Settlement Act* 1971 (ANCSA) authorised Alaska Natives to select, and receive title to, 44 million acres of federally-owned public land in Alaska, and also to receive $US962,000,000 in cash as settlement of their Aboriginal claim to land in the State of Alaska. Title to the land selected was not conveyed to native Alaskans nor tribal governments, but to native corporations. The Act established a system of village and regional native corporations to manage the lands and cash payments, with extensive provisions regarding the operations of the corporations.

These corporations bore little resemblance to Aboriginal organizations but were largely based on US corporations.[78] The Alaska Settlement has been described as a "very large real-estate deal," perhaps the largest in history. But there was nothing in the Act regarding native government, the institutions by which the natives could control their lands and their lives. Congress went out of its way in fact to reach a settlement without establishing any permanent racially-defined institutions.[79]

78 G Nettheim, G Meyers and D Craig, *Indigenous Peoples and Governance Structures,* Aboriginal Studies Press 2002, p64.

79 See *Berger Launches ANCSA Hearings, The Arctic Policy Review* June 1984. Available at <www.alaskool.org/projects> at 12 November 2003.

The immediate cause for the Settlement was the granting of statehood to Alaska in 1958. The new state had been given the right to select over 100 million acres of federal land for state ownership, but the native Alaskans claimed the same land as chosen by the state, a situation that was aggravated by the discovery of oil. The Settlement attempted to accommodate all interests, ie those of the State, the Natives, conservation concerns, and oil companies. The price that the Alaskan Natives paid for the grant of title to the 44 million acres and the cash settlement was extinguishment of native title over most of Alaska (365 million acres). As s 4(b) of the Act provides:

> All Aboriginal titles, if any, and claims of Aboriginal land based on use and occupancy, including submerged land underneath all water areas, both inland and offshore, and including any Aboriginal hunting or fishing rights that may exist, are hereby extinguished.[80]

The objectives of the Act in respect of Alaskan natives were to foster self-determination and the economic development of their lands as the perceived answer to the poverty of the Indigenous people. The assumption appears to have been that the traditional culture and economy would decline.[81] The results of the Settlement have been far from perfect and the legislation has needed amendment a number of times to address Indigenous concerns. The extinguishment of native title hunting and fishing rights over such a vast area in a situation where subsistence activities are of major importance has itself been highly problematic, and has necessitated protection of hunting and fishing rights through various separate state and federal pieces of legislation – a situation which created administrative difficulty and uncertainty about the long term security of the rights.

The main problems with the Settlement revolved around the corporatisation of land holding arrangements. Designed to facilitate native interests, assets and capital to be used towards productive investments, this approach failed to address the concerns of native Alaskans that their land would be protected and remain in their possession until passed to future generations. The corporate structures introduced objectives (maximising profits) and decision making processes that were alien and sometimes threatened the subsistence lifestyle. As Nettheim, Meyers and Craig observe:

> There was virtually no connection between ANSCA and the native Alaskan traditional way of life, subsistence.[82]

It is clear now that the negotiation processes for the Settlement were inadequate, that the young Indigenous representatives were inexperienced and failed to consult adequately with their own people living in the villages. There was pressure from government and business to conclude a deal so that oil exploration and production could proceed. Initially, most people thought that a good result had been achieved, given the large area granted and the size of the compensation figure. Thus:

80 *Alaska Native Claims Settlement Act* (43 USC 160-1624) – Public Law 92-203.
81 Nettheim, Meyers and Craig, *op.cit*, p64.
82 *ibid*, p67.

> ANSCA initially appeared to offer considerable gains for Alaskan native peoples. However, the design and implementation of ANSCA failed to provide a significant degree of self-determination and culturally appropriate governance structure so that native Alaskans could embrace it, and develop it, to meet their needs and contemporary aspirations…..The tragedy of ANSCA appears to be that it was too much of a top down settlement, by the US government, without sufficient real negotiation with the native peoples of Alaska. The assumptions about corporate and governance structures and Indigenous development have not worn well with time.[83]

The Alaska Settlement is something of a cautionary tale, including the importance of appropriate Indigenous representatives and negotiators, the absolute need to consult fully, the dangers of inappropriate governance structures that, in this case, clearly did not provide a "cultural fit", and the inappropriateness of large scale surrender or extinguishment of Aboriginal rights and native title. The objective of moving directly to concluding one-off comprehensive settlements or treaties in the name of certainty does not allow for the development, trial and testing of relations between native title parties and governments and their agencies. A more gradual (or incremental) approach is more conducive to improved economic and social outcomes.

Implications from US law and practice for the Australian situation

Sovereignty

In recognising the continuation of native title post acquisition of sovereignty in Australia, the High Court drew on the authority of decisions in Canada, the United States and New Zealand. As Professor Bartlett has pointed out, the landmark and founding decision in these jurisdictions is the 1823 decision by US Chief Justice Marshall in *Johnson v McIntosh*.[84] Marshall CJ's doctrine is clearly reflected in the High Court's recognition of native title in *Mabo*. As Bartlett notes:

> The High Court may have expressed a rationale of "full respect" for the rights of the Aboriginal inhabitants, but their specific directions as to proof, nature, content and the extinguishment of native title are all founded upon the pragmatic compromise declared by Chief Justice Marshall in *Johnson v McIntosh.*[85]

The curious difference is that the Australian courts have, despite the Marshall decisions, interpreted the acquisition of sovereignty by the British, unchallengeable in the courts itself as an Act of State, to necessarily require the complete extinguishment of Indigenous sovereignty from that time. The Australian High Court has seen the extinguishment of Indigenous sovereignty,

83 *ibid*, p75.
84 RH Bartlett, *The Mabo Decision,* Butterworths, Sydney 1994, pxi.
85 *ibid*, pxii.

and hence of any law-making or self-governing capacity, as a "cardinal" fact,[86] asserted that "there could be no parallel law-making after the assertion of sovereignty",[87] and attributed the "inherent fragility" of native title to the loss of Indigenous sovereignty.

This appears to be a misunderstanding of the application of the Act of State doctrine. Nor does it concur with the reality in Australia of an on-going Indigenous polity, with its own laws and sanctions. Over a significant part of Australia two sets of laws are operative – Australian law and Indigenous law. To deny this reality is to create another legal fiction. The recognition of a continuing Indian sovereignty in the United States has not seen the collapse of the American legal system or the dismemberment of the nation.

Thus, Australia has, belatedly, adopted the recognition of the Indigenous rights to possess and use the land decided by the Marshall Court, without the concomitant residual sovereignty which both logically and in fact goes with it. The implications of this disjuncture need to be carefully considered in examining the current imbroglio of native title and land settlements in Australia today. Barrister John Basten has referred to the ambivalence of the [Australian] common law towards Indigenous sovereignty. He notes that "[t]here is a tension between the acceptance that the common law remedies are available to protect rights and interests held under traditional law, and the assertion that there is no room for a parallel system of Indigenous governance….there is at least a danger that the Court has failed to articulate a coherent approach".[88] In the light of US legal doctrine, and in order to bring coherence to considerations of the relationship between native title and self-governance, the inherent rights of Indigenous Australians to a degree of autonomy or self-government should be reconsidered as a matter of priority.

Self-governance

The development of the Self-Governance project is highly significant. Though based around sovereign tribal government in Indian country, the principles of "contracting and compacting", the experience to date and the positive outcomes appear to have a quite close bearing on recent Australian developments such as the COAG "whole-of- government" trials.

However, Self-Governance is much more than better coordination of projects and programs, or even enhanced consultation and participation (which had already been provided in the US by the federal self-determination policy). It is all about Indian control (and accountability). It is about self-government, the on-ground practical application of the inherent sovereignty of Indigenous peoples anywhere, whether part of the explicit legal codes or not. The realities of Indigenous control and priority-setting are demonstrated in the comments of Chief Melanie Benjamin quoted above. The problem in Australia is that there

86 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) HCA 58 (12 December 2002) per Gleeson CJ, Gummow and Hayne JJ at [55].

87 *ibid*, at [44].

88 J Basten, "Beyond Yorta Yorta", *Land Rights, Laws: Issues of Native Title*. Issues Paper no 24, AIATSIS, October 2003, p4.

has been little approach to anything like such self-government. As Diane Smith has pointed out: "There is currently no Indigenous self-government jurisdiction in Australia, as there is, for example, in the United States of America".[89]

Indigenous leader Gerhardt Pearson has put the situation thus:

> It is easy for government bureaucracies to accept so-called "whole-of-government" approaches, coordinated service delivery and so on. It is much harder for them to let go of the responsibility. On one hand we have the almost complete failure on their part to lead and facilitate social and economic development in Indigenous Australia. On the other hand, our experience is that the government bureaucracies are resistant to the transfer of responsibility to our people.[90]

Perhaps the main lesson from the US Self-Governance Project is the need to link a secure land base to the negotiation and delivery of programs. The Self-Governance approach in the US is not conceivable without a land base (the Tribal reservations) and self-determination. However, to make it work, the Harvard Project has identified the central importance of developing effective and appropriate governance mechanisms. Thus governance, land and native title, and negotiated arrangements for funding and programs (in the American context, "Compacts") provide a basis for nation building and re-building. There is no reason why the same cannot apply in Australia.

Federal/State jurisdictions

In Australia the states are real players in native title because of concurrent jurisdiction in a way that does not exist in the US. The legal/constitutional relationship in the US is essentially between the federal government and the Tribes. The powers of the states in Australia expose native title to greater risk and a lack of uniformity between different jurisdictions. The role of the states in respect of native title was enhanced in the 1998 amendments to the *Native Title Act*. In particular, the types of rights and procedures available can vary significantly between jurisdictions, as long as minimum requirements set out in the NTA are met. As well, policy and administrative practices vary with the political philosophies current in each state and territory jurisdiction. The range of practices and policies adopted is highlighted in Chapter 3. This situation can be argued to be neither equitable nor efficient. It increases the transaction costs of negotiating over the use of native title lands.

Individualising/privatising Indigenous lands

While there may be some merit in proposals to "free up" land held by Indigenous Australians under statutory land rights or native title, and to allow for greater individual responsibility in relation to land held by communal title, two cautionary

89 D Smith, "Building Effective Indigenous Governance. The Way Forward for Northern Territory Regions and Communities", Background Issues Paper, *NT Indigenous Governance Conference* November 2003, p4. Available at <www.nt.gov.au/cdsca/indigenous>. Last visited 14 November 2003.

90 G Pearson, "Man Cannot Live By Service Delivery Alone", *Opportunity and Prosperity Conference*, Melbourne November 2003. Available at <www.capeyorkpartnerships.com>. Last visited 14 November 2003.

notes arise from the American experience. One is that these proposals may be premised on assimilationist motives or goals, in which group rights and identity are seen as standing in the way of individual enterprise and success. This is a value of the majority, not Indigenous, society. Secondly, in practical terms, such policies can lead to the legal or de facto loss of significant amounts of traditional lands, which already have been reduced to a small remnant of the former complete occupation and ownership of the country. Some US reservations have been seriously undermined as a result of the allotment policies.

Trust/fiduciary obligation

The role of the Department of Justice, based on the trust and guardianship role of the US Government, is positive and constructive in its support of and protection for the rights of Native Americans. This surely provides a contrast to the role of such departments and agencies in Australia. Perhaps analogous Australian agencies could look with benefit to American practice and experience.

Dangers of poorly negotiated land claims

The lessons arising from the Alaska Native Title Claims Settlement appear to confirm the findings of the Harvard Project from other contexts, namely the need for Indigenous governance structures that provide a good "cultural fit". This has been a major issue in Australia where the foisting of a variety of "community" council structures on settlements and missions in Australia from the late 1960's on in the name of "self-management" or "self-determination" contributed to undermining traditional authority structures, had little credibility in the eyes of community members, and may well have contributed to the social dysfunction that has developed in many communities over the past 20 to 30 years – in Harvard Project terms, there was a monumental lack of cultural fit.

It might also be observed from the experience of the Alaska Settlement that any agreements that involve voluntary extinguishment or surrender of native title rights should be approached with a high degree of caution.