

---

# Native Title Report 2004

## CHAPTER SUMMARY:

### Achieving economic and social development through native title

---



The *Native Title Report 2004* shows how native title can be oriented to sustainable economic and social development outcomes and presents five principles to guide the native title system to this end.

This is explained throughout the three chapters of the report which focus on:

- feedback on the principles from a series of consultations and related research
- developing the principles in light of issues raised in the consultations, and
- links between the principles and broader Indigenous affairs policy objectives.

#### *Chapter 1: Feedback on the economic and social development principles*

Chapter 1 reports on a series of consultations and considers the issues they raised in the context of additional research.

From August to October 2004, HREOC staff met with Native Title Representative Bodies (NTRBs) throughout the country, as well as a limited number of peak bodies, government representatives and academic researchers, to discuss the economic and social development principles. The national consultations tapped into the depth of experience that has developed within NTRBs and drew on the knowledge of various stakeholders operating within each state and territory.

There was a clear message from NTRBs that economic and social development is a goal that traditional owner groups want to achieve and that the principles were a useful guide to how development should be achieved through native title. The following issues were raised on how the principles might operate in practice:

#### **1. Identification of the traditional owner group**

Identifying the traditional owner group is important both for the group and third parties wanting to deal with traditional owners. However, governments and third parties should commence negotiations with traditional owners and work with them to identify their goals prior to or concurrently with a connection report being completed, unless there are substantial disputes about group identity.

#### **2. Governance**

Good governance structures and processes are a key to community-wide economic and social development and require: unified and visionary leadership; strong links between traditional law and governance structures; internal dispute resolution and effective group decision making mechanisms;

---

and options for governance structures beyond the Prescribed Bodies Corporate (PBCs) required by the Native Title Act.

### **3. Capacity development**

There is a need to develop the natural, financial, political, social and human resources of traditional owner groups so they can engage effectively with the native title system, as well as pursue economic and social development.

Capacity development needs to: recognise and build on the existing resources and skills of the group; include strong governance structures and processes and experiential learning (such as incremental agreement making processes); include training and assistance to build non-traditional skills in the group; and be supported by adequate time and resources. Governments and companies would also benefit from capacity building so they are better able to negotiate agreements directed to broader outcomes, coordinate a whole of government approach, and help build the capacity of traditional owner groups.

### **4. Resources**

Sufficient resources are needed to enable capacity development within traditional owner groups and those parts of the native title system on which these groups depend (particularly NTRBs and PBCs). Funding to non-Indigenous third party respondents in native title claims needs to be reassessed so that economic and social development initiatives, beyond the claims process, can be supported.

### **5. Maximising opportunities for economic development**

Recognition of traditional ownership is an asset from which economic development can flow. A wide range of options for economic development needs to be made available to traditional owners to reflect the diversity of their circumstances and goals.

There is a need for creative ideas for sustainable economic development. Some options include: supporting the commercial exercise of native title rights; natural resource management services; commercial customary harvesting; joint ventures with developers; directing a proportion of catch or mining profits to traditional owners; and developing eco and cultural tourism.

To support this type of economic development government must retain and satisfy its responsibilities to provide basic citizenship rights such as health, housing, education, roads and infrastructure. Consideration needs to be given to how economic development through native title can also work in a beneficial way for the broader Indigenous community.

### **6. Regional issues**

Redirecting the native title system to the economic and social development of traditional owner groups might be effectively pursued through a regional strategy. A regional approach to native title claims consolidates limited NTRB funding and allows broader outcomes to be pursued. Traditional owners must be represented in any regional Indigenous structures set up in order to engage with government as part of the new arrangements.

**7. Legal issues**

The legal test for the recognition of native title rights is very difficult for applicants to meet, while the test for the extinguishment of native title rights is easily met. This makes it hard for traditional owners to succeed in a native title determination. Governments should negotiate with groups that are acknowledged as traditional owners through the traditional way of defining rights to country, even where their native title rights cannot be established at law. There needs to be support for outcomes beyond the legal definition of rights. The use of native title related outcomes should be encouraged to complement consent determinations.

**8. Effective relationships**

There is a need to build and strengthen relationships between parties separate from the particular transaction that first brings them together and to ensure that relationships exist at an organisational, as well as an interpersonal level. All parties have to do more work promoting Indigenous rights and economic development as appropriate areas for government attention.

**9. Engagement between parties**

Native title negotiations provide governments with an opportunity to engage with traditional owners on a broad range of issues and goals. Parties should be prepared to engage beyond the legal minimum and must fully implement their obligations under a negotiated agreement.

Stakeholders need to establish agreed goals and directions to create a positive engagement regardless of the context for that engagement (eg ongoing litigation and government policies towards native title).

The consultations highlighted critical issues for agreement making directed to economic and social development outcomes, including the need for: effective community decision making structures and community engagement with the process; adequate time and resources for capacity development; creative ideas for sustainable economic development; support for outcomes beyond the legal framework; positive relationships; and underlying infrastructure such as health, roads and education to be guaranteed by governments.

***Chapter 2: Further development of the principles***

Chapter 2 applies the ideas and concerns raised in the consultations to each of the five principles, proposes strategies for addressing the issues identified by stakeholders and contains ideas on how each principle might be put into practice.

The consultations revealed that for native title to be oriented to achieve social and economic development outcomes, the principles should apply not just to agreements but also to other aspects of the native title system. For instance, the issues of capacity development and governance highlighted in the first three principles may be addressed through avenues other than agreement making: such as extending the existing Commonwealth capacity building program for NTRBs to include traditional owners. Also, the aim of the fourth and fifth principles - building relationships and the integration of activities at various levels to achieve the traditional owner group's development goals - could be achieved through funding arrangements, cross-cultural

training programs, government agency cooperation across portfolios and jurisdictions, and partnerships with business.

The emphasis in the principles is on process as much as outcomes. Whatever development goals are set, the principles require that they build the capacity and power of traditional owner groups to determine their own strategies consistent with traditional laws and customs. This can be achieved through building on existing skills, appropriate governance structures, incremental agreement making, and assistance from NTRBs, governments and third parties so that the group can identify and work towards its social and economic development goals. The chapter also stresses the need for positive relationships and sufficient resources to integrate activities between the stakeholders in the native title system to achieve the development goals of the group.

### ***Chapter 3: Developing a policy approach to native title aimed at economic and social development***

In order to shift the focus of native title to economic and social development outcomes, governments must develop a policy framework consistent with this goal. Chapter 3 shows how the principles in the report are consistent with the policy framework underpinning the Commonwealth's new arrangements for the administration of Indigenous affairs and the COAG trials.

The chapter suggests that engagement between native title policy and agreements and the new arrangements, and SRAs/RPAs would improve the sustainability of both.

The new arrangements and COAG trials emphasise improved service delivery, whole of government strategies, partnerships, flexibility, community governance, and capacity building. The trials also aim to invest in community leadership and promote economic independence for Indigenous communities.

Chapter 3 argues that the new arrangements provide an opportunity to take a fresh look at the way in which native title policies and agreement making are structured, in order to deliver better economic and social outcomes for Indigenous peoples.

There are opportunities to explore sustainable economic and social development goals within native title policies and agreements, consistent with the goals of COAG and the SRA agreement making process. The chapter suggests that failure to co-ordinate the goals of native title negotiations with these broader policies aimed at addressing the economic and social development of Indigenous people, not only limits the native title process; it also limits the capacity of the broader Indigenous policy to achieve its objectives.

The long term goal of the new arrangements is for a community that is self reliant and sustainable and capable of directing its own economic and social development with the support of governments. Native title can potentially contribute to this process. It brings with it assets, governance structures, and cultural capital. It is an opportunity to build on what already belongs to Indigenous Australians – their traditional ownership of land. However, it needs to be recognised as a tool that can be usefully employed to help achieve the goals that are an urgent priority for the government in the Indigenous policy arena.

It is proposed that Chapter 3 form the basis of ongoing consultations between the Social Justice Commissioner and governments and other stakeholders in the native title system in 2005. In those consultations, the Commissioner will be asking whether economic and social development for traditional owner groups is a goal that others are willing to support and, if so, how that support can best be provided.

### ***Summary***

The *Native Title Report 2004* seeks to develop principles that recognise the distinctiveness of traditional owner identity, while also seeking to use the native title system to assist with the economic and social development of traditional owner groups and the communities they live in.

The report shows how this approach is consistent with, and could contribute to, the strategies used in the Federal Government's new arrangements for the administration of Indigenous affairs. A synergy between the objectives, concepts and processes of the new arrangements and native title policy must be established to achieve sustainable goals.

Governments and Indigenous peoples must exploit this window of opportunity to build on native title agreement making processes and policies to ensure that sustainable and meaningful improvements and advancements for Indigenous Australians are realised within this generation.