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2010 Native Title Report

Aboriginal and Torres Strait Islander Social Justice Commissioner

Aboriginal & Torres Strait Islander Social Justice Commissioner

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Native Title Report 2010

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This image of Djawulu Mumunggurr was taken during a lunch break at Wanuwuy (Cape Arnhem). The Rangers had been collecting rubbish off the beaches in the morning and had stopped for a break and natha (food). Djawulu had brought along a garra (spear) this day and managed to supplement our lunch with some guya (fish).

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Please be aware that this publication may contain the names or images of Aboriginal and Torres Strait Islander people who may now be deceased.

Native Title Report 2010

Aboriginal and Torres Strait Islander Social Justice Commissioner

Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney-General as required by section 209 of the *Native Title Act 1993* (Cth).

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Aboriginal & Torres Strait Islander Social Justice Commissioner

About the Aboriginal and Torres Strait Islander Social Justice Commissioner

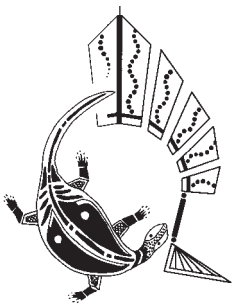
The position of the Aboriginal and Torres Strait Islander Social Justice Commissioner was established in 1993. The office of the Social Justice Commissioner is located within the Australian Human Rights Commission.

The Social Justice Commissioner:

- reports annually on the enjoyment and exercise of human rights by Aboriginal Torres Strait Islander peoples, and recommends action that should be taken to ensure these rights are observed
- reports annually on the operation of the *Native Title Act 1993* (Cth) and its effect on the exercise and enjoyment of the human rights of Aboriginal and Torres Strait Islander peoples
- promotes awareness and discussion of human rights in relation to Aboriginal and Torres Strait Islander peoples
- undertakes research and educational programs for the purpose of promoting respect for, and the enjoyment and exercise of, human rights by Aboriginal Torres Strait Islander peoples
- examines and reports on enactments and proposed enactments to ascertain whether or not they recognise and protect the human rights of Aboriginal and Torres Strait Islander peoples.

Office holders

- Mick Gooda: 2010–present
- Tom Calma: 2004–2010
- William Jonas AM: 1999–2004
- Zita Antonios: 1998–1999 (Acting)
- Mick Dodson: 1993–1998



About the Social Justice Commissioner's logo

The right section of the design is a contemporary view of traditional Dari or head-dress, a symbol of Torres Strait Islander people and culture. The head-dress suggests the visionary aspect of the Aboriginal and Torres Strait Islander Social Justice Commissioner. The dots placed in the Dari represent a brighter outlook for the future provided by the Commissioner'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 Commissioner and the support, strength and unity which the Commissioner 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.

For information on the work of the Social Justice Commissioner, please visit:
http://www.humanrights.gov.au/social_justice/index.html

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14 January 2011

The Hon Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney

Native Title Report 2010

I am pleased to present to you the *Native Title Report 2010* (the Report), which I have prepared in accordance with section 209 of the *Native Title Act 1993* (Cth).

The Report reviews developments in native title law and policy from 1 July 2009 to 30 June 2010 (the Reporting Period).

I have also used this opportunity to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples in light of other changes to policy and legislation made during the Reporting Period. I have done so in accordance with section 46C(1)(a) of the *Australian Human Rights Commission Act 1986* (Cth).

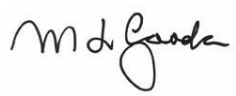
In the Report, I identify the priorities and issues in native title that I will focus on during my term as Aboriginal and Torres Strait Islander Social Justice Commissioner.

I also analyse the Australian Government's reforms, and proposed reforms, to promote agreement-making within the native title system.

Finally, I consider steps that can be taken to improve government consultation processes concerning matters that may affect our lands, territories and resources.

I look forward to discussing the Report with you.

Yours sincerely



Mick Gooda
Aboriginal and Torres Strait Islander
Social Justice Commissioner

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Note on terminology

The Aboriginal and Torres Strait Islander Social Justice Commissioner recognises the diversity of the cultures, languages, kinship structures and ways of life of Aboriginal and Torres Strait Islander peoples. There is not one cultural model that fits all Aboriginal and Torres Strait Islander peoples.

Aboriginal and Torres Strait Islander peoples retain distinct cultural identities whether they live in urban, regional or remote areas of Australia.

The word **'peoples'** recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their lives. This is affirmed by the *United Nations Declaration on the Rights of Indigenous Peoples*.[1]

There is a growing debate about the appropriate terminology to be used when referring to Aboriginal and Torres Strait Islander peoples. The Social Justice Commissioner recognises that there is strong support for the use of the terminology 'Aboriginal and Torres Strait Islander peoples', 'First Nations' and 'First Peoples'.[2] Accordingly, the terminology 'Aboriginal and Torres Strait Islander peoples' is used throughout this report.

Sources quoted in this report use various terms including 'Indigenous Australians', 'Aboriginal and Torres Strait Islanders', 'Aboriginal and Torres Strait Islander people(s)' and 'Indigenous people(s)'. International documents frequently use the term 'indigenous peoples' when referring to the Indigenous peoples of the world. To ensure consistency, these usages are preserved in quotations, extracts and in the names of documents.

1 GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 5 November 2010).

2 See Steering Committee for the creation of a new National Representative Body, *Our future in our hands: Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Australian Human Rights Commission (2009), pp 15, 43. At http://www.humanrights.gov.au/social_justice/repbody/report2009/index.html (viewed 5 November 2010).

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Introduction

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

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

Building on a legacy

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

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

Indeed, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur)[4] has recognised the position of the Social Justice Commissioner as 'an exceptional model for advancing the recognition and protection of rights of indigenous peoples'.[5]

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

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

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

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

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

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

The foundations of the *Native Title Report 2010*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Overview of the *Native Title Report 2010*

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

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

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

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

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

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

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

- the Native Title Amendment Bill (No 2) 2009 (Cth)[9]

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

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

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

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

Towards a reconciled Australia

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

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

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

Recommendations

Chapter 1: Working together in 'a spirit of partnership and mutual respect': My native title priorities

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

Chapter 2: 'The basis for a strengthened partnership': Reforms related to agreement-making

Recommendations	
2.1	That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of: ▪ the impact of the current burden of proof ▪ the operation of the law regarding extinguishment ▪ the future act regime ▪ options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements).

2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure.

2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making.

2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011.

2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the *Native Title Amendment Act (No 1) 2010* (Cth)) as a measure of last resort.

2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the *Native Title Amendment Act (No 1) 2010* (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.

2.7 That the Australian Government:

- consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples
- provide a clear, evidence-based policy justification

before introducing reforms that are designed to ensure the 'sustainability' of native title agreements.

2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.

Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement

Recommendations

3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should:

- explain whether, in the Australian Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.

3.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, that the Australian Government commit to using this framework to guide the development of consultation processes on a case-by-case basis, in partnership with the Aboriginal and Torres Strait Islander peoples that may be affected by a proposed legislative or policy measure.

3.4 That Part 4 of the NTNER Act be amended to remove the capacity to compulsorily acquire any further five-year leases. Further, in respect of the existing five-year lease arrangements, that the Australian Government implement its commitment to transition to voluntary leases with the free, prior and informed consent of the Indigenous peoples affected; and that it ensure that existing leases are subject to the *Racial Discrimination Act 1975* (Cth).

Chapter 1:
Working together in 'a spirit of partnership and mutual respect': My native title priorities

1.1 Introduction

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

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

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

In addition, a milestone was reached when the National Native Title Tribunal (NNTT) registered the 400th Indigenous Land Use Agreement (ILUA) in November 2009.[4]

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2 My overarching priority: Advancing the implementation of the Declaration

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

United Nations Declaration on the Rights of Indigenous Peoples

Article 3

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

Article 4

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

Article 10

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

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

Article 11

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

Article 12

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

Article 18

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

Article 19

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

Article 23

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

Article 25

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

Article 26

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

Article 27

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

Article 28

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

Article 29

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

Article 30

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

Article 31

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

Article 32

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

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

Article 43

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

As Social Justice Commissioner, I:

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

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

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

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

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

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

(a) Understanding our rights: governments

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Understanding our rights: the corporate sector

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

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

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

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

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

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

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

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

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

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

37 For a profile of this agreement, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2006*, Human Rights and Equal Opportunity Commission (2007), ch 5. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport06/index.html (viewed 19 October 2010).

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

1.4 Creating a just and fair native title system

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

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

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

(a) A failure to take action

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

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

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

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

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

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

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

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

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

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

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

(b) Reappraising the native title system

I agree with the Special Rapporteur that:

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

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

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

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43 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At http://www2.ohchr.org/english/bodies/cerd/cerds77.htm (viewed 2 December 2010).

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

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

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

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

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

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

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

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

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

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

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

As Social Justice Commissioner, I will:

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

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

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

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

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

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

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

(a) The case for effective engagement

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

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

I am also firmly of this view.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Building a framework for engagement

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

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

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

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

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

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

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

As Social Justice Commissioner, I will:

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

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

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

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

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

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

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

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

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

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

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

(a) Developing our financial and technical capacity

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

(i) NTRBs and NTSPs

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

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

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

(ii) PBCs

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

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

> Given the significant amount of time, resources and effort that goes into recognising native title, an investment in post-native title services will ensure that the opportunities and benefits brought about by these rights are fully realised and not lost.
>
> Governments should not assume that all native title groups will have sufficient income to establish and maintain a PBC with the capacity to comply with the myriad regulatory obligations and requirements under the NTA.[61]

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

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

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

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

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

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

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

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

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

(iii) More needs to be done

In recent years, I have been pleased to witness the growth of programs and projects to support capacity development in the native title system. These include the Aurora Project[64] and the training activities conducted by Office of the Registrar of Indigenous Corporations (ORIC).[65]

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

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

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

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

(b) Strengthening our communities

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

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

63 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

64 See *The Aurora Project*, http://www.auroraproject.com.au/About.htm (viewed 12 October 2010).

65 During the Reporting Period, ORIC received 10 training requests from Registered Native Title Bodies Corporate (RNTBCs). ORIC organised and funded 13 workshops, which were attended by 16 PBCs and RNTBCs: A Beven, Registrar of Indigenous Corporations, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 16 August 2010.

66 These include the Aurora Project, the AIATSIS Native Title Research Unit, the University of Western Australia's Anthropology Subsidy, and training and workshops for NTRB boards and staff: G Roche, Branch Manager, Indigenous Programs, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 13 August 2010.

67 G Roche, Branch Manager Indigenous Programs, Department of Families, Housing, Community Services and Indigenous Affairs, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 13 August 2010.

68 J Anaya, *Report by the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 87. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

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

I welcome the emergence of recent initiatives to support the resolution of disputes within our communities. For instance, ORIC has initiated and led a pilot program for the management of post-determination disputes. This collaborative project involves representatives from ORIC, NNTT, FaHCSIA and the Attorney-General's Department. I am informed that the pilot will be evaluated in 2010–11.[70]

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

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

(c) Improving our access to development opportunities

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

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

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

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

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

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

As Social Justice Commissioner I will:

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

1.7 Conclusion

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

We cannot achieve reconciliation in this country while:

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

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

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

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

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

Recommendations

1.1 That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the full implementation of the *United Nations Declaration on the Rights of Indigenous Peoples*.

1.2 That the Australian Government introduce legislation into Parliament to require the Attorney-General to table the annual *Native Title Report* within a set timeframe.

1.3 That the Australian Government introduce legislation into Parliament to require the Attorney-General to provide a formal response to the annual *Native Title Report* and the *Social Justice Report* within a set timeframe.

Chapter 2:
'The basis for a strengthened partnership': Reforms related to agreement-making

2.1 Introduction

For Aboriginal and Torres Strait Islander peoples, agreement-making can be an expression of free, prior and informed consent and the beginning of cooperative relationships with governments and other parties.

Good agreements can recognise our rights and facilitate their exercise. In particular, agreements can enable Aboriginal and Torres Strait Islander peoples to 'determine and develop priorities and strategies for the development or use of their lands or territories and other resources'.[1]

However, agreement-making does not always result in beneficial outcomes for Aboriginal and Torres Strait Islander peoples. As David Ritter notes, 'some deals seem objectively fair, but others have produced clear winners and losers'.[2]

Indeed, Aboriginal and Torres Strait Islander peoples face significant barriers to reaching just and equitable agreements. These include inadequate financial resources and access to appropriate professional advice. There are also significant barriers embedded within native title law and policy, such as the onerous burden of proof faced by Aboriginal and Torres Strait Islander peoples. To facilitate positive outcomes from agreement-making, governments need to take action to ensure that the playing field is level.[3]

During the Reporting Period (1 July 2009–30 June 2010), the Australian Government advanced a number of initiatives designed to promote broader land settlements and improve the ability of Aboriginal and Torres Strait Islander peoples to enter into beneficial agreements. While it is arguable that these initiatives do not go far enough, in general I welcome the Australian Government's attempts to reform the adversarial culture of the native title system.

In this Chapter, I examine the Australian Government's commitment to reforming the native title system to encourage negotiations and agreement-making. I first review some of the achievements in agreement-

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 32(1). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

2 D Ritter, *The Native Title Market* (2009), p 6.

3 Proposals for reforms to create a 'level playing field' are considered further in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), ch 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

making that occurred during the Reporting Period. I then review the Government's initiatives to encourage agreement-making and to explore options for broader and more substantial outcomes from native title agreements.

However, not all of the Australian Government's legislative and policy initiatives relating to agreement-making and agreements were positive.

During the Reporting Period, the Australian Government proposed a new future act process to facilitate the construction of public housing and infrastructure on Indigenous-held land. In this Chapter, I express serious concerns that this future act process will detract from agreement-making and that it does not contain sufficient procedural rights.

Finally, I briefly highlight a matter that I will continue to monitor closely – that is, the Government's proposal to introduce a new statutory review function to promote 'sustainable' agreements.

2.2 Achievements in agreement-making

Agreement-making is a significant part of the native title system. For example, a milestone was reached in November 2009 when the National Native Title Tribunal (NNTT) registered the 400th Indigenous Land Use Agreement (ILUA). President Graeme Neate of the NNTT recognised that '[t]he fact that 400 ILUAs have now been registered Australia-wide indicates that this form of agreement is continuing to work well for land users around the nation'.[4]

In addition, the NNTT has reported that all of the determinations that native title exists that were registered during the Reporting Period were made by consent of the parties.[5] President Neate has commented that:

> Those determinations and the ILUAs (some of which were associated with the making of determinations that native title exists), as well as numerous future act agreements and future act consent determinations, illustrate the strong agreement-making context in which native title issues are usually resolved.[6]

Over the Reporting Period, we have witnessed a number of significant agreements. I highlight a few of these in the text boxes below.

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

5 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 26. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

6 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 26. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

Text Box 2.1: Yawuru agreements

On 25 February 2010, the Yawuru People signed a body corporate ILUA and an area ILUA with the State of Western Australia and the Shire of Broome. The body corporate ILUA was registered by the NNTT on 24 May 2010 and the area ILUA was registered on 6 August 2010.[7]

The agreements are considered to be the largest native title agreements in Australia, and include a $196 million land and money package.[8]

The agreements provide compensation to the Yawuru People for the loss and impairment of their native title rights and interests. They also commit the Western Australian Government to help create a sustainable social and economic future for the community, including by providing funds for capacity building, economic development and social housing.[9]

Yawuru elder Pat Dodson is reported as saying that the agreements represent 'a serious cutting of the government umbilical cord. We are in the marketplace now and we have to develop commercial skills to run joint ventures'.[10]

He further comments:

> We in fact become probably the largest real estate developer of the future town of Broome. There is an area of the coast (and marine region of Roebuck Bay) area going from the north to the south for about 300km that we will joint manage with the Shire of Broome and the State Department of Environment. What is unique about this agreement is that we have to put in to get value out of development. There are no royalties to be paid out to native titleholders. This is not a mining deal. Dividends by way of community benefits will come from participation and development. We take the risks as well as the benefits from this deal.[11]

The agreements were a good outcome for the Yawuru People. However, the long process that led to the final agreements illustrates that there is still a need to change the adversarial culture of the native title system.

The agreements were reached 16 years after the Yawuru People submitted their first claim. As Justice Merkel of the Federal Court commented, the Yawuru People engaged in an 'epic struggle … to achieve recognition under Australian law of their traditional connection to, and ownership of, their country'.[12]

Pat Dodson described the process as 'pretty awful and very intrusive' and said that '[t]he adversarial approach put a lot of our people through a very rough time'.[13] Similarly, Peter Yu is reported as stating that:

---

7 National Native Title Tribunal, 'Tribunal registers Yawuru agreement' (Media Release, 25 May 2010). At http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/YawuruILUAsregistered.aspx (viewed 29 September 2010); National Native Title Tribunal, 'Tribunal registers second Yawuru ILUA' (Media Release, 6 August 2010). At http://www.nntt.gov.au/News-and-Communications/Newsletters/Talking-Native-Title/Pages/TribunalregisterssecondYawuruILUA.aspx (viewed 29 September 2010); National Native Title Tribunal, *Annual Report 2009–10* (2010), pp 78–80. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

8 Office of Native Title Western Australia, *Yawuru Agreements*, Fact Sheet. At http://www.ont.dotag.wa.gov.au/_files/Yawuru_fact_Sheet.pdf (viewed 29 September 2010).

9 Office of Native Title Western Australia, *Yawuru Agreements*, Fact Sheet. At http://www.ont.dotag.wa.gov.au/_files/Yawuru_fact_Sheet.pdf (viewed 29 September 2010).

10 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

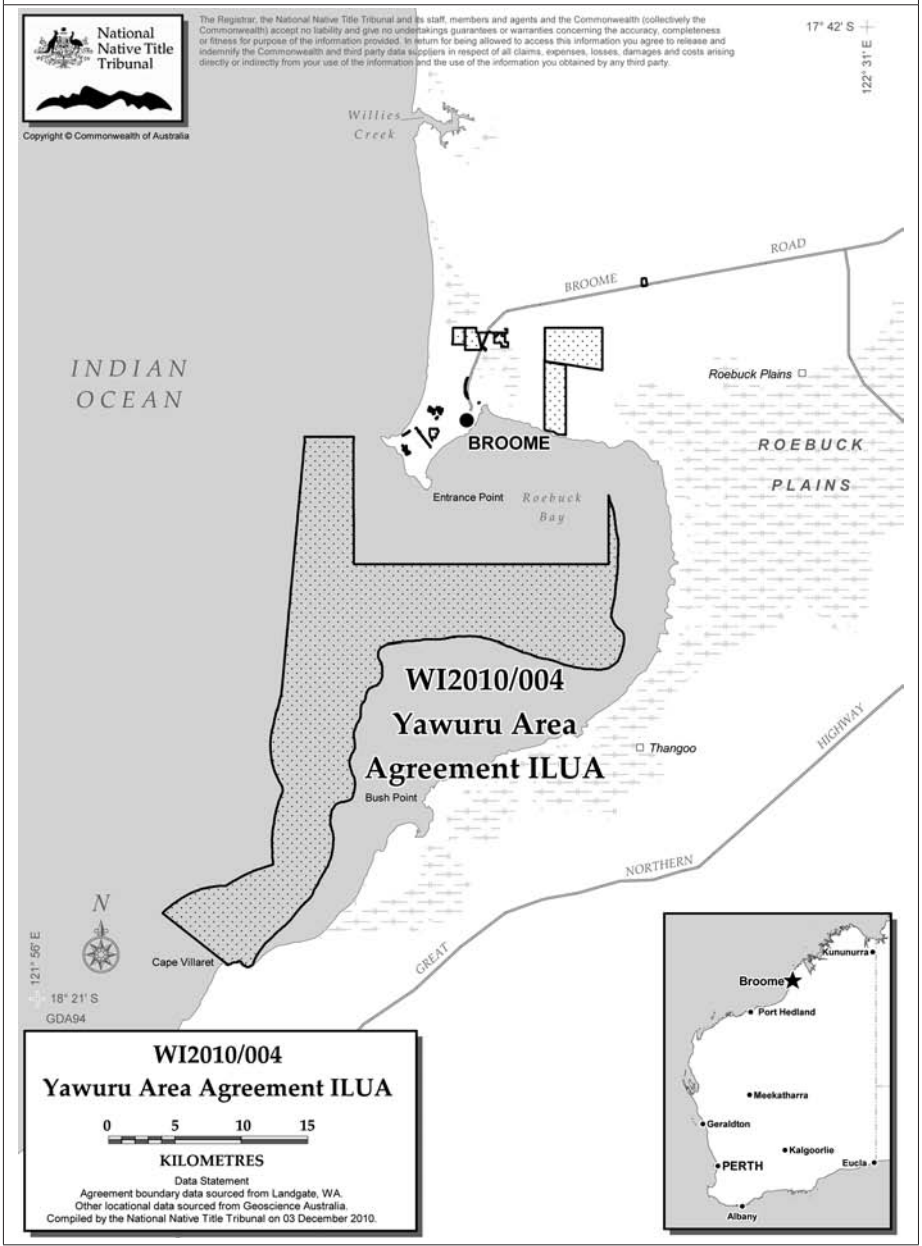
11 P Dodson, Email to K Kiss, Director, Social Justice Unit, Australian Human Rights Commission, 9 November 2010.

12 *Rubibi Community v Western Australia (No 7)* [2006] FCA 459 (28 April 2006), para 159.

13 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

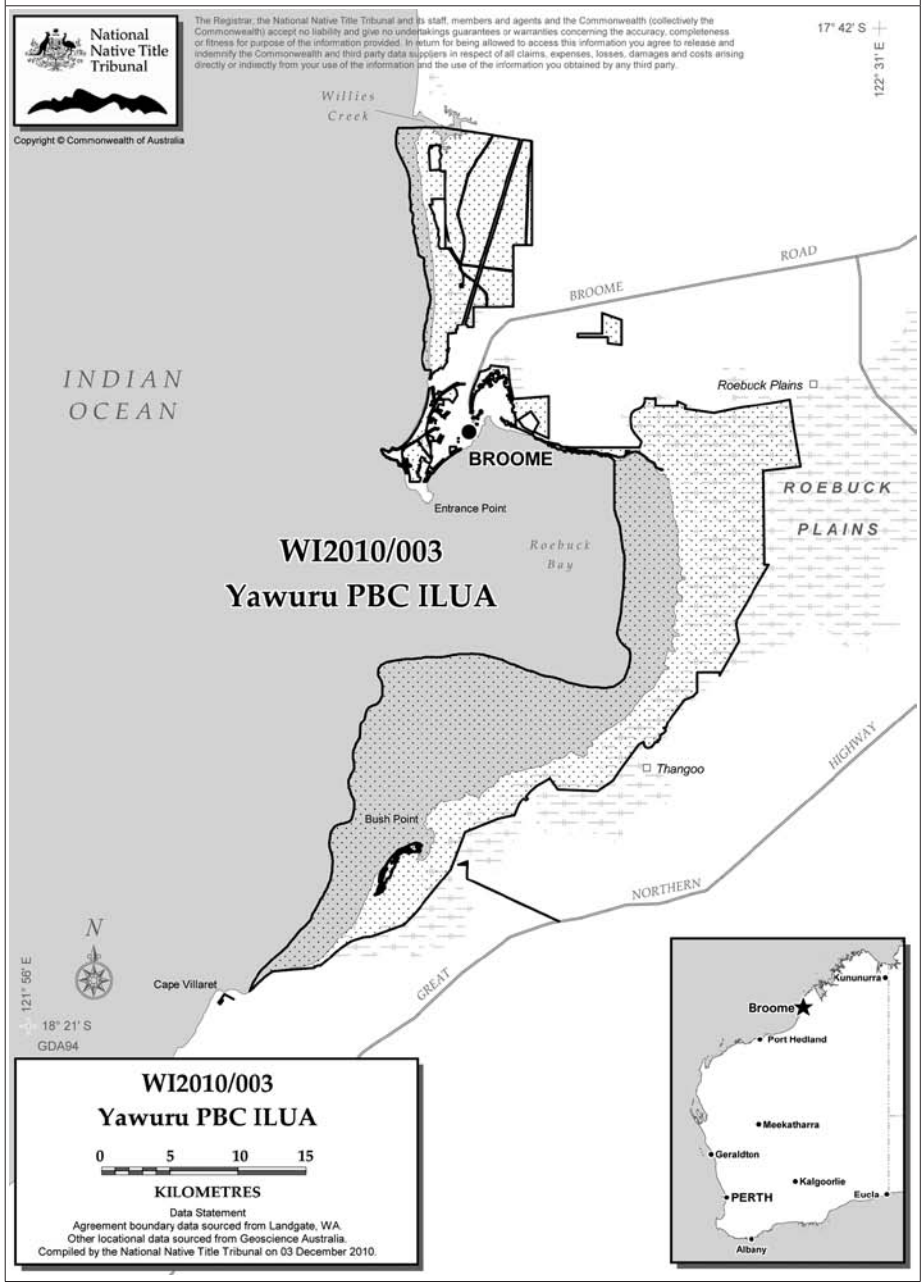
> The underlying principle of native title envisaged by the Keating government was mediation. It is now all highly litigious. No Australian should have their lives exposed and questioned in the way that it happened to us.[14]

Map 2.1: Yawuru Area ILUA



14 R Skeleton, 'Landmark in title claims bittersweet', *The Age*, 27 February 2010, p 6. At http://www.theage.com.au/national/landmark-in-title-claims-bittersweet-20100226-p97h.html (viewed 29 September 2010).

Map 2.2: Yawuru PBC ILUA



Text Box 2.2: Kowanyama consent determination

On 22 October 2009, the Federal Court made a consent determination which finalised Part A of the Kowanyama People's claim.[15] The determination area covers over 2730 square kilometres. It includes part of the land subject to the Kowanyama Deed of Grant in Trust (DOGIT) and a coastal strip. The Kowanyama People had exclusive native title rights recognised over the former area (excluding the Kowanyama township within the DOGIT) and non-exclusive rights recognised over the latter.[16]

The total native title claim area covers 19 800 square kilometres of land and sea and is divided into three parts. Part B includes pastoral leases and Part C covers the Kowanyama township area.[17] At the time of writing, native title over these parts had yet to be determined.

The consent determination regarding Part A followed successful negotiations between a number of stakeholders, including the Kowanyama People, the Queensland and Australian governments, Kowanyama Aboriginal Shire Council, Telstra, and commercial fishers.[18]

The Cape York Land Council (CYLC), as the native title representative body for Aboriginal peoples in Cape York, and the Queensland and Australian governments have agreed on a framework for progressing native title claims in the Cape York region. Noting that the Kowanyama area was the first to be progressed under that framework, the Attorney-General commented that this

> process is about adopting a regional focus, and looking beyond recognition of native title, to see whether traditional owners have other aspirations that can be met through negotiations with governments.[19]

NNTT Member Graham Fletcher, who mediated between the parties, said that negotiations could be fast-tracked due to the parties' willingness to put time and resources into the claim and focus on settling native title through agreement. Mr Fletcher further stated that the successful outcome puts the Kowanyama People and other parties in a good position to resolve the other two sections of the claim area (Parts B and C).[20]

The CYLC says that despite the existence of the framework agreement, and the commitment of the parties, the native title process remains slow, with complex issues still to be resolved. There remains uncertainty about whether native title holders can build on their native title rights to achieve economic and other development.[21]

15 *Kowanyama People v Queensland* [2009] FCA 1192 (22 October 2009).

16 *Kowanyama People v Queensland* [2009] FCA 1192 (22 October 2009), paras 2, 3.

17 See National Native Title Tribunal, *Kowanyama People's native title determination* (2009). At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Multimedia%20and%20determination%20brochures/Determination%20brochure%20Kowanyama%20October%202009.pdf (viewed 29 September 2010).

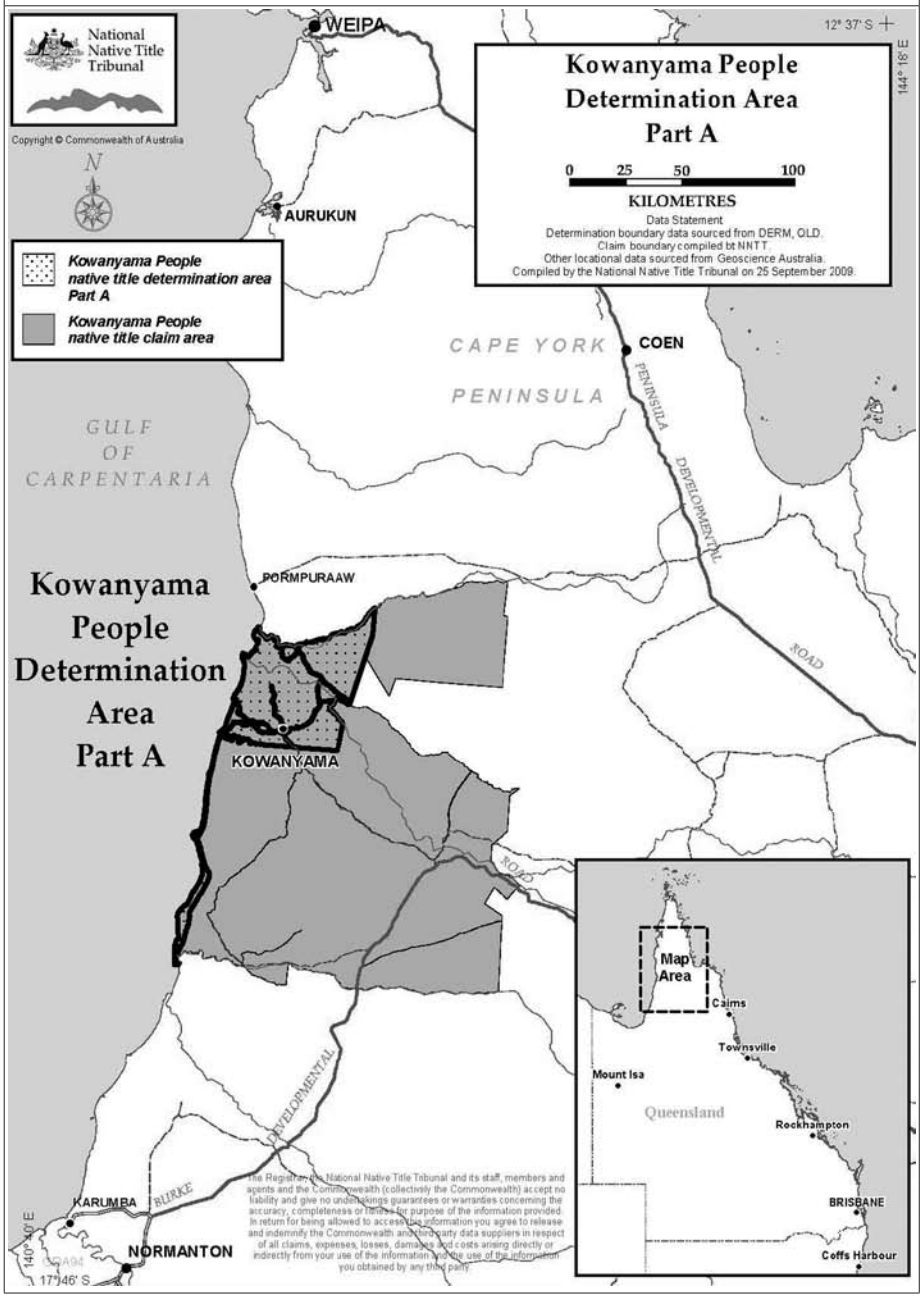
18 National Native Title Tribunal, 'Kowanyama native title determination' (Backgrounder, 22 October 2009). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Documents/2009%20media%20release%20attachments/Kowanyama_background_Oct_2009.pdf (viewed 13 October 2010).

19 The Hon R McClelland MP, Attorney-General, *Remarks at the Kowanyama Native Title Determination* (Speech delivered at the Kowanyama Native Title Determination, Kowanyama, 22 October 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FourthQuarter_22October2009-RemarksattheKowanyamaNativeTitleDetermination (viewed 29 September 2010). See also The Hon R McClelland MP, Attorney-General, and The Hon Craig Wallace MP, Minister for Natural Resources and Water (Qld), 'Joint Communiqué on Native Title' (Media Release, 20 August 2008). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2008_ThirdQuarter_20August2008-JointCommuniqueonNativeTitle (viewed 29 September 2010).

20 National Native Title Tribunal, 'Kowanyama native title recognised for first time' (Media Release, 22 October 2010). At http://www.nntt.gov.au/News-and-Communications/Media-Releases/Pages/Kowanyama_native_title_recognised_for_first_time.aspx (viewed 29 September 2010).

21 M Stinton, Senior Legal Officer, Cape York Land Council, Email to J Hartley, Senior Policy Officer, Social Justice Unit, Australian Human Rights Commission, 14 October 2010 (Attachment).

Map 2.3: Kowanyama consent determination area (Part A)



Text Box 2.3: Noongar Heads of Agreement

On 17 December 2009, the South West Aboriginal Land and Sea Council (SWALSC) and the Western Australian Government signed a Heads of Agreement (HoA) outlining a framework for the resolution of the Noongar People's active native claims.[22]

The HoA was arrived at after a long history of litigation. In September 2006, Justice Wilcox of the Federal Court found in favour of the Noongar People with respect to key issues in their claim over an area in and around Perth.[23] In April 2008, the Full Federal Court allowed appeals by Western Australia, the Commonwealth and the Western Australian Fishing Industry Council against the decision of Justice Wilcox.[24]

The HoA is an important first step towards a final agreement. Importantly, the HoA includes a timetable that proposes that an agreement be signed off by February 2012.

The SWALSC has stated that this 'is an historic opportunity to finally come to terms with the State and to build a new future'.[25] Similarly, Professor Simon Young of the University of Western Australia's Faculty of Law said that:

> This is a chance for Western Australia to step ahead and become something of a model. A successful result in relation to this very important Western Australian claim may well draw other regions into more comprehensive negotiations.[26]

In congratulating the parties on the HoA, the then Social Justice Commissioner Tom Calma stated:

> This commitment by the government to partner with the SWALSC to resolve native title for the Noongar people shows us yet again how crucial partnership, engagement and participation with Aboriginal and Torres Strait Islander peoples is in achieving native title for Australia's First Peoples.[27]

2.3 Reforms to encourage agreement-making

The examples of agreement-making highlighted in section 2.2, above, are encouraging. However, they also illustrate that we are a long way from truly breaking down the adversarial culture within the native title system. For instance, the Noongar Heads of Agreement and the Yawuru agreements came about only after many years of litigation.

I am pleased that the Australian Government has begun to take action to address this problem. Indeed, the Special Rapportuer on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur) has acknowledged the Australian Government's efforts to

22 See generally National Native Title Tribunal, *Agreement begins negotiations*, http://www.nntt.gov.au/Native-Title-In-Australia/Western-Australia/Pages/South-west.aspx (viewed 29 September 2010); South West Aboriginal Land and Sea Council, *Negotiations with the West Australia Government*, http://www.noongar.org.au/talks-government.php (viewed 29 September 2010).

23 *Bennell v Western Australia* (2006) 153 FCR 120.

24 *Bodney v Bennell* (2008) 167 FCR 84.

25 South West Aboriginal Land and Sea Council, 'What's in the package and why should we pursue a settlement?', *Noongar Wangkinyiny*, July 2010, p 4. At http://www.noongar.org.au/images/pdf/newsletters/June2010Newsletterforweb.pdf (viewed 29 September 2010).

26 J McHale, 'A new way forward', *ABC South West WA*, 22 February 2010. At http://www.abc.net.au/news/stories/2010/02/22/2826765.htm?site=southwestwa (viewed 29 September 2010).

27 Australian Human Rights Commission, 'Commissioner welcomes Native Title negotiations for the Noongar people' (Media Release, 18 December 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/131_09.html (viewed 29 September 2010).

> streamline the existing native title procedure and pursue related reforms, such as minimizing the adversarial approach of the native title system to allow for native title negotiations to be carried out in a more flexible manner...[28]

During the Reporting Period, the Attorney-General reiterated the Australian Government's commitment to ensuring 'a more flexible, less legalistic native title approach that delivers practical outcomes'.[29] The Government supported this commitment by providing an additional $50 million in the 2009–2010 Budget 'to build a more efficient native title system that focuses on achieving resolution through agreement-making rather than costly and protracted litigation'.[30]

In general, I welcome government initiatives to remove the obstacles to agreement-making. I believe that the Australian Government took several positive steps in the right direction during the Reporting Period. However, these steps need to be supported by more significant change to the framework of the native title system.

In this section, I analyse a selection of initiatives that have the potential to improve agreement-making in the native title system. These include:

- the *Native Title Amendment Act 2009* (Cth) (Native Title Amendment Act)
- financial support for settlements at a state and territory level
- the adoption of the *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (Best Practice Guidelines) by the Joint Working Group on Indigenous Land Settlements (JWILS)[31]
- proposed amendments to the *Native Title Act 1993* (Cth) (Native Title Act) to enable historical extinguishment to be disregarded in certain circumstances
- grants to support anthropologists working in the native title system
- potential reforms to clarify the requirement to negotiate 'in good faith'.

I am pleased that many of the Australian Government's initiatives to encourage agreement-making are broadly consistent with the recommendations in the *Native Title Report 2009*. I encourage the Australian Government to continue to pursue this reform agenda in 2010–2011.

(a) The *Native Title Amendment Act 2009* (Cth)

The Native Title Amendment Act commenced on 18 September 2009. Among other things, the Native Title Amendment Act amended the Native Title Act to:

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28 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 28. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 29 September 2010).

29 The Hon R McClelland MP, Attorney-General, 'Native Title Reforms Pass Parliament' (Media Release, 14 September 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_ThirdQuarter_14September2009-NativeTitleReformsPassParliament (viewed 29 September 2010).

30 The Hon R McClelland MP, Attorney-General, 'Kowanyama Native Title Determination' (Media Release, 22 October 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FourthQuarter_22October2009-KowanyamaNativeTitleDetermination (viewed 29 September 2010).

31 JWILS consists of representatives of the Attorney-General's Department, the Department of Families, Housing, Community Services and Indigenous Affairs, and state and territory governments. The objective of JWILS is 'to develop innovative policy options for progressing broader and/or regional land settlements that complement the *Native Title Act 1993 (Cth)* and the work of the Federal Court of Australia': Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

- allow the Federal Court to determine whether it, the NNTT or another individual or body, should mediate a claim,[32] which gives the Federal Court 'the central role in managing native title claims'[33]
- enable the Federal Court to rely on an agreed statement of facts between the parties in consent determinations[34]
- provide for the application of recent amendments to the *Evidence Act 1995* (Cth) to native title proceedings that began before 1 January 2009 and where evidence has been heard, if the parties consent or the Federal Court orders that it is in the interests of justice to do so[35]
- empower the Federal Court to make orders to give effect to the terms of an agreement that involve matters other than native title.[36]

In general, I welcome the Government's efforts to foster more timely and flexible negotiated settlements. However, a common perception is that these amendments simply 'tinker at the edges' and that greater reform is needed. For example, Queensland South Native Title Services (QSNTS) submitted that there is

> enormous practical benefits in adopting the agreed statement of facts model … as well as broadening the jurisdiction for determinations to include a … power over non-native title matters, but these changes are very much at the back-end of any process and will not of themselves kindle a native title environment conducive to achieving negotiated outcomes.[37]

I have been informed that the Federal Court, the NNTT and the Attorney-General's Department are monitoring the impact of the amendments. However, it is too soon to assess whether the amendments have promoted the resolution of native title claims and agreement-making.[38]

I encourage the Federal Court, the NNTT and the Attorney-General's Department to continue to monitor and to report on the impact of these amendments. In particular, these monitoring processes should include an examination of whether the amendments:

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32 *Native Title Act 1993* (Cth), s 86B(1).

33 Attorney-General's Department, *Native Title Amendment Act 2009: Information Sheet* (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 29 September 2010).

34 *Native Title Act 1993* (Cth), ss 87(8)–(11), 87A(9)–(12).

35 *Native Title Act 1993* (Cth), s 214. For example, the *Evidence Act 1995* (Cth) (as amended by the *Evidence Amendment Act 2008* (Cth)) now includes exceptions to the hearsay rule regarding evidence of a representation about the existence or non-existence, or the content, of the traditional laws and customs of an Aboriginal or Torres Strait Islander group: *Evidence Act 1995* (Cth), s 72. These amendments are reviewed in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 19–20. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/index.html (viewed 29 September 2010).

36 *Native Title Act 1993* (Cth), ss 87(4)–(7), 87A(5)–(7). Regulations may specify the kinds of matters other than native title that an order of the Federal Court under these provisions may give effect to: ss 87(7), 87A(7). Such regulations had not been made by the end of the Reporting Period.

37 Queensland South Native Title Services, *Submission to the Attorney-General's Department on proposed minor native title amendments* (17 February 2009), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform# (viewed 29 September 2010). See also National Native Title Council, *Submission to the Attorney-General's Department on proposed minor native title amendments* (20 February 2009), pp 1, 2–3. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform# (viewed 29 September 2010); J Creamer, 'We Will Mediate the Gap Closed: 2009 Native Title Amendments' (2010) 7(16) *Indigenous Law Bulletin* 21, p 22.

38 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010; R Hanf, Manager – Strategic Projects and Planning, National Native Title Tribunal, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 9 August 2010.

- have led to the negotiation of broader land settlements
- have affected the resources of native title representative bodies (NTRBs) and native title service providers (NTSPs).

I consider these issues below.

(i) Have the amendments encouraged broader land settlements?

As described above, the Federal Court now has the power to make orders to give effect to the terms of an agreement that involve matters other than native title.

The Attorney-General has stated that the amendments 'will assist with the negotiation of broader native title agreements and provide greater certainty for all stakeholders'.[39] The Australian Government has explained that:

> Broader settlement packages provide land and social justice outcomes beyond answering the question of whether native title exists. Examples of benefits under such settlements include training and employment opportunities, land transfers and co-management of land.[40]

However, it is unclear if the amendments will be sufficient to facilitate the negotiation of broader settlement agreements. Minor amendments, such as those introduced by the Native Title Amendment Act, may not promote agreement-making unless they are accompanied by further reforms to laws, policies, attitudes and behaviours.

For example, the Yamatji Marlpa Aboriginal Corporation (YMAC) has informed me that the amendments have had little impact to date in its region. YMAC reports that, due to the policies of the Western Australian Government, there have been few opportunities to take advantage of the amendments.

For instance, state consent determination guidelines are 'highly onerous' and require Traditional Owners to meet 'a significant evidentiary threshold'.[41] As discussed in the *Native Title Report 2009*, there is a need for governments to encourage more flexible approaches to connection evidence requirements.[42]

(ii) The impact of recent amendments on the disposition of claims

Aboriginal and Torres Strait Islander peoples understand all too well that justice delayed is justice denied. We know that our Elders may not be with us to witness the final outcomes of the native title claims and negotiations that are tangled in bureaucratic and adversarial webs.

I am pleased that the Attorney-General has recognised that:

> On current estimates, it may take another 30 years to resolve all current native title claims. It is a tragedy to see people dying before their peoples' claims are resolved.

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39 The Hon R McClelland MP, Attorney-General, 'Rudd Government Introduces Legislation to Improve the Native Title System' (Media Release, 19 March 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_FirstQuarter_19March2009-RuddGovernmentintroducesLegislationtoimprovetheNativeTitlesystem (viewed 7 October 2010).

40 Human Rights Committee, *Replies to the List of Issues (CCPR/C/AUS/Q/5) to be Taken Up in Connection with the Consideration of the Fifth Periodic Report of the Government of Australia (CCPR/C/AUS/5)*, UN Doc CCPR/C/AUS/Q/5/Add.1 (2009), para 41. At http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm (viewed 7 October 2010).

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

42 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 88–93, 123 (recommendation 3.9). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

> Australia's Indigenous people deserve better, and all participants in the system should strive to achieve that.[43]

As noted above, to support the Australian Government's aim of 'achieving more negotiated native title outcomes in a more timely, effective and efficient fashion', the Native Title Amendment Act gave the Federal Court 'a central role in managing all native title claims, including deciding who mediates a claim'.[44]

During the Reporting Period, the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act) was also amended to provide:

> The overarching purpose of the civil practice and procedure provisions is to facilitate the just resolution of disputes:
>
> (a) according to law; and
>
> (b) as quickly, inexpensively and efficiently as possible.[45]

Justice Reeves of the Federal Court suggests that the amendments to the Native Title Act and the Federal Court Act have together 'created an entirely new environment for native title litigation'.[46]

For example, the Federal Court's National Native Title Registrar has informed me that the Court has 'reviewed its approach to the management of the jurisdiction in order to ensure, to the extent possible, the efficient, effective and just resolution of claims'.[47] Indeed, Kevin Smith, CEO of QSNTS, observes that the Federal Court has adopted a 'very proactive' approach towards the disposition of claims.[48]

This development could be beneficial, particularly if state governments are encouraged to improve their processes and make more concerted efforts to progress negotiations. While noting that it is too early to express an opinion on all the recent reforms, the Goldfields Land and Sea Council has commented that having the Federal Court control the direction of each native title case in a proactive and efficient manner will mean that opportunities for resolution can be more easily identified and pursued.[49]

In general, NTRBs and NTSPs are supportive of the drive to speed up the claims process, and are working cooperatively with the Federal Court to achieve this. However, this inevitably places pressure on already stretched resources and the limited pool of legal and anthropological experts. I encourage the Australian Government to monitor the resourcing implications of these reforms closely.

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43 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3249 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf (viewed 7 October 2010).

44 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 March 2009, p 3249 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr190309.pdf (viewed 7 October 2010).

45 *Federal Court of Australia Act 1976* (Cth), s 37M(1). This amendment was introduced by the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), which commenced on 1 January 2010.

46 Justice J Reeves, *Recent Developments in the Federal Court Following the Amendments to the* Native Title Act (Paper presented to the Native Title: Rights, Obligations and Agreements Conference, Brisbane, 28 May 2010), p 18.

47 L Anderson, National Native Title Registrar, Federal Court of Australia, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 23 September 2010. For further information, see Justice J Reeves, *Recent Developments in the Federal Court Following the Amendments to the* Native Title Act (Paper presented to the Native Title: Rights, Obligations and Agreements Conference, Brisbane, 28 May 2010).

48 K Smith, *"Our old people are dying"; a cry for broader land settlement and social justice not just native title claim disposition* (Speech delivered to the 2nd Annual National Native Title Law Summit, Brisbane, 16 July 2010), p 3.

49 Goldfields Land and Sea Council, 'Information requested for the Native Title Report 2010' (30 September 2010).

I also question whether simply 'speeding up' claims processes will result in just outcomes. These amendments to the Native Title Act do not alter the features of the native title system that tip the scales so heavily in favour of non-Indigenous interests. These features include the onerous burden placed upon Traditional Owners to prove continuity and the devastating impact of extinguishment.

Under such conditions, there is a risk that the Government's focus on more 'timely' settlements may lead to further injustice. As Kevin Smith has stated, '[i]f the system was made fair then by all means expedite the process. But to push claims through the system as it presently stands is grossly unfair'.[50]

Our desire for justice should not be swept aside in the name of efficiency. I am also aware that the human rights problems plaguing the system cannot be rectified by minor, procedural amendments. As I stated in Chapter 1, I consider that there needs to be a comprehensive, independent review of the Native Title Act with a view to aligning it with international human rights standards.

(b) Financial support for settlements

The Australian Government's willingness and ability to support settlements at a state and territory level was a matter of contention during the Reporting Period.

The Australian Government is currently exploring options for the creation of settlement packages, and I am pleased to report that it has committed to provide funding towards the first two settlements under the Victorian Native Title Settlement Framework (Victorian Settlement Framework). However, the Australian, state and territory governments are yet to negotiate a Native Title National Partnership Agreement (NTNPA).

(i) Potential for a Native Title National Partnership Agreement

In 2008, Native Title Ministers agreed to negotiate in good faith on an offer of financial assistance from the Australian Government that could better facilitate the settlement of native title issues by state and territory governments. In its 2008–2009 report, JWILS noted that significant progress had been made towards a draft NTNPA that would provide

> for Commonwealth financial assistance to State and Territory governments to negotiate settlements that result in the full and final resolution of a claim or potential claim, and provide practical benefits to Native Title Claim Groups, for example land acquisition, the buy back of licences and opportunities to co-manage and access land.[51]

At the 2009 Native Title Ministers' Meeting (NTMM),[52] the Australian Government committed to continue to 'explore funding options to underpin a draft native title National Partnership Agreement in the future'.[53]

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50 K Smith, *"Our old people are dying"; a cry for broader land settlement and social justice not just native title claim disposition* (Speech delivered to the 2nd Annual National Native Title Law Summit, Brisbane, 16 July 2010), p 3.

51 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

52 The Native Title Ministers' Meeting comprises of federal, state and territory ministers with native title responsibilities. The meeting is convened by the federal Attorney-General. Meetings were held in 2005, 2006, 2008 and, most recently, on 28 August 2009. See Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

53 Native Title Ministers' Meeting, *Communiqué* (28 August 2009). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Communique_NTMM-28.08.09.pdf/$file/Communique_NTMM-28.08.09.pdf (viewed 7 October 2010).

In April 2010, the Attorney-General's Department also advised the Native Title Consultative Forum (NTCF)[54] that 'the Commonwealth's ability to conclude the draft NTNPA in the short to medium term will be dependent upon the outcomes of the current Federal budget process'.[55] I encourage the Australian Government to make every endeavour to finalise the NTNPA as soon as possible.

(ii) Native Title Settlements Project

The Attorney-General's Department advised the NTCF that, in the absence of an NTNPA, it was 'making significant efforts to identify and improve access to existing programs and resources that could be used to promote flexible and constructive native title outcomes'.[56]

In late 2009, the Attorney-General's Department established the Native Title Settlements Project and appointed a Director of Native Title Settlements to explore opportunities for the Australian Government to encourage broader native title settlement outcomes.[57] The Director met with federal departments to identify and negotiate access to specific resources and programs that may be usefully applied towards settlements.[58]

The Attorney-General's Department reported to the NTCF that it had 'identified a number of potential opportunities as well as areas where there are challenges concerning program access and available resources'.[59] The Department recognises that 'any packaging of Commonwealth resources in settlements will need to be managed on a case-by-case basis'.[60] It has begun to trial this new approach with a small number of specific cases.[61]

I support efforts to create better settlement packages to assist with the resolution of claims. However, I would be concerned if these settlement packages only represent a repackaging of existing services. I also consider that such services should not be provided in lieu of compensation for the use or development of our lands.

(iii) Australian Government support for the Victorian Settlement Framework

A significant question emerged during the Reporting Period as to whether the Australian Government would financially support the Victorian Settlement Framework.

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54 The NTCF consists of representatives from the Attorney-General's Department, FaHCSIA, the Federal Court of Australia, the NNTT, state, territory and local governments, NTRBs and NTSPs, pastoral, fishing, mining and petroleum industries and the Australian Human Rights Commission. For further information, see Attorney-General's Department, *Native title system coordination and consultation*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlesystemcoordinationandconsultation (viewed 7 October 2010).

55 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

56 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

57 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010; The Hon R McClelland MP, Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 20 April 2010.

58 The Hon R McClelland MP, Attorney-General, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 20 April 2010.

59 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

60 Native Title Unit, Attorney-General's Department, *Native Title Consultative Forum: Written Report* (9 April 2010).

61 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

The former Attorney-General of Victoria announced the adoption of the Victorian Settlement Framework on 4 June 2009.[62] The Victorian Settlement Framework 'provides for out of court settlement packages that allow Traditional Owners to settle their land claim directly with the State outside the Federal Court process'.[63]

Following the announcement, the federal Attorney-General described the Victorian Settlement Framework as 'an example of how, by changing behaviours and attitudes, and by resolving native title through settlements that include the provision of practical benefits that we can make native title work better'.[64]

However, in November 2009 the Victorian Traditional Owner Land Justice Group expressed concerned that the Victorian Settlement Framework was 'in jeopardy as a result of disagreement over funding between the State and Commonwealth Governments'.[65]

I am pleased that the Australian Government has now agreed to contribute towards settlement costs for specific settlements under the Victorian Settlement Framework. The federal Attorney-General's Department has informed me that the Commonwealth has committed funding towards the first two settlements under the Victorian Settlement Framework.[66]

The former Attorney-General of Victoria informed me that Victorian Government agencies worked over the Reporting Period to develop the policy and legislative detail required to bring the Victorian Settlement Framework into operation.[67]

I congratulate the State of Victoria and the Traditional Owners of Victoria on this significant achievement. I encourage the Australian Government and the incoming Victorian Government to work together to ensure that the Victorian Settlement Framework is sufficiently funded and successfully implemented. I also encourage

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62 The Hon R Hulls MP, Attorney-General (Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/RobertHulls.pdf (viewed 7 October 2010).

63 Steering Committee for the Development of a Victorian Native Title Settlement Framework, *Report of the Steering Committee for the Development of a Victorian Native Title Settlement Framework*, Department of Justice (Victoria) (2008), p 10. At http://www.justice.vic.gov.au/wps/wcm/connect/1d97d700404a43e5ae77fff5f2791d4a/FINAL+SC+Report+13May09.pdf?MOD=AJPERES (viewed 7 October 2010). See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 47–51. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

64 The Hon R McClelland MP, Attorney-General, *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 5 June 2009). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_SecondQuarter_5June2009-AustralianInstituteofAboriginalandTorresStraitIslanderStudies (viewed 7 October 2010).

65 Victorian Traditional Owner Land Justice Group, 'Traditional Owner Concern Over Native Title Funding' (Media Release, 5 November 2009). At http://www.landjustice.com.au/document/LJG-TRADITIONAL-OWNER-CONCERN-OVER-NATIVE-TITLE-FUNDING.pdf (viewed 7 October 2010). See also The Hon R Hulls MP, Attorney-General (Victoria), 'Commonwealth Abrogating Native Title Responsibility' (Media Release, 5 November 2009). At http://www.premier.vic.gov.au/component/content/article/8637.html (viewed 7 October 2010).

66 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010. Since this correspondence, the first settlement under the Victorian Settlement Framework has been reached. The native title rights of the Gunaikurnai peoples were recognised by the Federal Court in a consent determination on 22 October 2010. The Victorian and Australian governments each contributed $6 million towards the $12 million settlement package. See The Hon R McClelland MP, Attorney-General, and The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Gunaikurnai native title recognition' (Media Release, 22 October 2010). At http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_FourthQuarter_22October2010-GunaikurnainativetitlerecognitionGunaikurnainativetitlerecognition (viewed 22 November 2010).

67 The Hon R Hulls MP, Attorney-General, Victoria, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 September 2010. The Traditional Owner Settlement Act 2010 (Vic) commenced on 23 September 2010.

the Australian Government to work with other states and territories to achieve similar reforms across the country.

(c) Adoption of the *Guidelines for Best Practice Flexible and Sustainable Agreement Making*

In August 2009, the NTMM endorsed the Best Practice Guidelines.[68] These guidelines were developed by JWILS.

(i) What do the Best Practice Guidelines cover?

In a *Communiqué* from their August 2009 meeting, the Native Title Ministers stated:

> The Guidelines provide practical guidance for governments on the behaviours, attitudes and practices that can achieve the efficient resolution of native title, from the early stages of negotiations through to implementation.
>
> The Guidelines emphasise the desirability for government parties to provide broader practical and sustainable benefits attuned to the interests of Indigenous native title claimants.[69]

Among other things, the Best Practice Guidelines encourage government parties to:

- adopt an interest-based approach to negotiations
- negotiate in good faith
- be proactive in providing connection and tenure information early
- consider engaging in regional settlements
- consult effectively to achieve a sustainable agreements
- exercise cultural awareness and sensitivity
- use interpreters and draft agreements in plain English
- consider whether capacity-building is required for Aboriginal and Torres Strait Islander parties to realise fully the potential of sustainable benefits
- recognise the importance of committing to ongoing implementation and review of agreements.

Aspects of the Best Practice Guidelines are broadly consistent with the recommendations for improving the native title system contained in the *Native Title Report 2009*. These include the need for governments to adopt an interest-based approach to negotiations, provide access to tenure information as early as possible, promote regional approaches to agreement-making, and build the capacity of Aboriginal and Torres Strait Islander communities to effectively engage in agreement-making.[70]

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68 Joint Working Group on Indigenous Land Settlements, *Guidelines for Best Practice Flexible and Sustainable Agreement Making* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments (viewed 7 October 2010).

69 Native Title Ministers' Meeting, *Communiqué* (28 August 2009). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~Communique_NTMM-28.08.09.pdf/$file/Communique_NTMM-28.08.09.pdf (viewed 7 October 2010).

70 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 65, 94–96, 112–117. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

(ii) Will the Best Practice Guidelines be effective?

Now that they have adopted the Best Practice Guidelines, governments need to implement them. Otherwise, the Best Practice Guidelines will be little more than empty words.

This sentiment was reflected during the consultations on the draft guidelines that were conducted by JWILS in mid-2009. Many stakeholders noted that guidelines 'would only add value if effectively implemented by governments'.[71] For instance, QSNTS generally supported the draft guidelines as a 'positive step towards a more flexible and less technical approach to agreement making' but stated that 'unless governments are prepared to take certain steps to ensure that the Guidelines are adhered to, then they will be of little or no use'.[72]

YMAC has further commented that the Best Practice Guidelines 'will only have effect if genuine efforts are made by government parties to implement them in everyday practice', and that it had yet to see any tangible outcomes from the commitments made at the NTMM and JWILS.[73]

Indeed, these guidelines may not be sufficient to alter government practices. I share the view of former Social Justice Commissioner, Tom Calma, that the Australian Government should play a leadership role in encouraging states and territories to change their behaviour, including by using its financial position.[74]

This could be achieved through the development of a NTNPA. According to JWILS, a 'key requirement' for federal financial assistance under the draft NTNPA would be that a settlement 'is sustainable over the longer term and contributes to the Council of Australian Governments' (COAG) "Closing the Gap" targets'.[75] In a similar way, the Australian Government could explore options for making the provision of funding to states and territories under the NTNPA conditional on best practice standards in agreement-making – such as those set out in the Best Practice Guidelines – being met.

(d) Proposed amendments to disregard historical extinguishment

On 14 January 2010, the Attorney-General released an exposure draft of proposed amendments to the Native Title Act.[76] These amendments would allow parties to agree to disregard the historical extinguishment of native title in 'areas set aside or vested by a Government law for the purpose of preserving the natural environment

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71 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 1. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

72 Queensland South Native Title Services, *Submission to the Joint Working Group on Indigenous Land Settlements on the Draft Guidelines for Best Practice Flexible and Sustainable Agreement Making* (July 2009), pp 1, 7. At http://www.qsnts.com.au/publications/SubmissiononDraftGuidelinesforBestPracticeFlexibleandSustainableAgreementMaking.pdf (viewed 7 October 2010).

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

74 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 88. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

75 Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), p 2. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILS_Report-to_NTMM.pdf/$file/JWILS_Report-to_NTMM.pdf (viewed 7 October 2010).

76 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 3 (Exposure Draft). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 7 October 2010).

of the area, such as a State or Territory park or reserve'.[77] This amendment is inspired by the reforms proposed by Chief Justice Robert French of the High Court of Australia.[78]

(i) What would be the benefits of this reform?

As stated in the *Native Title Report 2002*, native title can be 'an archaeological site of extinguishment'.[79] The breadth and permanency of extinguishment across Australia entrenches dispossession and disadvantage. It is also contrary to Australia's human rights obligations. Following his visit to Australia in August 2009, the Special Rapporteur observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration)[80] and other international instruments.[81]

Sections 47–47B of the Native Title Act already provide for prior extinguishment in respect of pastoral leases held by native title claimants; reserves; and vacant Crown land to be disregarded in certain circumstances. In the *Native Title Report 2009*, the then Social Justice Commissioner recommended that the Australian Government explore options for extinguishment to be disregarded in a greater number of circumstances.[82]

It is therefore encouraging that the Australian Government has proposed amendments to enable historical extinguishment to be disregarded over an area such as a national, state or territory park.

(ii) Are there any limitations to this reform proposal?

The Attorney-General suggests that this amendment 'could provide opportunities for more claims to be settled by negotiation rather than litigation'.[83]

Under the proposed amendment, extinguishment would be disregarded only if the relevant parties agree to it in writing.[84] The proposed amendment would therefore

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77 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 2 August 2010).

78 Chief Justice R S French, 'Lifting the burden of native title: Some modest proposals for improvement' (2009) 93 *Reform* 10, p 13. At http://www.austlii.edu.au/au/other/alrc/publications/reform/reform93/ (viewed 7 October 2010).

79 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002*, Human Rights and Equal Opportunity Commission (2003), p 68. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport02/index.html (viewed 7 October 2010).

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

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

82 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 110–111, 124 (recommendation 3.18). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

83 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 1. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 2 August 2010).

84 The Hon R McClelland MP, Attorney-General, 'Proposed amendment to enable the historical extinguishment of native title to be disregarded in certain circumstances' (undated), p 3 (Exposure Draft, proposed s 47C(1)(c)). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform#possible (viewed 7 October 2010).

have the most impact where government parties are truly prepared to be flexible and approach claims processes in good faith.

Yet, as the Australian Institute of Aboriginal and Torres Strait Islander Studies observed, it is in the interests of a state to argue for extinguishment so that the land remains under its control, free from encumbrances.[85] This suggests that, unless accompanied by a cultural change within governments, this particular reform may not promote agreement-making. In the absence of such a change, the proposed amendment could be strengthened by removing the requirement that there be an agreement before extinguishment can be disregarded.

(iii) What else could the Australian Government do?

I hope that the Australian Government's proposal is a precursor to further reforms to the Native Title Act. I encourage the Government to work with NTRBs and NTSPs to develop proposals to expand the range of circumstances in which extinguishment can be disregarded.

The proposed reform will not alone be sufficient to address the injustices of extinguishment. I consider that the impact and operation of the law concerning extinguishment should be a significant part of the terms of reference of a comprehensive, independent review of the Native Title Act.

(e) Grants to support anthropologists

To ensure that they receive sustainable outcomes from agreements, Traditional Owners need to be able to access necessary expert advice.

On 28 May 2010, the Attorney-General announced that the Australian Government will invest $1.4 million over three years in a Native Title Anthropologists Grants Program to attract and retain anthropologists within the native title system.[86] On 3 June 2010, the Minister for Indigenous Affairs announced the establishment of a Native Title Research Scholarship Program. The scholarships will support postgraduate study in a field relating to native title, with a focus on anthropology and history.[87] I support these initiatives. They are consistent with the recommendation in the *Native Title Report 2009* that the Australian Government should provide further support for the training and development of experts in native title.[88] I encourage the Australian Government to explore further initiatives in this regard.

(f) Potential reforms to clarify the requirement to negotiate 'in good faith'

Towards the end of the Reporting Period, the Minister for Families, Housing, Community Services and Indigenous Affairs (Minister for Indigenous Affairs) and the Attorney-General announced that the Australian Government would 'progress work

85 Australian Institute for Aboriginal and Torres Strait Islander Studies (AIATSIS), *Submission to the Attorney-General's Department on the Proposed Amendment to Enable the Historical Extinguishment of Native Title to be Disregarded to Certain Circumstances* (undated), p 2. At http://www.aiatsis.gov.au/ntru/docs/publications/submissions/s47.pdf (viewed 7 October 2010).

86 The Hon R McClelland MP, Attorney-General, '$1.4 Million for native title anthropologists' (Media Release, 28 May 2010). At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2010_SecondQuarter_28May2010-$1.4MillionforNativeTitleAnthropologists (viewed 7 October 2010).

87 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 11 January 2010); The Aurora Project, *NTRB Scholarships*, http://www.auroraproject.com.au/NTRB_scholarships.htm (viewed 11 January 2010).

88 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 121–122, 124 (recommendation 3.24). At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

to clarify the meaning of "in good faith" under the right to negotiate provisions' of the Native Title Act.[89]

Such reforms could potentially address some of the disparities in bargaining power that exist under the right to negotiate regime, and place Aboriginal and Torres Strait Islander peoples in a better position to negotiate beneficial agreements.

(i) Why is this reform needed?

Under the Native Title Act, the right to negotiate applies to certain future acts, including the grant of certain mining rights and certain compulsory acquisitions.[90] Section 31(1)(b) of the Native Title Act requires parties to

> negotiate in good faith with a view to obtaining the agreement of each of the native title parties to:
>
> (i) the doing of the act; or
>
> (ii) the doing of the act subject to conditions to be complied with by any of the parties.

A party may apply to an arbitral body for a determination in relation to the act if at least six months have passed since the 'notification day'[91] and the parties have not made an agreement.[92]

In *FMG Pilbara Pty Ltd v Cox* (*FMG*),[93] the Full Federal Court found that the Native Title Act does not require that parties reach a certain stage in negotiations before a party is able to apply for a determination. A future act determination can be made once the prescribed period expires regardless of the stage negotiations have reached, provided those negotiations were conducted in good faith during that period. Nor are parties compelled to negotiate in a particular way or over specified matters.[94]

In the *FMG* decision, this meant that it was not a breach of the requirement to negotiate in good faith for the proponent to apply for a determination when:

- negotiations had reached only a preliminary stage
- the proponent had negotiated on a 'whole of claim' basis rather than specifically about the future act that was the subject of the application to the NNTT.[95]

The Australian Government has observed that:

> This decision has been criticised on the basis that it could enable parties to approach the NNTT for a determination that a particular future act proceed, even if there have been no substantive negotiations about the doing of that act. It has therefore been

89 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 7 October 2010).

90 *Native Title Act 1993* (Cth), s 25(1).

91 The Government party must give notice of the act to certain parties. In this notice, the Government party must specify a day as the 'notification day' for the act: *Native Title Act 1993* (Cth), ss 29(1), (4)(a).

92 *Native Title Act 1993* (Cth), s 35(1).

93 (2009) 175 FCR 141. This decision was profiled in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 31–35. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

94 *FMG Pilbara Pty Ltd v Cox* (2009) 175 FCR 141, 146, 148.

95 That is, negotiation on a 'whole of claim' basis is acceptable so long as it is clear to all parties that a particular tenement (the subject of the section 29 notice) is included in the negotiations.

> suggested that the decision could discourage parties to actively engage in negotiations to reach broad and practical agreements.[96]

The previous Social Justice Commissioner expressed concerns that the Full Federal Court had interpreted the Act 'in ways which unnecessarily strengthened the position of mining companies over native title interests'.[97] The High Court of Australia refused special leave to appeal this decision on 14 October 2009.[98]

YMAC has informed me that:

> The High Court's decision [to refuse special leave to appeal] has the potential to create a situation in which mining companies can avoid their obligation to negotiate in good faith. This could undermine the rights of Traditional Owners and will render the relevant provisions of the NTA redundant.
>
> If Traditional Owners lose this mechanism, the ability to secure benefits for Traditional Owner communities will be greatly diminished, which in turn will undermine efforts to close the gap.[99]

(ii) What are the next steps?

On 3 July 2010, just outside of the Reporting Period, the Minister for Indigenous Affairs and the Attorney-General released the *Leading practice agreements: maximising outcomes from native title benefits* discussion paper (Agreements Discussion Paper).[100] In this discussion paper, the Australian Government stated that it

> has decided to amend the Act to provide clarification for parties on what negotiation in good faith entails and to encourage parties to engage in meaningful discussions about future acts under the right to negotiate provisions.[101]

I am pleased that the Government has indicated a willingness to revisit the requirements for 'good faith' negotiations. As my predecessor observed, 'the obligation on miners to negotiate in good faith … is one of the few legal safeguards that native title parties have under the future act regime'.[102]

In the *Native Title Report 2009*, the Social Justice Commissioner recommended that the Australian Government consider measures to strengthen procedural rights and the future acts regime. In general, I would welcome legislative reform to strengthen the right to negotiate to ensure a more level playing field.

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96 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 14. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

97 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 34. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

98 Transcript of proceedings, *Cox v FMG Pilbara Pty Ltd* [2009] HCATrans 277 (14 October 2009). At http://www.austlii.edu.au/au/other/HCATrans/2009/277.html (viewed 14 October 2010).

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

100 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

101 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 14. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

102 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 34. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 7 October 2010).

In its submission in response to the Agreements Discussion Paper, the Australian Human Rights Commission recommended that the Native Title Act should be amended to include explicit criteria as to what constitutes good faith, and be supplemented by a code or framework to guide parties and the NNTT as to the requirements of good faith negotiation. The Commission further recommended that the Australian Government consider broader options for reforming the right to negotiate regime.[103]

I will closely monitor the progress of these proposals.

2.4 The Native Title Amendment Bill (No 2) 2009 (Cth)

During the Reporting Period, the Attorney-General introduced the Native Title Amendment Bill (No 2) 2009 (Cth) (the Amendment Bill (No 2)) into Parliament.[104]

The purpose of the Amendment Bill (No 2) was to introduce a new future act process into the Native Title Act to 'assist the timely construction of public housing and a limited class of public facilities … for Aboriginal people and Torres Strait Islanders in communities on Indigenous held land'.[105] I analyse the process leading to the introduction of the Amendment Bill (No 2) in Chapter 3.

In the previous section, I considered the steps that the Australian Government has taken to promote negotiations and agreement-making within the native title system. The new future act process appears to be at odds with this approach.

I understand that this reform is aimed at improving the delivery of measures to alleviate the chronic housing shortages in Aboriginal and Torres Strait Islander communities. However, the Native Title Act provides mechanisms for facilitating the construction of housing and infrastructure with the consent of Traditional Owners – that is, through the use of ILUAs.

I believe that the new future act process may encourage governments to circumvent agreement-making processes. This would diminish the ability of Aboriginal and Torres Strait Islander peoples to exercise their rights, including their rights to self-determination; to participate in decision-making; and to determine and develop strategies and priorities for the development or use of their lands or territories and other resources.[106]

(a) Background to the Amendment Bill (No 2)

The states and the Northern Territory are the 'major deliverer[s] of housing for Indigenous people in remote areas of Australia' under the Council of Australian

103 Australian Human Rights Commission, *Submission on the Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010).

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

105 Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), p 2. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

106 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 32(1). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

Governments' $5.5 billion National Partnership Agreement on Remote Indigenous Housing (National Partnership Agreement).[107]

The Australian Government's commitment to provide additional funding for remote Indigenous housing is 'conditional on secure land tenure being settled'.[108] This includes ensuring that governments have 'access to and control of, the land on which construction will proceed for a minimum period of 40 years', and that native title issues have been resolved.[109]

State governments have expressed concerns that native title is 'delaying their ability to provide such housing and infrastructure'.[110] These concerns were said to arise because:

- there is no specific subdivision in the future act regime covering public housing and infrastructure in Indigenous communities
- there is uncertainty about the application of existing future act processes to these types of development[111]
- negotiating ILUAs 'to provide for the non extinguishment principle to apply clearly adds delays to the provision of essential public works to communities'.[112]

(b) Where would the process apply?

The Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) have stated that the process would 'only apply to future acts on land which is held by or for the benefit of Aboriginal

107 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 16(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.rtf (viewed 24 September 2010). See also Department of Families, Housing, Community Services and Indigenous Affairs, *National Partnership Agreement on Remote Indigenous Housing*, http://www.fahcsia.gov.au/sa/indigenous/progserv/housing/Pages/RemoteIndigenousHousing.aspx (viewed 24 September 2010).

108 Council of Australian Governments, *National Partnership Agreement on Remote Indigenous Housing*, cl 15(a). At http://www.coag.gov.au/intergov_agreements/federal_financial_relations/docs/national_partnership/national_partnership_on_remote_indigenous_housing.pdf (viewed 24 September 2010).

109 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, 18 August 2009.

110 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 4. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

111 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

112 Department of Housing (Western Australia), 'Native Title Amendment Bill (No 2) 2009: Commonwealth Request for Information', p 1, Attachment A to the Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

peoples or Torres Strait Islanders'.[113] It would not apply to acts creating or affecting certain 'Aboriginal / Torres Strait Islander land or waters'[114] that are excluded from the definition of a 'future act'.[115] The process is 'most relevant' to Queensland and Western Australia.[116]

(c) What acts would be covered by the process?

The process is designed to cover acts of an 'action body'[117] that permit, require or consist of the construction, operation, use, maintenance or repair of:

- public housing provided for Aboriginal people or Torres Strait Islanders living in, or in the vicinity of, the area
- public education or health facilities, and police or emergency facilities that benefit those people
- certain facilities in connection with the above-mentioned public housing or facilities.[118]

The act would need to be done or commenced within 10 years of the commencement of the amendments.[119] The process would not apply in instances of compulsory acquisition.[120]

(d) Would the process promote agreement-making and relationship-building?

The Attorney-General stated that the Amendment Bill (No 2)

> contains important safeguards to ensure genuine consultation with native title parties.
>
> It sets in place a framework for meaningful engagement with key stakeholders in decisions about housing and other services for Indigenous communities.

113 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 1. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010). Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(b).

114 This includes land or waters held by or for the benefit of Aboriginal peoples or Torres Strait Islanders under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth); *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Lands Trust Act 1966* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Pitjantjatjara Land Rights Act 1981* (SA) or any other law, or part of a law, prescribed for the purposes of the provision in which the expression is used: *Native Title Act 1993* (Cth), s 253.

115 *Native Title Act 1993* (Cth), s 233(3). The scope of the proposed amendment may be even further limited, see Law Council of Australia, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (31 January 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=a94aebeb-0b01-46a1-9129-11ea3903e9ff (viewed 24 September 2010).

116 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 24 September 2010).

117 Defined as the Crown, or a local government body or other statutory authority of the Crown, in any of its capacities: Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(c).

118 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(1)(c), 24JAA(3). The *Native Title Amendment Act (No 1) 2010* (Cth) also covers staff housing.

119 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(d).

120 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(2).

> The new process sets out reasonable and specific periods for comment and consultation, and provides flexibility to allow native title parties to choose the level of engagement they feel is appropriate for each individual project.[121]

An act would be invalid unless, before the act is commenced or done, the action body:

- gives notice of, and an opportunity to comment on, the act to certain native title parties
- provides a report on the things done regarding the requirements to provide notice, an opportunity to comment and, in limited circumstances, to engage in consultation.[122]

The act would also be invalid if it is done or commenced before the end of the 'consultation period'.[123]

The non-extinguishment principle would apply and native title holders may be entitled to compensation.[124] Heritage processes[125] and any processes under the particular land rights legislation or arrangements governing the use of the land[126] would also have to be complied with.

I welcome the Australian Government's emphasis on the importance of 'genuine consultation'. However, for the reasons outlined below, I am unable to agree with the Attorney-General's assessment of the new future act process.

(i) The notice provisions are limited

The action body is to provide notice to any registered native title claimant, Registered Native Title Body Corporate (RNTBC) and any representative Aboriginal / Torres Strait Islander body in relation to the land or waters in the area. The action body must provide notice in the way determined by the Minister by legislative instrument.[127]

The notice must specify a 'notification day', that is, 'a day by which, in the action body's opinion, it is reasonable to assume that all notices … in relation to the act will have been received by, or will otherwise have come to the attention of, the persons who must be notified'.[128]

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121 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 October 2009, p 10468 (The Hon R McClelland MP, Attorney-General). At http://www.aph.gov.au/hansard/reps/dailys/dr211009.pdf (viewed 27 September 2010).

122 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(4), (5).

123 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(6). If no claimant or body corporate requests to be consulted, the consultation period ends two months after the specified notification day. If there is such a request, the consultation period ends four months after the specified notification day: Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(19).

124 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(7), (8).

125 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(1)(e). See also Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), p 5. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

126 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

127 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(10). See Native Title (Notices) Amendment Determination 2010 (No. 1).

128 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(12).

Further, the notice must contain statements to the effect that comments on the act and requests to be consulted must be made within two months of the notification day.[129]

I am concerned that the 'action body's opinion' plays such a pivotal role in determining whether it is reasonable to assume that all notices have been received, or have come to the attention of, the relevant persons. I share the view of the Law Council of Australia that action bodies should be obliged to take reasonable steps to identify and notify all relevant claimants, body corporates or representative bodies, and report those steps to the Minister.[130]

It is also important that the notice be accessible and in a form that is able to be readily understood by Traditional Owners. For example, I consider that the notice should be translated into all relevant languages.

The notice should also provide all relevant details relating to the act. In the context of other future act processes, the Full Federal Court has stated that the obligation to give notice for the purpose of affording an opportunity to comment 'can be fulfilled by the decision-maker providing to the designated recipient only general information'.[131]

Getting this notification process right is crucial. If Traditional Owners do not receive a notice, or if they do not understand the notice or the potential impact of the proposed act, they may miss the limited window of opportunity to comment or request to be consulted about the proposed act.

(ii) The 'opportunity to comment' does not enable Aboriginal and Torres Strait Islander peoples to participate genuinely in decision-making processes

The action body must give registered native title claimants, RNTBCs and any representative Aboriginal / Torres Strait Islander body in relation to the land or waters, an opportunity to comment on the act. Comments on the act must be made within two months of the notification day.[132]

This procedure does not allow Aboriginal and Torres Strait Islander peoples to participate genuinely in decision-making processes. As a previous Social Justice Commissioner observed, 'the "opportunity to comment" process places effectively no restrictions at all upon the manner or outcome of the decision-making process'.[133]

The Full Federal Court has found that the 'opportunity to comment' provides only 'a right to proffer information and argument to the decision-maker that it can make such use of as it considers appropriate'.[134] There is no right to participate in decision-making or to seek information from the decision-maker. It is entirely up to the decision-maker 'whether the comment should cause it to change or modify its decision'.[135] As the Western Desert Lands Aboriginal Corporation (Jamakurnu-

129 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(11).

130 Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (23 December 2009), para 25. At http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=91A681EE-1E4F-17FA-D2CF-53E8735AAECF&siteName=lca (viewed 27 September 2010).

131 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 73.

132 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(10), (11).

133 W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2001), p 153. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport00/index.html (viewed 28 June 2010).

134 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 71.

135 *Harris v Great Barrier Reef Marine Park Authority* (2000) 98 FCR 60, 74.

Yapalinkunu) RNTBC observes, this procedural right 'does not and will not result in meaningful participation of native title parties'.[136]

(iii) Consultation requirements may not be stringent

A registered native title claimant or RNTBC would be entitled to be consulted if, within two months of the notification day, they request to be consulted.[137] The right to request consultation does not extend to representative bodies or to Traditional Owners that have not achieved registration.[138]

If such a request is made, the action body must consult:

- about ways of minimising the act's impact on registered native title rights and interests in relation to land or waters in the area
- if relevant, about any access to the land or waters
- if relevant, about the way in which anything authorised by the act might be done.[139]

I am concerned that this process would place the onus upon under-resourced Traditional Owners and RNTBCs to assess the proposed act, and request to be consulted, within a short timeframe.

Further, the consultation timeframe is short. The maximum 'consultation period' is four months from the notification day.[140] During this time, Traditional Owners and RNTBCs that wish to be consulted would have to assess the notice (assuming they receive it), request to be consulted, ascertain the views of Traditional Owners and engage in consultations with the action body. This may not be sufficient time for genuine consultations to take place.

While I do not support the introduction of a new future act process, in general I welcome that, in consulting with a claimant or RNTBC, the action body would need to comply with any requirements determined by the Minister by legislative instrument.[141] I consider that any consultation requirements should be developed in partnership with Aboriginal and Torres Strait Islander peoples. I consider the elements of effective engagement in Chapter 3.

The Explanatory Memorandum to the Amendment Bill (No 2) indicates that the legislative instrument

> may, for example, require the action body to hold one or more face-to-face meeting with native title claimants or body corporate who have requested consultation, provide translators during consultation, or address issues of the design, location and nature of the proposed act. The Commonwealth Minister will be able to refine these requirements

136 T Wright, Acting CEO, Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC, Correspondence to C Edwards, Manager – Land Reform Branch, Department of Families, Housing, Community Services and Indigenous Affairs, 4 September 2009. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform (viewed 28 September 2010).

137 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed ss 24JAA(11)(b), (13), (14).

138 For concerns about this limitation, see NTSCORP, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (27 November 2009), para 30. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e8cbcf54-d770-497a-b3fc-9b86884627be (viewed 28 September 2010).

139 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(14).

140 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(19).

141 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(15).

> in light of the experiences of action bodies and native title parties over time and having regard to differing projects and community circumstances.[142]

Encouragingly, the Attorney-General's Department and FaHCSIA state that:

> The concept of 'consulting' has an established meaning. It is insufficient to simply 'go through the motions', and a proponent who failed to seriously engage or to consider information and arguments put forward would not in fact be 'consulting'.[143]

(iv) Action bodies may not be held accountable

I welcome that an action body must provide a written report to the Minister on the things it has done with respect to the procedural steps outlined above.[144] However, I am concerned that the Amendment Bill (No 2) does not require the Minister to publish these reports.

Further, Traditional Owners may not have the opportunity to challenge the action body's report or put forward their views on the adequacy of consultation. Similarly, the Torres Strait Regional Authority expressed concern that the Amendment Bill (No 2) denies native title holders 'the opportunity to confirm whether the information provided was appropriate, sufficient and easily understood'.[145]

(v) There are no guarantees that the process would be used as a measure of last resort

The Attorney-General's Department and FaHCSIA have stated that:

> The existing Indigenous Land Use Agreements (ILUA) provisions would remain as an option for future acts otherwise covered by the new process. However, the new process would be available in circumstances where the timely negotiation and registration of an ILUA is not possible or timely.[146]

Certainly, the new future act process does not restrict the ability of parties to enter into ILUAs. However, it does not encourage agreement-making. There are no safeguards to ensure that the process would be used only as a measure of last resort. Indeed, as stated by one NTRB:

> The Bill creates an incentive for Governments to avoid trying to reach an agreement with Aboriginal people in favour of the simpler option of overriding their legal rights and interests.[147]

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142 Explanatory Memorandum, Native Title Amendment Bill (No 2) 2009 (Cth), para 1.14. At http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr4230%22 (viewed 28 September 2010).

143 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 3. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

144 Native Title Amendment Bill (No 2) 2009 (Cth), sch 1, item 3, proposed s 24JAA(16).

145 Torres Strait Regional Authority, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (21 December 2009). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=10e5d762-ea65-470f-9e9b-7adaeb4b4ce2 (viewed 28 September 2010).

146 Attorney-General's Department and Department of Families, Housing, Community Services, and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 28 September 2010).

147 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 32. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 28 September 2010).

Indeed, President Neate of the NNTT has observed that:

> If the Bill is passed, the amendments might result in fewer ILUAs being negotiated, given that the cost and delay of negotiating area agreement ILUAs for these purposes, particularly in Queensland and Western Australia, was said to be one reason for the proposed amendments.[148]

NTRBs submitted that the new process may even jeopardise negotiations that are currently under way, and reduce goodwill among the parties to negotiate broader settlements.[149] I am concerned that this would detract from efforts to rebuild the relationships between governments and Aboriginal and Torres Strait Islander peoples.

(e) Governments should address the real barriers to agreement-making

I welcome the Australian Government's commitment to overcoming disadvantage in Aboriginal and Torres Strait Islander communities, including through addressing chronic housing shortages. However, this objective can best be pursued by working in partnership with Aboriginal and Torres Strait Islander peoples to solve problems, rather than by implementing a new future act process.

Native title is not the reason for the deplorable state of infrastructure and housing that exists in many Aboriginal and Torres Strait Islander communities. Yet, if it is concerned that delays in agreement-making processes have impeded the construction of public housing and infrastructure, the Australian Government should confront the reasons behind any such delays.

The Western Australian Department of Housing has stated that the negotiation of ILUAs delays the provision of essential public works, for reasons including:

- the resourcing of NTRBs
- that the expectations of Traditional Owners may differ from community expectations
- the time, resourcing and workload issues faced by Prescribed Bodies Corporate (PBCs)
- the costs and the legal nature of negotiations under the Native Title Act.[150]

The new future act process will not solve these fundamental problems. For instance, it will not resolve conflicting community expectations. If anything, the construction of public housing and infrastructure by governments without the agreement of Traditional Owners could exacerbate community disputes.

Nor will a new future act process address the chronic underfunding of NTRBs, NTSPs and PBCs.

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148 National Native Title Tribunal, *Annual Report 2009–10* (2010), p 13. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20report%202009%20-%202010.pdf (viewed 13 October 2010).

149 See, for example, National Native Title Council, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (11 November 2009). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=80a8d226-856e-4a3b-8c07-bb6aeb08135c (viewed 28 September 2010).

150 Department of Housing (Western Australia), 'Native Title Amendment Bill (No 2) 2009: Commonwealth Request for Information', Attachment A to Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010). At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 28 September 2010).

Ultimately, it is by no means clear that options for improving agreement-making processes have been exhausted such that the new future act process is necessary. For example, NTRBs and NTSPs have proposed that template ILUAs be developed in order to facilitate agreement-making.[151] This worthy initiative could reduce the costs associated with agreement-making and create goodwill. I encourage governments to work with NTRBs and NTSPs to progress template ILUAs to support the timely negotiation of agreements.

2.5 Future reforms: maximising outcomes from native title benefits?

During the Reporting Period, the Australian Government signalled an intention to focus future reform efforts on ensuring the sustainability of agreements and improving the governance of native title entities that receive native title payments.

This issue had also been on the Government's agenda in previous years. In 2008, the Government convened a Native Title Payments Working Group (Working Group) to recommend 'leading policy and practice to optimise financial and non-financial benefits from resource agreements'.[152] In December 2008, the Government released a discussion paper on 'optimising benefits from native title agreement-making'.[153]

During the Reporting Period, the Government progressed its work in this area through JWILS. It also foreshadowed a public consultation process on measures to promote 'leading practice principles'.[154]

(a) Activities of JWILS

The management of native title benefits was a central component of the 2009–2010 terms of reference of JWILS. These terms of reference focus on:

- supporting and building the capacity of PBCs to effectively manage benefits
- designing culturally appropriate and effective governance structures to manage benefits, including cross-generational benefits

151 See, for example, Queensland South Native Title Services, *Submission on the Possible Housing and Infrastructure Native Title Amendments Discussion Paper* (September 2009), p 8. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Queensland+South+native+Title+Services+-+Submission.pdf/$file/Queensland+South+native+Title+Services+-+Submission.pdf (viewed 29 September 2010).

152 See Native Title Payments Working Group, *Report* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Working+Group+report+-+final+version.DOC/$file/Working+Group+report+-+final+version.DOC (viewed 29 September 2010).

153 Australian Government, *Australian Government Discussion Paper* (undated). At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Discussion+paper+-+final+version.DOC/$file/Discussion+paper+-+final+version.DOC (viewed 28 September 2010).

154 This consultation process began with the release of the Agreements Discussion Paper on 3 July 2010, but was suspended in accordance with caretaker conventions when the federal election was called later that month. The process recommended in October 2010. Submissions closed 30 November 2010. See Attorney-General's Department, *Native title reform*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 29 November 2010).

- maximising economic development, leadership and governance opportunities.[155]

On 8 April 2010, JWILS convened a workshop on sustainable benefits management in native title settlements. The results of this workshop will assist JWILS to develop recommendations against its terms of reference.[156]

(b) The Agreements Discussion Paper

Towards the end of the Reporting Period, the Minister for Indigenous Affairs and the Attorney-General announced that the Australian Government would release a discussion paper which would 'outline a package of reforms to promote leading practice in native title agreements and the governance of native payments'.[157] The Agreements Discussion Paper was released on 3 July 2010.[158]

In addition to the options for clarifying the good faith negotiation requirements under the Native Title Act (see section 2.3, above), the Agreements Discussion Paper included options to:

- encourage entities that receive native title payments to adopt measures to strengthen their governance
- create a new statutory function to review native title agreements, with the objective of improving the sustainability of these agreements
- streamline ILUA processes.

The Agreements Discussion Paper includes a proposal for a new 'statutory review function'.[159] 'Future act' agreements would be required to be registered with a review body. This body could be responsible for:

- receiving and reviewing native title agreements and maintaining a confidential register of those agreements
- assessing some native title agreements against leading practice principles
- advising and assisting parties to implement leading practice in native title agreements

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155 'Joint Working Group on Indigenous Land Settlements: Terms of Reference 2009–10' in Joint Working Group on Indigenous Land Settlements, *2008–09 Report: Native Title Ministers' Meeting* (undated), Attachment A. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3273BD3F76A7A5DEDAE36942A54D7D90)~JWILSTermsofReference_post-settlement_project_2009.pdf/$file/JWILSTermsofReference_post-settlement_project_2009.pdf (viewed 28 September 2010). The terms of reference of JWILS were endorsed at the Native Title Ministers' Meeting in August 2009: Attorney-General's Department, *Consultation with State and Territory Governments*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Consultationwithstateandterritorygovernments#4 (viewed 7 October 2010).

156 The executive summary of the workshop was released for comment in July 2010. See Joint Working Group on Indigenous Land Settlements, *Governance Workshop: Sustainable Benefits Management in Native Title Settlements: Consultation Process* (2010).

157 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, 'Supporting stronger governance in Indigenous native title corporations' (Media Release, 3 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/native_title_corp_030610.aspx (viewed 29 September 2010).

158 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010). At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010).

159 For criticism of this proposal see, for example, 'Native title reforms labelled racist, paternalistic', *The World Today*, 5 July 2010. At http://www.abc.net.au/worldtoday/content/2010/s2944814.htm (viewed 28 September 2010).

- research and communication to develop and promote leading practice in agreement-making
- reporting on trends and issues via an annual report tabled in Parliament
- advising relevant Ministers, including where parties are not prepared to adopt leading practice principles, or in relation to measures to further assist parties to native title agreements
- assessing access to tax benefits for financial benefit packages paid under the agreements.[160]

The Australian Government suggests that certain governance measures and leading practice principles could be mandated. Alternatively, favourable tax treatment could be conditional on the adoption of these measures and principles.[161]

I recognise the importance of government support to assist native title groups to negotiate beneficial agreements and develop robust governance structures. However, I consider that such support should focus on capacity development, rather than on increased regulation, review or assessment.

Without access to adequate financial resources and expert advice, Aboriginal and Torres Strait Islander peoples are unlikely to be able to enter into 'sustainable' agreements, enforce the implementation of such agreements or develop effective governance structures.

I consider that the Australian Government has not adequately demonstrated the need for a new statutory review function. I also believe that the statutory function will do little to empower Aboriginal and Torres Strait Islander peoples and their representatives to negotiate beneficial agreements. Further, as elaborated in the Australian Human Rights Commission's submission in response to the Agreements Discussion Paper, the potential elements of the review function are problematic and should be reconsidered.[162]

I urge the Australian Government not to proceed with any reforms without consulting and cooperating with Aboriginal and Torres Strait Islander peoples in order to obtain our free, prior and informed consent, consistent with article 19 of the Declaration.

I emphasise that any reform should be guided by the minimum standards affirmed in the Declaration. These include our rights to:

- self-determination
- participate in decision-making in matters which would affect our rights

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160 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), pp 8-9. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 28 September 2010).

161 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon R McClelland MP, Attorney-General, *Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (2010), p 7. At http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlereform (viewed 7 October 2010). On 18 May 2010, the Treasury released a consultation paper in which it outlined options to improve the relationship between the taxation and the native title systems. See Australian Government, *Native Title, Indigenous Economic Development and Tax* (2010). At http://www.treasury.gov.au/documents/1809/RTF/Consultation_Paper_Native_Title_IED_and_Tax.rtf (viewed 7 October 2010). Consultations were suspended in accordance with caretaker conventions when the federal election was called. The process recommended in October 2010. Submissions closed 30 November 2010.

162 Australian Human Rights Commission, *Submission on the Discussion Paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010).

- determine and develop priorities and strategies for the development or use of our lands, territories and resources.[163]

I will continue to monitor the progress of the Agreements Discussion Paper, and any related reforms, during the 2010–2011 reporting period.

2.6 Conclusion

I commend the Australian Government for its actions during the Reporting Period to promote and facilitate agreement-making. These are important first steps towards transforming the culture of the native title system and building better relationships with Aboriginal and Torres Strait Islander peoples.

However, the Government needs to commit to a more substantial reform agenda if it truly wants the system to change.

I understand the Government's concern to ensure that agreements are beneficial and sustainable. However, 'good' agreements will remain the exception rather than the rule while the system is so heavily weighted against the interests of Aboriginal and Torres Strait Islander peoples.

However, it is not good enough for governments to deal with perceived problems by imposing further layers of unwanted regulation, just as it is not enough for governments to deal with complex problems by offering piecemeal solutions. Nor is it acceptable for the Australian Government to introduce further incursions into our rights by expanding the future act regime, effectively reducing our ability to negotiate agreements.

I encourage the Australian Government to build on its reforms designed to improve agreement-making, but to do so in a way that fully respects our rights.

Recommendations

2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of:

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

163 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 3, 18, 32. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 28 September 2010).

2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure.

2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making.

2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011.

2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the *Native Title Amendment Act (No 1) 2010* (Cth)) as a measure of last resort.

2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the *Native Title Amendment Act (No 1) 2010* (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.

2.7 That the Australian Government:

- consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples
- provide a clear, evidence-based policy justification

before introducing reforms that are designed to ensure the 'sustainability' of native title agreements.

2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes.

Chapter 3:
Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement

3.1 Introduction

On 3 April 2009, the Minister for Families, Housing, Community Services and Indigenous Affairs (Minister for Indigenous Affairs) delivered a formal statement in support of the *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration).[1] In this statement, the Minister acknowledged that '[w]e need to find more ways of hearing Indigenous voices'.[2]

This acknowledgement was long overdue.

There is an urgent need for governments to improve their approach to engaging with Aboriginal and Torres Strait Islander peoples. As the New South Wales Aboriginal Land Council (NSWALC) has observed:

> Government processes for engagement barely reach a threshold that could be appropriately characterised as consultative in nature. It is even rarer for Government engagement processes to reach a threshold that could be described as involving negotiation with Indigenous peoples, or involving the free, prior and informed consent of Indigenous peoples.[3]

Over the years, the failures of governments to engage with us effectively have been the subject of international scrutiny. International human rights bodies have repeatedly called upon Australia to consult with us adequately before adopting laws and policies that affect our right to our lands, territories and resources.

For example, the Committee on the Elimination of Racial Discrimination (CERD) recommended in 2005 that Australia 'make every effort to seek

1 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 29 September 2009).

2 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Statement on the United Nations Declaration on the Rights of Indigenous Peoples* (Speech delivered at Parliament House, Canberra, 3 April 2009). At http://www.jennymacklin.fahcsia.gov.au/statements/Pages/un_declaration_03apr09.aspx (viewed 29 September 2010).

3 D Lee, Intervention on behalf of the New South Wales Aboriginal Land Council to the Expert Mechanism on the Rights of Indigenous Peoples, 3rd session, agenda item 3 (12 July 2010). At http://www.docip.org/gsdl/collect/cendocdo/index/assoc/HASH0100/5b640305.dir/EM10david012.pdf (viewed 29 September 2010).

the informed consent of indigenous peoples before adopting decisions relating to their rights to land'.[4]

In 2010, CERD again encouraged Australia to 'reset the relationship with Aboriginal people based on genuine consultation, engagement and partnership', and recommended that Australia 'enhance adequate mechanisms for effective consultation with indigenous peoples around all policies affecting their lives and resources'.[5]

In this Chapter, I examine how the Australian Government could improve its consultation processes in relation to measures that affect our rights to our lands, territories and resources.

Specifically, I explore the practical steps that governments can take to ensure that consultation processes are meaningful and effective. I also analyse the relevance of consultation and consent to the design and implementation of 'special measures' under the *Racial Discrimination Act 1975* (Cth) (RDA).

Finally, I analyse the consultation processes in relation to:

- the Native Title Amendment Bill (No 2) 2009 (Cth)
- the amendments to the provisions of the *Northern Territory National Emergency Response Act 2007* (Cth) concerning the power of the Government to compulsorily acquire five-year leases over certain land.

I argue that the consultation processes concerning these measures were inadequate in several key respects. Further, the inadequacy of the consultation processes calls into question whether these measures can properly be regarded as special measures under the *Racial Discrimination Act 1975* (Cth).

In summary, I am pleased that the Australian Government is committed to ensuring that the principle of 'strong engagement with Indigenous people … underpins all our Indigenous policies and the implementation of programs'.[6] However, events during the Reporting Period have demonstrated that there is much room for improvement in the Government's approach to engaging with Aboriginal and Torres Strait Islander peoples.

3.2 What are the features of a meaningful and effective consultation process?

As I discuss in Chapter 1, Aboriginal and Torres Strait Islander peoples have the right to participate in decision-making in matters that affect our rights. Governments are under a duty to consult 'whenever a State decision may affect indigenous peoples in ways not felt by others in society', even if our rights have not been recognised in domestic law.[7] This duty requires governments to consult effectively with us before adopting or implementing measures that may affect our rights.

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4 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At http://www2.ohchr.org/english/bodies/cerd/cerds66.htm (viewed 29 September 2010).

5 Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), paras 16, 18.

6 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, *Budget 2010–11: Closing the Gap Between Indigenous and Non-Indigenous Australians* (Statement, 11 May 2010). At http://www.fahcsia.gov.au/about/publicationsarticles/corp/BudgetPAES/budget10_11/Documents/indig_statement.htm (viewed 29 September 2010).

7 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 43–44. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

I am concerned that governments do not fully understand what genuine and effective consultation looks like. Until this issue is addressed, governments will continue to impose laws and policies upon us in order to 'solve' our problems.

In a recent study on the duty to consult, the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people (Special Rapporteur) considered that the objective of consultations 'should be to obtain the consent or agreement of the indigenous peoples concerned'.[8]

He further considered that the 'strength or importance' of this objective will vary 'according to the circumstances and the indigenous interests involved'.[9] In some cases, a State will be required to obtain the free, prior and informed consent of the affected Indigenous peoples before proceeding with a proposed measure.[10] I consider this further in section 3.3, below.

Yet, in all cases, States should engage in '[a] good faith effort towards consensual decision-making'.[11] Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.[12]

This leads me to ask – what would a meaningful and effective consultation process look like?

The key features of the duty to consult and the standard of free, prior and informed consent have been set out in several international and domestic studies.[13] For example the United Nations Permanent Forum on Indigenous Issues (UNPFII) convened an

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8 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

9 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

10 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010). For example, free, prior and informed consent must be obtained when the measure involves relocating indigenous peoples from their lands or territories; or the storage or disposal of hazardous materials in the lands or territories of indigenous peoples: *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), arts 10, 29(2). At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 29 September 2010).

11 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 50. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

12 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 48. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

13 For recent studies, see, for example, United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), para 46. At http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html (viewed 29 September 2010); J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009). At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010); Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010). At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 29 September 2010). See also T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), Appendix 3. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 29 September 2010).

international workshop on 'free, prior and informed consent' in 2005. In Appendix 3, I have extracted a list of the 'elements of a common understanding of free, prior and informed consent' that was developed at this workshop.

In this section, I build upon these studies to elaborate the key features of a meaningful and effective consultation process. In undertaking research for this section, I have asked Native Title Representative Bodies (NTRBs), Native Title Service Providers (NTSPs) and Prescribed Bodies Corporate (PBCs) to consider what to them would constitute a meaningful and effective consultation process. I have also considered the views of NTRBs, NTSPs and other Aboriginal and Torres Strait Islander peoples' organisations as expressed in their submissions to recent public inquiries and international processes.

Based on the perspectives and experiences of these organisations, and informed by international standards, I consider that at minimum:

- consultation processes should be products of consensus
- consultations should be in the nature of negotiations
- consultations need to begin early and should, where necessary, be ongoing
- Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance
- Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision
- adequate timeframes should be built into consultation processes
- consultation processes should be coordinated across government departments
- consultation processes need to reach the affected communities
- consultation processes need to respect Aboriginal and Torres Strait Islander representative and decision-making structures
- governments must provide all relevant information and do so in an accessible way.

I describe these features in turn below. In doing so, I am aware that a rigid consultation 'checklist' would not be conducive to relationship-building or to effective consultation. Nor would it be consistent with the right of Indigenous peoples to self-determination. Further, as the Expert Mechanism on the Rights of Indigenous Peoples (EMRIP) emphasises, the Declaration 'requires "effective" participation, not pro forma consultations, the goal of which is to obtain the free, prior and informed consent of indigenous peoples'.[14]

I therefore do not advocate a 'one-size-fits-all' model of consultation. However, I consider that the features set out below can be used to guide the development of appropriate processes on a case-by-case basis.

(a) Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on Indigenous

14 Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), para 89. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 29 September 2010).

peoples.[15] Indeed, the Special Rapporteur emphasises that a consultation procedure should itself be the product of consensus. This can help ensure that the procedure is effective.[16]

Similarly, the Cape York Land Council (CYLC) lists 'an agreed structure for the consultation process' as one of the essential features of an adequate and effective consultation process.[17]

I believe that this principle should underpin any government efforts to engage with Aboriginal and Torres Strait Islander peoples. Before commencing consultations, governments should work with the affected peoples to determine the appropriate nature and level of consultations, and to agree upon a process.

(b) Consultations should be in the nature of negotiations

Too often, government 'consultations' do not allow us to genuinely participate in decision-making in matters that may affect our lands, territories and resources.

For example, the Carpentaria Land Council Aboriginal Corporation (CLCAC) has expressed its concern that:

> The so-called consultation that occurs is often merely a cloak to conceal that decisions have already been made by Government agencies without taking any Aboriginal input into account. It is not unusual for Government departments to hold meetings, relied upon as 'consultation', which are in effect only information sessions with Aboriginal people.[18]

To engage in genuine consultation, governments need to do more than provide information about measures that they have developed on our behalf and without our input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.

As NSWALC submitted to the UNPFII, '[g]enuine and effective consultation does not just involve discussion; it requires active and informed participation in the decision making process'.[19]

Accordingly, I consider that the requirement to consult must reflect, in a practical sense, a requirement to negotiate.

This will require a shift in the way that governments approach consultations. As the CYLC identifies, there needs to be '[f]lexibility in government policies and procedures to ensure that internal processes allow for practical negotiation'.[20]

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15 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 45. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

16 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), paras 51, 68. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

17 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

18 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.9. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010)

19 New South Wales Aboriginal Land Council, *The Northern Territory Intervention: Compliance with the UN Declaration on the Rights of Indigenous Peoples: Submission to the United Nations Permanent Forum on Indigenous Issues*, *Ninth Session, 19–30 April 2010* (2010), p 17. This report was prepared by Ben Schokman for the New South Wales Aboriginal Land Council.

20 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

Governments need to be willing and flexible enough to accommodate our concerns, and work with us in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on our rights and that the affected peoples do not agree to the measure.

At the very least, governments need to commit 'to carefully consider the views expressed and comments made, and to use their best endeavours to incorporate those views into the final product'.[21]

In this way, governments can ensure that consultation processes are more 'in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures'[22] than the information sessions to which we have become accustomed.

(c) Consultations need to begin early and should, where necessary, be ongoing

Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

This does not always occur. As the CLCAC explains:

> Rather than go to native title holders and their representatives to develop proposals upfront, the project is developed, consultants retained, contracts entered to, and then, when the project is about to commence the native title process commences. This has the inevitable consequence that the native title holders are only provided with input into a proposal at a point where it is essentially concluded. This makes any consultation a farce and makes consultations subject to strict timeframes coupled with the pressure of cost blow-outs …[23]

Early consultation can prevent problems from occurring 'down the track'. As the Torres Strait Regional Authority (TSRA) states, '[e]arly undertaking of consultative processes can facilitate accurate identification of traditional landholdings and the resolution of community disputes, should they arise'.[24]

Early engagement also creates the opportunity for long-term, positive relationships to grow. This is important because our right to participate in decision-making imposes ongoing obligations upon governments. For example, if a proposal changes, affected peoples should again be consulted in order to obtain their free, prior and informed consent. Additionally, one NTSP has emphasised that '[o]utcomes from consultations should also provide for future/renewed consultations where necessary'.[25]

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21 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

22 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (15 July 2009), para 46. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 29 September 2010).

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

24 J T Kris, Chairperson, Torres Strait Regional Authority, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 10 August 2010.

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

(d) Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance

The Declaration affirms:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.[26]

Such assistance is, in many instances, essential to ensure that we are able to enjoy our right to participate in decision-making. The UNPFII has even suggested that the

> principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity.[27]

The capacity of our communities to engage in consultative processes can be hindered by our lack of resources. Even the most well-intentioned consultation procedure will fail if we are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to our communities or access appropriate expert advice, we cannot possibly be expected to consent to or comment on any proposal in a fully informed manner.

As the CYLC highlights, governments need to provide 'adequate resources to ensure that those people potentially affected are given the opportunity to be directly involved'.[28]

As I discussed in Chapter 1, problems relating to the lack of capacity of Traditional Owners and their representatives exist throughout the native title system. The problem is particularly acute for PBCs, who are required to consult with, and obtain the consent of, common law native title holders before making a 'native title decision'.[29]

Although they are the 'statutory interface between the proponents of future acts and the native title holders … [n]o resources are provided to enable PBCs to canvas issues with native title holders'.[30] This can create barriers to the effective discharge of a PBC's statutory obligations.

I therefore consider it important that governments or proponents provide Aboriginal and Torres Strait Islander peoples with adequate resources to enable them to participate effectively in consultation processes.

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26 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 30 September 2010).

27 United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 30 September 2010).

28 Cape York Land Council, 'Information requested for the *Native Title Report 2010*' (10 October 2010).

29 Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth), reg 8(2). As defined in reg 8(1), a 'native title decision' means a decision to:

- surrender native title rights and interests in relation to land or waters or
- do, or agree to do, any other act that would affect the native title rights or interests of the common law holders.

30 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.10. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

(e) Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision

Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain our consent.[31]

As the CLCAC has stated '[c]onsultation does not occur … where Aboriginal people are pressured to decide an issue a particular way under threat of a negative impact or sanctions'.[32] It is therefore unacceptable for governments to adopt a 'take it or leave it' approach to consultations.

In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes. For example, genuine consultation cannot occur when Aboriginal and Torres Strait Islander peoples are told 'if you don't decide now, you'll miss out'.

(f) Adequate timeframes should be built into the consultation process

Native title is a notoriously complex and legalistic regime. However, Aboriginal and Torres Strait Islander peoples are frequently faced with unreasonably short deadlines for commenting on discussion papers and draft legislation.[33]

Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, we may not be able to respond to such proposals in a fully informed manner.

Consultation timelines need to be 'inclusive of Aboriginal community internal processes and respect … community protocols and cultural practice'.[34] As the Yamatji Marpla Aboriginal Corporation (YMAC) emphasised to me, NTRBs and NTSPs need to consult with Traditional Owners before providing submissions to government processes on their behalf.[35] Governments need to take this into account when designing consultation processes.

Further, the Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC has submitted that native title parties require adequate time to:

- obtain third party advice if necessary or desired
- inform, discuss and consult with other members of the native title party

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31 United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), para 46. At http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html (viewed 30 September 2010).

32 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.11. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

33 See, for example, the consultation processes concerning the Native Title Amendment Bill (No 2) 2009 (Cth). I examine these processes in section 3.4, below.

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

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

- translate or develop information into culturally appropriate forms for members of the native title party so as to allow genuine discussions and informed consent.[36]

(g) Consultation processes should be coordinated across government departments

Consultation processes should be coordinated in order to ease the 'consultation burden' that is caused by multiple discussion papers and reform proposals.

YMAC suggests that:

> Government departments and agencies need to plan their consultation processes to ensure they are not duplicating others running concurrently and/or creating competing deadlines.[37]

To achieve this, I believe that governments should adopt a 'whole of government' approach to native title reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies.

(h) Consultation processes need to reach the affected communities

For a consultation process to be genuine, it needs to reach the communities that may be affected by a measure. As the Special Rapporteur states:

> [M]easures that affect particular indigenous peoples or communities … will require consultation procedures focused on the interests of, and engagement with, those particularly affected groups.[38]

Government consultation processes need to directly reach people 'on the ground'. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them.

For example, it is often inadequate for a government to just hold consultation sessions in capital cities or regional centres. Such locations may be 'hundreds or thousands of kilometers away from the relevant Aboriginal community making it impossible for members of that community to attend'.[39]

Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that may be affected by a proposed measure.

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36 T Wright, Acting CEO, Western Desert Lands Aboriginal Corporation (Jamakurnu-Yapalinkunu) RNTBC, Correspondence to C Edwards, Manager – Land Reform Branch, Department of Families, Housing, Community Services and Indigenous Affairs, 4 September 2009. At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform#submissions1 (viewed 30 September 2010).

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

38 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 45. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 30 September 2010).

39 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.11. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

(i) Consultation processes need to respect representative and decision-making structures

The Declaration requires consultation to be undertaken with 'the indigenous peoples concerned through their own representative organisations'.[40] The UNPFII has emphasised that free, prior and informed consent must 'be sought from genuinely representative organisations or institutions charged with the responsibility of acting on their behalf'.[41]

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision-making mechanisms. As the CLCAC notes, consultation should take 'traditional laws and customs … regarding decision making' into account.[42]

The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

(j) Governments must provide all relevant information and do so in an accessible way

EMRIP has observed that '[c]onsistent and wide dissemination of information to indigenous peoples in culturally appropriate ways, and in a timely manner, is often lacking'.[43]

To ensure that we are able to exercise our rights to participate in decision-making in a fully informed way, governments must provide us with full and accurate information about the proposed measure and its potential impact.[44]

This information needs to be clear, accessible and easy to understand. Information should be provided in plain English and, where necessary, in language.

For example, YMAC considers:

> Those who are drafting discussion papers should be careful to structure the document so that it can be read and accessed by audiences with a range of literacy levels and limit the number of questions requiring a response.[45]

Similarly, the Goldfields Land and Sea Council recognises that 'language used in explaining legislative or administrative measures needs to be clear, transparent and understandable and not ambiguous and overly legal in terminology'.[46]

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40 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 19. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 30 September 2010).

41 United Nations Permanent Forum on Indigenous Issues, *A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements*, UN Doc E/C.19/2009/CRP.7 (undated), p 21. At http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_7.doc (viewed 30 September 2010).

42 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 38. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 30 September 2010).

43 Expert Mechanism on the Rights of Indigenous Peoples, *Progress report on the study on indigenous peoples and the right to participate in decision-making*, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/35 (2010), para 99. At http://www2.ohchr.org/english/bodies/hrcouncil/docs/15session/A.HRC.15.35_en.pdf (viewed 30 September 2010).

44 See Appendix 3: 'Elements of a common understanding of free, prior and informed consent' for examples of the information that should be provided to Aboriginal and Torres Strait Islander peoples.

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

46 Goldfields Land and Sea Council, 'Information requested for the *Native Title Report 2010*' (30 September 2010).

3.3 The relationship between consultation, consent and special measures

In the previous section, I explain that governments are under a duty to consult 'whenever a State decision may affect indigenous peoples in ways not felt by others in society'.[47] The Special Rapporteur further states that:

> A significant, direct impact on indigenous peoples' lives or territories establishes a strong presumption that the proposed measure should not go forward without indigenous peoples' consent. In certain contexts, that presumption may harden into a prohibition of the measure or project in the absence of indigenous consent.[48]

The Australian Human Rights Commission considers that governments should pay particular attention to issues of consultation and consent when developing and implementing special measures that affect the rights of Aboriginal and Torres Strait Islander peoples.

The concept of 'special measures' as it applies to Aboriginal and Torres Strait Islander peoples must be understood consistently with the right of Indigenous peoples to self-determination. In particular, it is inconsistent with the right to self-determination for a government to impose a measure that limits the rights of an Indigenous group without the consent of the group.[49]

(a) What is a 'special measure'?

The term 'special measures' is generally understood to apply to positive measures taken to redress the disadvantage, and secure the 'full and equal enjoyment of human rights and fundamental freedoms', of a particular racial group.[50]

The *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD)[51] recognises that different treatment designed to ensure the equal enjoyment of rights is not discriminatory. Special measures undertaken for this purpose are essential to achieving substantive equality, advancing human dignity and eliminating racial discrimination.[52] The relevant articles of the ICERD are set out in Text Box 3.1.

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47 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 43. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

48 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 47. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

49 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 91. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

50 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), paras 11–12. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 19 November 2010).

51 *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, arts 1(4), 2(2). At http://www2.ohchr.org/english/law/cerd.htm (viewed 21 September 2010).

52 See, for example, Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 20. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 28 July 2010).

Text Box 3.1: Extracts from the ICERD regarding special measures

Article 1(4)

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

Article 2(2)

States Parties shall, when the circumstances so warrant, take, in the social, economic, cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms. These measures shall in no case entail as a consequence the maintenance of unequal or separate rights for different racial groups after the objectives for which they were taken have been achieved.

The RDA also provides for the development of special measures (see Text Box 3.2).[53]

Text Box 3.2: Extracts from the RDA regarding special measures

Part II – Prohibition of Racial Discrimination

Section 8: Exceptions

1. This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

   …

Section 10: Rights to equality before the law

1. If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
2. A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
3. Where a law contains a provision that:
   (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

53 For further information on the operation of the RDA, see Australian Human Rights Commission, *Federal Discrimination Law* (2010), ch 3. At http://www.humanrights.gov.au/legal/FDL/index.html (viewed 21 September 2010).

> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
>
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

To meet the requirements of a special measure, a measure must comply with all of the following criteria:

- the measure must confer a benefit on some or all members of a class of people
- membership of this class must be based on race, colour, descent, or national or ethnic origin
- the sole purpose of the measure must be to secure the adequate advancement of the beneficiaries so they may enjoy and exercise their human rights and fundamental freedoms equally with others
- the protection given to the beneficiaries by the measure must be necessary for them to enjoy and exercise their human rights and fundamental freedoms equally with others
- the measure must stop once its purpose has been achieved and not set up separate rights permanently for different racial groups.[54]

(b) What is the relevance of consultation and consent to a special measure?

CERD has stated that:

> States parties should ensure that special measures are designed and implemented on the basis of prior consultation with affected communities and the active participation of such communities.[55]

In particular, it is necessary to pay attention to issues of consultation and consent when assessing whether the measure is for the 'sole purpose of securing adequate advancement' of the beneficiaries. To the extent that the impact of the measures upon group members may differ, the specific wishes of those persons who are the intended beneficiaries of the measure must be considered closely. As the Australian Human Rights Commission has previously submitted, '[t]o take any other approach contemplates a paternalism that considers irrelevant the views of a group as to their wellbeing and decisions materially affecting them'.[56]

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54 See *International Convention on the Elimination of All Forms of Racial Discrimination*, 1965, art 1(4). At http://www2.ohchr.org/english/law/cerd.htm (viewed 3 August 2010). For discussion of the indicia of a special measure, see *Gerhardy v Brown* (1985) 159 CLR 70, 130–140 (Brennan J).

55 Committee on the Elimination of Racial Discrimination, *General Recommendation No. 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 18. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 28 July 2010).

56 Human Rights and Equal Opportunity Commission, 'Submissions of the Human Rights and Equal Opportunity Commission on Grounds of Appeal', Submission in *Bella Bropho v Western Australia*, WAD90 of 2007, 3 September 2007, para 37. At http://www.humanrights.gov.au/legal/submissions_court/intervention/bella_bropho.html (viewed 22 September 2010).

Under Australian law, it has been recognised that the wishes of the intended beneficiaries are of great importance in establishing whether a measure is a special measure. In *Gerhardy v Brown*, Brennan J stated:

> 'Advancement' is not necessarily what the person who takes the measure regards as a benefit for the beneficiaries. The purpose of securing advancement for a racial group is not established by showing that the branch of government or the person who takes the measure does so for the purpose of conferring what it or he regards as a benefit for the group if the group does not seek or wish to have the benefit. *The wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement.* The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them.[57]

The desirability of consultation has recently been confirmed by the Queensland Court of Appeal.[58]

The Commission is of the view that the level of consultation required, and whether consent is necessary, for a measure to be considered a special measure will vary depending on whether the measure involves a limitation on rights or is entirely beneficial in nature.[59]

In the Commission's view, a measure that seeks to provide a benefit to a racial group or members of it, but operates by limiting certain rights of some or all of that group, is unlikely to be a special measure if the consent of the group has not been obtained.[60] This is consistent with the right of Indigenous peoples to self-determination.[61]

Consent is particularly important in the context of measures that affect property owned by Aboriginal and Torres Strait Islander peoples. The 'special measures' exception in the RDA does not apply to a provision in a law that:

- authorises property owned by an Aboriginal or Torres Strait Islander person to be managed by another without their consent

or

- prevents or restricts an Aboriginal or Torres Strait Islander person from terminating the management by another person of property owned by the Aboriginal person

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57 *Gerhardy v Brown* (1985) 159 CLR 70, 135 (Brennan J) (emphasis added). This view was rejected by Nicholson J in *Bropho v Western Australia* [2007] FCA 519 (13 April 2007), para 569.

58 *Morton v Queensland Police Service* (2010) 240 FLR 269, 279–280 (McMurdo P), 298 (Chesterman JA) (*Morton*). See also *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2010) 237 FLR 369, 402–403 (McMurdo P), 431–432, 441 (Keane JA), 451–452 (Philippides J) (*Aurukun*). President McMurdo considered that the desirability of consultation is supported by article 1 of the *International Covenant on Civil and Political Rights* and articles 3 and 4 of the *United Nations Declaration on the Rights of Indigenous Peoples* (which affirm the right of Indigenous peoples to self-determination): *Morton*, above, 279–280. The High Court refused special leave to appeal the *Aurukun* decision on 12 November 2010: Transcript of proceedings, *Aurukun Shire Council v CEO, Liquor Gaming & Racing in Dept of Treasury; Kowanyama Aboriginal Shire Council v CEO of Liquor, Gaming & Racing* [2010] HCATrans 293 (12 November 2010). At http://www.austlii.edu.au/au/other/HCATrans/2010/293.html (viewed 1 December 2010).

59 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 84. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

60 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 89. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 19 November 2010).

61 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 3. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 21 September 2010).

where that provision is not one that applies to persons generally without regard to their race, colour, or national or ethnic origin.[62]

(c) 'Special measures' during the Reporting Period

Australian law is not yet fully settled on the question of the significance of 'consultation' and 'consent' to the development and implementation of a special measure. However, in light of the comments of CERD and the rights of Indigenous peoples as affirmed by the Declaration, the Commission believes that issues of consultation and consent should be central to an assessment of whether a measure is indeed a special measure.

During the Reporting Period, the Australian Government referred to the concept of 'special measures' in the context of certain legislative reforms that affect our rights to our lands, territories and resources. In the following section, I explore the issues of consultation and consent in relation to two law reform processes that occurred during the Reporting Period.

3.4 Are government consultation processes meaningful and effective?

I am pleased that the Australian Government has been willing to consult with us regarding laws and policies that would affect our rights to our lands, territories and resources.

During 2009–2010, the Australian Government invited comment on a range of proposals relating to our lands, territories and resources.[63] The Government also continued to hold periodic meetings with organisations involved in the native title system.[64] For example, the Attorney-General's Department convenes the Native Title Consultative Forum (NTCF), which consists of representatives from:

- the Attorney-General's Department
- the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)
- the Federal Court of Australia
- the National Native Title Tribunal
- state, territory and local governments
- NTRBs and NTSPs
- pastoral, fishing, mining and petroleum industries
- the Australian Human Rights Commission.[65]

The NTCF met twice during the Reporting Period.

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62 *Racial Discrimination Act 1975* (Cth), ss 8(1), 10(3).

63 See, for example, Attorney-General's Department, *Native title reform*, http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform (viewed 5 October 2010); Department of Families, Housing, Community Services and Indigenous Affairs, *Prescribed Bodies Corporate*, http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Pages/prescribed_bodies_corporate.aspx (viewed 5 October 2010).

64 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

65 For further information on the NTCF, see Attorney-General's Department, *Native title system coordination and consultation*, http://www.ag.gov.au/www/agd/agd.nsf/Page/Indigenouslawandnativetitle_Nativetitle_Nativetitlesystemcoordinationandconsultation (viewed 5 October 2010).

However, as demonstrated during the Reporting Period, there is clear scope for the Australian Government to improve its approach to consultation and negotiation processes regarding law and policy reforms. In this section, I review the consultation processes concerning the following law reform initiatives:

- the Native Title Amendment Bill (No 2) 2009 (Cth) (Amendment Bill (No 2))
- the amendments to the *Northern Territory National Emergency Response Act 2007* (NTNER Act) concerning the power to compulsorily acquire five-year leases over certain land.

In analysing these measures, I have been guided by the features of a meaningful and effective consultation process discussed in section 3.2 and the criteria for special measures set out in section 3.3.

(a) Consultations regarding the Native Title Amendment Bill (No 2) 2009 (Cth)

The Amendment Bill (No 2) was introduced into the Commonwealth Parliament in October 2009. The purpose of the Bill was to insert a new future act process in the Native Title Act in order to facilitate the construction of public housing and infrastructure on Aboriginal land.

In Chapter 2, I analyse the procedural safeguards contained in this new future act process, and consider how this process could detract from agreement-making. In this section, I argue that the public consultation process concerning the Amendment Bill (No 2) lacked many of the essential elements of a meaningful and effective engagement process. In particular, I consider that the Australian Government did not:

- allow sufficient time for consultations
- provide sufficient opportunities for Aboriginal and Torres Strait Islander peoples to participate in consultations
- respond sufficiently to the concerns expressed by Aboriginal and Torres Strait Islander peoples.

(i) Were the timeframes for consultation on the proposed amendments adequate?

The public were twice given the opportunity to comment on the proposed reforms.

First, the Australian Government conducted consultations in relation to a discussion paper released by the Attorney-General and the Minister for Indigenous Affairs on *Possible housing and infrastructure native title amendments* (Housing Discussion Paper).[66]

Secondly, the Senate Legal and Constitutional Affairs Legislation Committee (Legal and Constitutional Affairs Committee) conducted an inquiry into the Amendment Bill (No 2).

The stages in the public consultations on the Amendment Bill (No 2) are set out in Table 3.1, below.

66 Attorney-General's Department and the Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_nativetitlereform#2009Bill (viewed 5 October 2010).

Table 3.1: Public consultation timetable – Native Title Amendment Bill (No 2) 2009 (Cth)

Date	Event
13 August 2009	The Attorney-General and the Minister for Indigenous Affairs release the Housing Discussion Paper.[67]
24 August 2009– 2 September 2009	The Attorney-General's Department and FaHCSIA hold information sessions on the proposed amendments in Darwin, Alice Springs, Perth, Adelaide, Sydney, Brisbane and Cairns. An information session planned for Broome is cancelled due to 'lack of interest'.[68]
4 September 2009	Submissions on the Housing Discussion Paper are due. The Australian Government receives 27 submissions.[69]
21 October 2009	The Amendment Bill (No 2) is introduced into the House of Representatives.
29 October 2009	The Senate refers the provisions of the Amendment Bill (No 2) to the Legal and Constitutional Affairs Committee for inquiry and report by 2 February 2010.
24 November 2009	Submissions to the Legal and Constitutional Affairs Committee regarding the Amendment Bill (No 2) are due. The Amendment Bill (No 2) is passed by the House of Representatives.
26 November 2009	The Amendment Bill is (No 2) introduced into the Senate.
28 January 2010	The Legal and Constitutional Affairs Committee holds a public hearing in Sydney.
2 February 2010	The Senate agrees to extend the Legal and Constitutional Affairs Committee's reporting date to 23 February 2010.
24 February 2010	The report of the Legal and Constitutional Affairs Committee's inquiry into the Amendment Bill (No 2) is released.[70]

67 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Discussion Paper: Possible housing and infrastructure native title amendments* (2009). At http://www.ag.gov.au/www/agd/agd.nsf/page/indigenouslawandnativetitle_nativetitle_native titlereform#2009Bill (viewed 5 October 2010).

68 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 5 October 2010). However, the Attorney-General's Department informs me that a teleconference was held with the Kimberley Land Council on 7 September 2009 to discuss the proposal: P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

69 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

70 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Report on the Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010). At http://www.aph.gov.au/Senate/committee/legcon_ctte/nativetitle_two/report/report.pdf (viewed 5 October 2010).

In section 3.2, above, I express the view that governments must allow sufficient time in consultation processes to enable Aboriginal and Torres Strait Islander peoples to develop a fully informed response to a proposed measure. However, the timeframes for submissions in relation to the Housing Discussion Paper (3 weeks) and the Legal and Constitutional Affairs Committee's inquiry (3.5 weeks) were unreasonably short.

NTRBs and NTSPs submitted that this unrealistic timeframe prevented them from ascertaining the views of native title holders,[71] 'denied Indigenous communities across Australia an opportunity to effectively participate in the decision-making process'[72] and meant that 'indigenous people … had no meaningful opportunity to negotiate with the Commonwealth'.[73] The CLCAC regarded this as 'simply unacceptable'.[74]

These limited timeframes are especially problematic in light of the resource constraints faced by NTRBs, NTSPs and PBCS (see further discussion in Chapter 1). It is very difficult for such organisations to analyse proposed legal reforms, inform Traditional Owners of the potential impact of the reforms, and provide submissions to government on top of their existing workloads. In addition to ensuring that consultation timeframes are sufficient, governments must ensure that Aboriginal and Torres Strait Islander peoples and their representatives are adequately resourced to participate in consultation processes.

The short timeframes allowed for consultations gave the appearance that the Australian Government believed that the Amendment Bill (No 2) should be enacted as a matter of urgency. Yet, the Amendment Bill (No 2) had not been enacted by the time the federal election was called in July 2010.[75] This leads me to question why such demands were placed on the limited resources of native title stakeholders to attend consultation sessions and prepare submissions in such short timeframes.

(ii) Were there sufficient opportunities for Aboriginal and Torres Strait Islander peoples to attend consultation sessions?

Eleven NTRBs and NTSPs attended a consultation session and / or provided a written submission in response to the Housing Discussion Paper.[76]

However, NTRBs and NTSPs have expressed concern that the public information sessions did not reach the communities that were likely to be affected by the

71 Torres Strait Regional Authority, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (21 December 2009), np. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=10e5d762-ea65-470f-9e9b-7adaeb4b4ce2 (viewed 5 October 2010).

72 NTSCORP, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (27 November 2009), para 18. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e8cbcf54-d770-497a-b3fc-9b86884627be (viewed 5 October 2010).

73 Cape York Land Council, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), p 6. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=d2fb685c-44c1-4ff8-a14b-9336289cd0d6 (viewed 5 October 2010).

74 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 14. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

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

76 P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

proposed amendments.[77] The sessions were concentrated in capital cities and regional centres, meaning that Traditional Owners outside of these areas had limited opportunities to participate.

For example, the CLCAC informed the Legal and Constitutional Affairs Committee that the Government did not 'directly consult with or offer to consult with Aboriginal communities in the southern Gulf of Carpentaria' and that the closest public consultation session was 'held over 1000 kilometres away in Cairns', only two days before submissions were due.[78]

Further, the only public hearing conducted by the Legal and Constitutional Affairs Committee in relation to the Amendment Bill (No 2) was held in Sydney. Hearings were not held in the states most likely to be affected by the amendments. The Australian Government only clarified late in the Legal and Constitutional Affairs Committee's inquiry process that the Amendment Bill (No 2) would be most relevant to Western Australia and Queensland.[79]

Senator Siewert, of the Australian Greens and a member of the Legal and Constitutional Affairs Committee, expressed concern that this information was not made available in the Explanatory Memorandum or the Attorney-General's Second Reading Speech. This meant that

> this crucial fact did not inform the committee's terms of reference nor its hearing program (hearings were not held in Queensland or WA) … [and] there was no engagement with native title representative bodies, land councils or Aboriginal organisations in WA.[80]

This reflects a concern that Aboriginal and Torres Strait Islander peoples' organisations identified during my research for the *Native Title Report 2010* – too often, governments do not go to communities, but expect communities to come to them. However, communities rarely possess sufficient resources to do so.

(iii) Did the Australian Government respond sufficiently to the concerns of Aboriginal and Torres Strait Islander peoples?

The Australian Government did refine the future act process in response to the public consultations on the Housing Discussion Paper. For example, the Government has stated that the procedural requirements of the Amendment Bill (No 2) were developed in light of public consultation. Additional consultation mechanisms were drafted into the Bill as a result of stakeholder feedback. Also, the future act process

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77 Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 10. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

78 See Carpentaria Land Council Aboriginal Corporation, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (10 November 2009), para 10. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=2e81ce84-44ba-4c7f-88b4-6307d2ac55d2 (viewed 5 October 2010).

79 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Supplementary submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), p 2. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 5 October 2010). The Law Council of Australia had highlighted the limited scope of the Amendment Bill (No 2) during the Committee's public hearing: Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 29 (R Webb QC, Law Council of Australia). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

80 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 39 (Dissenting Report of the Australian Greens). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/d02.pdf (viewed 5 October 2010).

was not confined to remote areas, as had been proposed in the Housing Discussion Paper.[81]

However, in their submissions in response to the Housing Discussion Paper, NTRBs and NTSPs questioned the need for, and desirability of, a new future act process. They emphasised that governments should facilitate the construction of public housing and infrastructure by entering into agreements with Aboriginal and Torres Strait Islander peoples.[82]

NTRBs and NTSPs further contended that the Government failed to provide sufficient evidence to justify the new future act process. Warren Mundine, CEO of NTSCORP, submitted that:

> For us the key objection to the bill is that there is insignificant identification of the need for the amendments. In fact, insignificant evidence has been provided with regard to the Native Title Act processes being a source of delay.[83]

The Legal and Constitutional Affairs Committee also received strong objections to the Amendment Bill (No 2), including that:

- Indigenous Land Use Agreements (ILUAs) should be the preferred mechanism for negotiating arrangements regarding public housing and infrastructure
- the Amendment Bill (No 2) is racially discriminatory
- the proposed process would result in de facto extinguishment.[84]

In fact, there was 'nearly unanimous rejection of the Bill by native title holder representative bodies'.[85]

NTRBs and NTSPs presented the Australian Government and the Legal and Constitutional Affairs Committee with options that would meet the Government's objectives and have less impact on the rights of Traditional Owners. These options included the development of template ILUAs[86] and amending the Amendment Bill

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81 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (undated), p 6. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=bbf314d8-661a-4ee1-840b-8a68b00a0ce9 (viewed 5 October 2010); P Arnaudo, A/g First Assistant Secretary, Social Inclusion Division, Attorney-General's Department, Correspondence to M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, 12 August 2010.

82 See, for example, National Native Title Council, *Submission: Possible Housing and Infrastructure Native Title Amendments* (4 September 2009). At www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~National+Native+Title+Council+-+Possible+housing+and+infrastructure+amendments+NNTC+submission.PDF/$file/National+Native+Title+Council+-+Possible+housing+and+infrastructure+amendments+NNTC+submission.PDF (viewed 5 October 2010).

83 Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 2 (W Mundine, NTSCORP). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

84 For a summary of the concerns expressed in relation to the Amendment Bill (No 2), see Department of Parliamentary Services, Parliament of Australia, 'Native Title Amendment Bill (No 2) 2009', *Bills Digest*, no 118 (24 February 2010), pp 8–14. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/4JZV6/upload_binary/4jzv62.pdf;fileType=application%2Fpdf#search=%22r4230%22 (viewed 5 October 2010).

85 See Department of Parliamentary Services, Parliament of Australia, 'Native Title Amendment Bill (No 2) 2009', *Bills Digest*, no 118 (24 February 2010), p 19. At http://parlinfo.aph.gov.au/parlInfo/download/legislation/billsdgs/4JZV6/upload_binary/4jzv62.pdf;fileType=application%2Fpdf#search=%22r4230%22 (viewed 5 October 2010).

86 See, for example, Queensland South Native Title Services, *Submission on the Possible Housing and Infrastructure Native Title Amendments Discussion Paper* (September 2009), pp 7–8. At http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~Queensland+South+native+Title+Services+-+Submission.pdf/$file/Queensland+South+native+Title+Services+-+Submission.pdf (viewed 5 October 2010).

(No 2) such that the right to negotiate regime would apply to the new future act process.[87]

These recommendations were not adopted by the majority of the Legal and Constitutional Affairs Committee or the Australian Government.[88] However, the Legal and Constitutional Affairs Committee and the Government responded favourably to certain concerns that had been raised by the states. For example, the Queensland Government expressed concern that the proposed future act process did not cover housing for staff involved with the provision of public housing and infrastructure.[89] The Legal and Constitutional Affairs Committee recommended that the Amendment Bill (No 2) be amended 'to include the provision of staff housing as part of the new future acts process'.[90]

In a dissenting report, Senator Siewert observed that:

> [T]here appears to be a major disconnect between the evidence presented, the concerns discussed and arguments evaluated within the [majority] report on the one hand, and its final conclusions on the other.[91]

It is seriously concerning that the objections of NTRBs and NTSPs, and the alternatives that they proposed, do not appear to have been given sufficient consideration by the Australian Government or the Legal and Constitutional Affairs Committee.

(iv) Was there sufficient consultation to address the elements of a 'special measure'?

Given the fundamental importance of ensuring that the rights of Aboriginal and Torres Strait Islander peoples are protected in the implementation of legislative or administrative measures, it is disappointing that the Housing Discussion Paper did not raise for consideration the implications of the proposed amendments in terms of their potentially racially discriminatory effect.

The Attorney-General's Department informed the Legal and Constitutional Affairs Committee that it considered the Amendment Bill (No 2) to be consistent with the RDA, but admitted that it did not have legal advice to this effect.[92]

In a supplementary submission to the Legal and Constitutional Affairs Committee, FaHCSIA and the Attorney-General's Department stated:

> The Government sees the NTA as a special measure under the *Racial Discrimination Act 1975*. … The new process is similar to the existing future acts processes in the

87 See, for example, B Wyatt, Chairperson, National Native Title Council, Correspondence to the Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, 12 February 2010. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8397a353-dc5a-48ae-9ce7-ba8c983adef4 (viewed 5 October 2010).

88 But see recommendation 1 of the Liberal Senators, and the recommendations of Senator Siewert (Australian Greens): Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), pp 35 (Liberal Senators), 44–45 (Senator Siewert). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

89 S Robertson MP and D Boyle MP, Correspondence to P Hallahan, Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, undated. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=1a692ae9-def5-4dd2-9cfe-e70ba24fc63a (viewed 5 October 2010).

90 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 33 (recommendation 1). At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010). The *Native Title Amendment Act (No 1) 2010* (Cth) covers staff housing.

91 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 38. At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

92 Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 44 (T Harvey, Attorney-General's Department). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

> NTA with a relatively small adjustment to meet the urgent need for housing and public infrastructure in Indigenous communities. The adjustment of the arrangements must be considered in that context, and will be part of that special measure.[93]

The Legal and Constitutional Affairs Committee accepted that the Amendment Bill (No 2) was a special measure.[94]

It is beyond the scope of the *Native Title Report 2010* to examine the complex interaction between the Native Title Act, the RDA and special measures (see section 3.3, above, for discussion of the elements of a special measure). However, I note that the preamble to the Native Title Act states that the Act,

> together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the *Racial Discrimination Act 1975*, to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.[95]

Yet, CERD found in 1999 that the amended Native Title Act

> appears to wind back the protections of indigenous title offered in the *Mabo* decision of the High Court of Australia and the 1993 Native Title Act. As such, the amended Act cannot be considered to be a special measure within the meaning of articles 1(4) and 2(2) of the Convention …[96]

Since then, CERD has clarified the relationship between our rights to land and special measures:

> Special measures should not be confused with specific rights pertaining to certain categories of person or community, such as, … the rights of indigenous peoples, including rights to lands traditionally occupied by them, …Such rights are permanent rights, recognized as such in human rights instruments, …States parties should carefully observe distinctions between special measures and permanent human rights in their law and practice.[97]

In this context, I am concerned that the Australian Government and the Legal and Constitutional Affairs Committee did not provide adequate analysis to support their finding that the Amendment Bill (No 2) is a special measure.

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93 Attorney-General's Department and Department of Families, Housing, Community Services and Indigenous Affairs, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (3 February 2010), pp 4–5. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=6aa97735-3cf8-4ff5-9685-47aee40dd631 (viewed 5 October 2010). See also Commonwealth, *Official Committee Hansard: Reference: Native Title Amendment Bill (No 2) 2009,* Senate Legal and Constitutional Affairs Legislation Committee (28 January 2010), p 43 (T Harvey, Attorney-General's Department; A Cattermole, Department of Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/hansard/senate/commttee/S12690.pdf (viewed 5 October 2010).

94 Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment Bill (No 2) 2009 [Provisions]* (2010), p 33. At http://www.aph.gov.au/senate/committee/legcon_ctte/nativetitle_two/report/index.htm (viewed 5 October 2010).

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

96 Committee on the Elimination of Racial Discrimination, *Decision 2(54) on Australia*, UN Doc A/54/18 (1999) 6, p 7 (para 8). For further information on special measures and the amended Native Title Act, see Z Antonios, Acting Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 1998*, Human Rights and Equal Opportunity Commission (1999), pp 69–72. At http://www.humanrights.gov.au/pdf/social_justice/native_title_report_98.pdf (viewed 7 October 2010).

97 Committee on the Elimination of Racial Discrimination, *General Recommendation No 32 (2009): The meaning and scope of special measures in the International Convention on the Elimination of Racial Discrimination*, UN Doc A/64/18 (Annex VIII) (2009), para 15. At http://www2.ohchr.org/english/bodies/cerd/comments.htm (viewed 19 October 2010).

Further, the Australian Human Rights Commission believes that provisions which limit the rights of some, or all, of a racial group, are unlikely to be a special measure if the consent of the group has not been obtained.[98] As discussed above, I believe that the consultation processes concerning the Amendment Bill (No 2) were inadequate. In addition, NTRBs and NTSPs expressed strong opposition to the Amendment Bill (No 2). I therefore question whether the new future act process can properly be regarded as a special measure.

The deficiencies in the consultation process are particularly concerning in light of the potentially far-reaching impact of these amendments upon the rights of Traditional Owners. For example, while the future act process provides for the application of the non-extinguishment principle, the long-term nature of the acts that are covered by the new future act process (for example, the construction of housing and public infrastructure) suggests that it may be a significant time before any native title rights and interests will again have full effect. NTRBs, NTSPs and others expressed concerns that this would amount to 'practical extinguishment'.[99]

In addition, Traditional Owners may not be the beneficiaries of the public housing or other public facilities that are built pursuant to the proposed process, and for which purpose their rights have been suspended. For example, Traditional Owners may not live on the land on which the housing is built.

(v) Conclusion

As I have detailed in this section, the Australian Government did not:

- allow sufficient time for consultations
- provide sufficient opportunities for Aboriginal and Torres Strait Islander peoples to participate in consultations
- respond sufficiently to the concerns expressed by Aboriginal and Torres Strait Islander peoples.

I therefore do not believe that the consultation processes regarding the Amendment Bill (No 2) were adequate.

The impact of the future act regime of the Native Title Act on the human rights of Aboriginal and Torres Strait Islander peoples has been analysed and criticised extensively.[100] It is therefore concerning that, despite its stated commitment to strong engagement and partnership, the Australian Government has seen fit to extend the future act regime without adequate consultation and without the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples.

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98 Australian Human Rights Commission, *Draft guidelines for ensuring income management measures are compliant with the* Racial Discrimination Act (2009), para 89. At http://www.humanrights.gov.au/racial_discrimination/publications/RDA_income_management2009_draft.html (viewed 5 October 2010).

99 See, for example, B Wyatt, Chairperson, National Native Title Council, Correspondence to the Committee Secretary, Senate Legal and Constitutional Affairs Legislation Committee, 12 February 2010. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=8397a353-dc5a-48ae-9ce7-ba8c983adef4 (viewed 5 October 2010); Law Council of Australia, *Submission to the Senate Legal and Constitutional Affairs Legislation Committee Inquiry into the Native Title Amendment Bill (No 2) 2009 (Cth)* (23 December 2009), p 7. At https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=50b8cf7e-3d2b-483a-8c5c-652e856d5c13 (viewed 5 October 2010).

100 See, for example, W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2000*, Human Rights and Equal Opportunity Commission (2001), ch 5. At http://www.humanrights.gov.au/pdf/social_justice/nt-report2000.pdf (viewed 5 October 2010); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2001*, Human Rights and Equal Opportunity Commission (2002), ch 1. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport01/chap1.html (viewed 5 October 2010).

(b) Reforms to the Northern Territory Emergency Response measures

The second consultation process that I will examine concerns the 2010 amendments to the Northern Territory Emergency Response (NTER) measures. These amendments 'redesigned' the NTER measures.[101] Specifically, I will consider the amendments to the *Northern Territory National Emergency Response Act 2007* (Cth) (NTNER Act) that concern the power to compulsorily acquire five-year leases.[102]

I first outline the background to the amendments. I then discuss the 'redesigned' NTER measures and assess the consultation process that preceded the introduction of the amendments to these measures, with a particular focus on the measures that affect rights to lands, territories and resources. Finally, I consider whether there was sufficient consultation for the legislative provisions regarding five-year leases to be properly considered to be special measures.

I set out the key milestones in the history of the NTER in Table 3.2.

Table 3.2: Key milestones – Northern Territory Emergency Response (NTER)

Date	Event
15 June 2007	The *Little Children are Sacred*[103] report is publicly released by the Northern Territory Government.
21 June 2007	The Australian Government announces the introduction of the Northern Territory Emergency Response measures.
7 August 2007	The following Bills are introduced into, and passed by the House of Representatives: ▪ Northern Territory National Emergency Response Bill 2007 ▪ Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth) ▪ Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth) ▪ Appropriation (Northern Territory National Emergency Response) Bill (No 1) 2007–2008 (Cth) ▪ Appropriation (Northern Territory National Emergency Response) Bill (No 2) 2007–2008 (Cth).

101 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth). At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

102 *Northern Territory National Emergency Response Act 2007* (Cth), s 31. For discussion of the other NTER measures, see Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/download.html (viewed 22 September 2010).

103 National Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"* (2007). At http://www.inquirysaac.nt.gov. au/pdf/bipacsa_final_report.pdf (viewed 19 October 2010).

9 August 2007	The Senate refers the five Bills to the Senate Standing Committee on Legal and Constitutional Affairs. The Committee received 154 submissions.[104]
10 August 2007	The Senate Standing Committee on Legal and Constitutional Affairs conducts its sole public hearing for this inquiry.
13 August 2007	The report of the Senate Standing Committee on Legal and Constitutional Affairs is tabled in Parliament.
17 August 2007	All five Bills pass the Senate and receive assent. The five Acts are referred to as the NTER.
June 2008	The Rudd Government commissions an independent review of the NTER.
October 2008	The NTER Review Board reports to the Australian Government.[105]
23 October 2008	The Australian Government issues its initial response to the Report of the NTER Review Board.[106]
21 May 2009	The Australian Government issues its final response to the Report of the NTER Review Board.[107] The Australian Government releases the *Future Directions for the Northern Territory Emergency Response: Discussion paper.*[108]
June–August 2009	The Australian Government consults with Aboriginal communities on ways that certain identified NTER measures could be redesigned.
23 November 2009	The Australian Government releases its *Report on the Northern Territory Emergency Response Redesign Consultations* and the independent report it commissioned from the Cultural and Indigenous Research Centre Australia (CIRCA).[109]

104 Parliament of Australia, *Submissions and Additional Information received by the Committee as at 28 August 2007*, http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2004-07/nt_emergency/submissions/sublist.htm (viewed 19 October 2010).

105 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008). At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 19 October 2010).

106 Minister for Families, Housing, Community Services and Indigenous Affairs, 'Compulsory income management to continue as key NTER measure' (Media Release, 23 October 2008). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2008/Pages/nter_measure_23oct08.aspx (viewed 2 December 2010). The Government accepted the three overarching recommendations of the Review Report.

107 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_reportNTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

108 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 19 October 2010).

109 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 19 October 2010); Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

24 November 2009	The Australian Government releases its policy statement on the proposed redesigned NTER measures.[110]
25 November 2009	The Australian Government introduces the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) (Welfare Reform Bill) into the House of Representatives.[111]
26 November 2009	The Senate refers the Welfare Reform Bill to the Senate Community Affairs Legislation Committee along with the Families, Housing, Community Services and Indigenous Affairs and other Legislation Amendment (2009 Measures) Bill 2009 (Cth) and Senator Siewert's private senator's Bill (the Families, Housing, Community Affairs and Other Legislation (Restoration of Racial Discrimination Act) Bill 2009 (Cth)).
1 February 2010	Submissions to the Senate Community Affairs Legislation Committee's Inquiry are due. The Committee receives 95 submissions.[112]
4, 11, 15, 17, 22, 25, 26 February 2010	The Senate Community Affairs Legislation Committee holds public hearings.
24 February 2010	The House of Representatives passes the Welfare Reform Bill.
10 March 2010	The Senate Community Affairs Legislation Committee reports on its inquiry.[113]
21 June 2010	The Senate passes the Welfare Reform Bill.
29 June 2010	The Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2010 (Cth) receives assent.
1 July 2010	The amendments to the five-year lease provisions commence.[114]
31 December 2010	The provisions lifting the suspension of the RDA over the NTER legislation and actions under it are scheduled to commence.[115]

110 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

111 The Government also introduced the Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 (Cth).

112 Parliament of Australia, *Submissions received by the Committee*, http://www.aph.gov.au/senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/submissions/sublist.htm (viewed 19 October 2010).

113 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 19 October 2010).

114 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 5.

115 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 1. For a discussion of the applicability of the RDA to new income management measures see Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), paras 50–53. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 November 2010).

(i) The original NTER measures

On 21 June 2007, the Howard Government announced a number of measures to combat child sex abuse in Aboriginal communities in the Northern Territory. This became known as the NTER or the 'Intervention'.

The NTER measures were implemented by a suite of Acts including the NTNER Act.[116]

This legislation was implemented in great haste. The Howard Government made no attempt to obtain the free, prior and informed consent of the Aboriginal peoples affected by the legislation.

The Bills were introduced into, and passed by, the House of Representatives on 7 August 2007. The Senate Standing Committee on Legal and Constitutional Affairs was given only five days to conduct an inquiry into the Bills. A public hearing was held on 10 August, and the report of the Committee was tabled on 13 August 2007. The Bills were passed by the Senate on 17 August 2007 and received assent that day.[117] I will refer to these Acts collectively as the 'NTER legislation'.

Suspension of the RDA and deeming of special measures

In relation to the operation of the RDA, the original NTER legislation:

- deemed the measures contained in each Act, and any acts done under or for the purposes of those provisions, to be special measures for the purposes of the RDA
- suspended the operation of Part II of the RDA[118] in relation to the provisions of the Acts and any acts done under or for the purposes of those provisions.[119]

The Social Justice Commissioner considered the implications of the suspension of the RDA in the *Social Justice Report 2007.*[120] In essence, the provisions stated that all of the measures introduced through the legislation were to be characterised as 'beneficial' and therefore exempt from the prohibition of racial discrimination in Part II of the RDA.

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116 The other Bills were: Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007 (Cth); Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007 (Cth); Appropriation (Northern Territory National Emergency Response) Bill (No. 1) 2007–2008 (Cth); Appropriation (Northern Territory National Emergency Response) Bill (No. 2) 2007–2008 (Cth).

117 For a more detailed timeline, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 209–211. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/download.html (viewed 22 September 2010).

118 Part II of the RDA makes it unlawful to discriminate against a person on the basis of their race.

119 *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4; *Northern Territory National Emergency Response Act 2007* (Cth), s 132; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 4, 6. The original NTER legislation also exempted the operation of the Northern Territory's anti-discrimination laws: *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 5; *Northern Territory National Emergency Response Act 2007* (Cth), s 133; *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth), ss 5, 7. But see *Northern Territory National Emergency Response Act 2007* (Cth), Notes, Table A: 'Application, saving or transitional provisions' (*Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth), s 4(3)).

120 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2010).

The suspension of the RDA meant that even if the NTER measures were not special measures, the protections of the RDA did not apply. This meant individuals had no right to bring a complaint under the RDA with respect to provisions of the legislation or any acts done under or for the purposes of those provisions. Nor could section 10 of the RDA be used to challenge the validity of any laws introduced by the Northern Territory Government under the auspices of the NTER legislation.

Significantly, the Special Rapporteur did not accept that the discriminatory aspects of the original NTER measures had not been shown to qualify as special measures. He observed that the Australian Government did not engage in adequate consultation before the measures were enacted. Nor did the Special Rapporteur consider that the measures were proportional or necessary to the stated objectives of the NTER.[121]

Measures affecting rights to lands, territories and resources

As part of the NTER, the Howard Government introduced measures that affected the rights of Aboriginal people to their lands, territories and resources, including:

- the compulsory acquisition of leases for a term of five years over prescribed areas, including Aboriginal land and specified community living areas[122]
- empowering the Australian Government to compulsorily acquire rights, titles and interests relating to town camps[123]
- providing that the future acts regime under the Native Title Act does not apply to acts done by, under, or in accordance with certain provisions of the NTNER Act[124]
- providing for the acquisition (by the Australian or Northern Territory Governments or their authorities) of extensive statutory rights in relation to areas of Aboriginal land designated as construction areas (statutory rights provisions).[125]

In previous *Native Title Reports* and *Social Justice Reports*, the Social Justice Commissioner examined the NTER and its effect on land rights and native title. The

121 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, paras 20–23. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

122 *Northern Territory National Emergency Response Act 2007* (Cth), ss 31(1), (2). For further information, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 188–196. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010); Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), paras 137–150. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

123 *Northern Territory National Emergency Response Act 2007* (Cth), pt 4, div 2. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 196–199. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

124 *Northern Territory National Emergency Response Act 2007* (Cth), s 51. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 200–201. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

125 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), pt IIB. For further information see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 202–206. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010).

Commissioner expressed concern about the lack of consultation that preceded the introduction of the NTER, and highlighted the discriminatory impact of some of the measures on Aboriginal people.[126]

In the following sections, I will focus on the legislative provisions regarding the compulsory acquisition of five-year leases. The Australian Government currently holds five-year leases over 64 communities. These leases will expire in August 2012.[127]

The compulsory acquisition of the five-year leases undercuts the Australian Government's message of strong engagement with Aboriginal and Torres Strait Islander peoples. Normally, the terms of a lease are negotiated by the parties. However, the terms and conditions of the five-year leases made pursuant to the NTNER Act are determined by the Government.[128]

The NTER measures apply to people and land within 'prescribed areas' which 'are specified "Aboriginal land" and other designated areas that are populated almost entirely by indigenous people'.[129] Accordingly, the Special Rapporteur has also said that the NTER measures, including the five-year leases, distinguish on the basis of race[130] and 'undermine indigenous self-determination, limit control over property, inhibit cultural integrity and restrict individual autonomy'.[131]

(ii) The 'redesigned' NTER measures

In June 2008, the Rudd Government commissioned an independent review of the NTER. This Review was conducted by the Northern Territory Emergency Review Board (NTER Review Board), comprised of Peter Yu, Marcia Ella Duncan and Bill Gray AM.[132]

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126 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Human Rights and Equal Opportunity Commission (2008), pp 187–207. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 151–158. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report 2007*, Human Rights and Equal Opportunity Commission (2008), ch 3. At http://www.humanrights.gov.au/social_justice/sj_report/sjreport07/index.html (viewed 22 September 2010).

127 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

128 *Northern Territory National Emergency Response Act 2007* (Cth), ss 35, 36. Also see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 151. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

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

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

131 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 13. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 19 October 2010).

132 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated), p 1. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_report NTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

The NTER Review Board reported to the Government in October 2008. As part of its three 'overarching' recommendations, the NTER Review Board recommended that the Australian and Northern Territory governments 'acknowledge the requirement to reset their relationship with Aboriginal people based on genuine consultation, engagement and partnership'.[133] The Australian Government accepted the three overarching recommendations.[134]

From June to August 2009, the Australian Government consulted with Aboriginal communities on ways that a limited number of NTER measures could be redesigned.[135]

Following these consultations, the Australian Government introduced the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth) (Welfare Reform Bill) into Parliament on 25 November 2009. This included changes to the five-year lease provisions under Part 4 of the NTNER Act.

The Senate referred this Bill to the Senate Community Affairs Legislation Committee (Community Affairs Committee) on 26 November 2009. This Committee reported on 10 March 2010.[136] The Welfare Reform Bill received assent on 29 June 2010.

Changes to the NTER measures concerning five-year leases

The *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth) (NTNER Amendment Act) provides for the repeal of the provisions which suspend the operation of the RDA with respect to the NTER legislation, and actions under it, from 31 December 2010. It also provides for the removal of those provisions that deem the legislation and actions done under it to be special measures.[137]

In addition, the Australian Government states that several of the NTER measures have been redesigned so they are:

- improved and strengthened
- sustainable over the long-term

133 Northern Territory Emergency Response Review Board, *Report of the NTER Review Board* (2008), p 12. At http://www.nterreview.gov.au/docs/report_nter_review.PDF (viewed 22 September 2010). The NTER Review Board also made the following overarching recommendations:

- that the Australian and Northern Territory Governments recognise as a matter of urgent national significance the continuing need to address the unacceptably high level of disadvantage and social dislocation being experienced by Aboriginal Australians living in remote communities throughout the Northern Territory
- that government actions affecting Aboriginal communities respect Australia's human rights obligations and conform with the *Racial Discrimination Act 1975* (Cth).

134 Australian Government and Northern Territory Government, *Response to the Report of the NTER Review Board* (undated), p 1. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/response_to_report NTER/Documents/Aust_response_1882953_1.pdf (viewed 19 October 2010).

135 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 3 (C Halbert, Department of Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/hearings/index.htm (viewed 22 September 2010).

136 The transcripts of the Senate Community Affairs Legislation Committee's public hearings can be found at http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/hearings/index.htm (viewed 22 September 2010).

137 *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), sch 1, items 1–3. This also repeals the sections exempting the operation of the Northern Territory's anti-discrimination laws.

- 'more clearly special measures or non-discriminatory within the terms of the *Racial Discrimination Act 1975*'.[138]

However, the core measures of the NTER have been retained.[139] For example, the NTNER Amendment Act made some minor changes to the provisions of the NTNER Act concerning the five-year leases. However, these provisions have not been 'redesigned' in any significant way.

Further, while the entire NTNER Act is no longer deemed to be a special measure, the NTNER Act now provides that the object of Part 4 of the Act is to enable special measures to be taken.[140] Part 4 contains the provisions relating to the acquisition of rights, titles and interests in land, including the five-year lease provisions.

I provide a summary of these changes in Text Box 3.3.

Text Box 3.3: Amendments to the five-year lease provisions of the NTNER Act

First, the NTNER Amendment Act inserted a new object clause into Part 4 of the NTNER Act, which concerns the acquisition of rights, titles and interests in land (including the five-year lease provisions).

Section 30A of the NTNER Act now provides that the object of Part 4 of the NTNER Act is to enable special measures to be taken to:

- improve the delivery of services in Indigenous communities in the Northern Territory
- promote economic and social development in those communities.[141]

Secondly, section 35(2A) of the NTNER Act now provides that the Commonwealth is only entitled to use, and to permit the use of, land covered by a five-year lease for any use that the Commonwealth considers is consistent with the fulfilment of the object of the Part. This 'does not entitle the Commonwealth to engage in, or to permit, exploration or mining in respect of land covered by a lease granted under section 31'.[142]

Thirdly, the new section 35A of the NTNER Act will require the Minister to make, by legislative instrument, guidelines that specify the matters the Commonwealth must have regard to when subleasing, licensing, parting with possession of, or otherwise dealing with its interest in the five-year lease.[143]

Fourthly, the NTNER Act now specifies that regard must be had to the body of traditions, observances, customs and beliefs of Indigenous persons when administering five-year leases.[144]

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138 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline. At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

139 Explanatory Memorandum, Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 (Cth), outline. At http://www.comlaw.gov.au/comlaw/legislation/bills1.nsf/framelodgmentattachments/40DF878226ED1626CA25767A0005AFF3 (viewed 21 September 2010).

140 *Northern Territory National Emergency Response Act 2007* (Cth), s 30A.

141 *Northern Territory National Emergency Response Act 2007* (Cth), s 30A.

142 *Northern Territory National Emergency Response Act 2007* (Cth), s 35(2B). However, this does not limit Part IV of the *Aboriginal Land Rights (Northern Territory) Act 1976*, which concerns mining on Aboriginal land: *Northern Territory National Emergency Response Act 2007* (Cth), s 35(2D).

143 At the time of writing, section 35A had yet to commence. Section 35A will commence on a date fixed by Proclamation. However, if it has not commenced within 6 months of the date the NTNER Amendment Act received Royal Assent (29 June 2010), it commences on the day after this period: *Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Act 2010* (Cth), s 2.

144 *Northern Territory National Emergency Response Act 2007* (Cth), s 36A.

> Finally, the relevant owner of land subject to a five-year lease may request the Commonwealth to enter into good faith negotiations on the terms and conditions of another lease covering all or part of the land. If requested to do so by the owner, the Commonwealth must enter into such good faith negotiations.[145]

The Australian Government has said that it will retain the existing five-year leases until they expire in August 2012. However, it has also committed to progressively transition to voluntary leases during this period.[146] While this intention is positive, the Government must commit to this process by devoting the time and resources necessary to planning and coordinating the roll-out of voluntary leases, including making lease applications.[147]

In a further welcome development, the Australian Government announced on 25 May 2010 that it had started to pay rent to Aboriginal land owners in 45 of the 64 communities subject to five-year leases. The rent will be backdated to the commencement of the leases in 2007. Rent payments for the leases concerning two communities in the Tiwi Islands, Milikapiti and Pirlangimpi, began in September 2009.[148]

While these are positive developments, I remain concerned that there is no legislative guarantee against the compulsory acquisition of further leases.

I am also concerned that, at the time of writing, no announcement has been made concerning compensation payments for the compulsory acquisition of these leases. In *Wurridjal v Commonwealth*[149] the High Court found that the Australian Government is required to pay just terms compensation for the five-year leases.[150]

The Australian Government has acknowledged that '[t]he payment of rent does not preclude continuing discussions with the land owners in relation to the provision

145 *Northern Territory National Emergency Response Act 2007* (Cth), s 37A.

146 Commonwealth, *Parliamentary Debates,* House of Representatives, 25 November 2009, p 12787 (The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs). At http://www.aph.gov.au/hansard/reps/dailys/dr251109.pdf (viewed 22 September 2010); Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), pp 10–11. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 15 October 2010).

147 The Central Land Council reports that in the last financial year the Commonwealth requested s 19A leases over three communities in its region, however each of those applications were rejected. It states the Commonwealth has not provided revised applications: Central Land Council, *CLC Annual Report 2009–2010* (2010), pp 76–77. At http://www.clc.org.au/Media/annualrepts/CLC_annual_report_2009_2010.pdf (viewed 2 December 2010).

148 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, and The Hon W Snowdon MP, Minister for Indigenous Health, Rural and Regional Health and Regional Services Delivery, 'Rent payments for NTER five-year leases' (Media Release, 25 May 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/rent_nter_25may10.aspx (viewed 22 September 2010). The amount of rent was determined by the Northern Territory Valuer-General. The Government also stated that it was 'standing by' to make payments to the remaining 16 Aboriginal corporations which hold title to community living areas, and that the lease over Northern Territory Crown land at Canteen Creek did not involve a rent payment.

149 (2009) 237 CLR 309.

150 For discussion of this decision, see T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 26–31, 153. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

of reasonable compensation provided for under the legislation'.[151] I encourage the Government to progress discussions with Aboriginal land owners with a view to reaching agreement on appropriate compensation.[152]

(iii) Assessing the Australian Government's consultation process

The Australian Government's consultations about the proposed redesigned measures were based on a discussion paper titled *Future Directions for the Northern Territory Emergency Response* (Future Directions Discussion Paper).[153] The consultations covered the 73 NTER communities[154] plus a number of town camps.

The Australian Government estimates the consultation processes reached a total of 3000–4000 people.[155] The Government employed a four-tiered approach to the consultations:

- Tier 1 was an ongoing process in which individuals, families and small groups in communities were able to provide their views to government business managers. There were 444 of these meetings.
- Tier 2 involved whole-of-community meetings led by Indigenous Coordination Centre Managers and Government Business Managers. There were 109 of these meetings.
- Tier 3 involved regional workshops of two to three days. These meetings involved a more detailed examination of issues. Six of these meetings were held and 176 people attended.
- Finally, Tier 4 involved five workshops with major Indigenous stakeholder organisations, which 101 people attended.[156]

This process presented a real opportunity for meaningful engagement. With the financial and organisational support of the Australian Government, such wide-scale endeavours have the potential to create a constructive dialogue between the Government and Aboriginal communities. This potential was not realised.

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151 Department of Families, Housing, Community Services and Indigenous Affairs, *Five-year leases on Aboriginal townships*, http://www.fahcsia.gov.au/sa/indigenous/progserv/ntresponse/about_response/housing_land_reform/Pages/five_year_leases_aboriginal_townships.aspx (viewed 22 September 2010).

152 I note that the previous Social Justice Commissioner did not accept that a reasonable amount of rent based on the unimproved value of the land represents just terms compensation for the compulsory acquisition of Aboriginal land under five-year leases: T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), p 154. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

153 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 19 October 2010).

154 Section 4 of the NTNER Act allows the Government to prescribe areas in which the NTER measures will apply. There are 73 such targeted communities, see Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 3. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 19 October 2010).

155 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 28 (Bruce Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

156 For details of the engagement process, see Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), pp 16–19. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

The consultation processes regarding the redesigned NTER measures have been analysed extensively.[157] A number of parties have argued that the consultation process was limited.[158] I am also aware of concerns that some areas, such as 'the bush', had minimal consultation.[159] I acknowledge that the Australian Government has responded to a number of these criticisms in Senate Committee hearings.[160]

It is beyond the scope of this Chapter to detail all facets of this consultation process. However, in this section, I survey some of the features of the consultation process and question whether Aboriginal peoples were able to participate effectively in the decision-making processes regarding the redesigned measures. Specifically, I consider:

- the Australian Government's overall approach to the consultation process
- whether the Australian Government was open to addressing the concerns of Aboriginal people regarding the measures affecting their rights to their lands, territories and resources
- the accessibility of information presented during the consultations.

Were there any steps in the right direction?

Certainly, the consultation process displayed some positive features.

First, the scale of consultation that the Australian Government embarked upon should be applauded. Reaching such a large number of people across large areas of remote territory is not easy.

Secondly, the Government contracted the Cultural and Indigenous Research Centre Australia (CIRCA) to review the engagement and communication strategy for the redesign consultations. CIRCA released its final *Report on the NTER Redesign Engagement Strategy and Implementation* (CIRCA Report) in September 2009.[161]

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157 See, for example, Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 22 September 2010); Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009). At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010); A Nicholson, L Behrendt, A Vivian, N Watson & M Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (2009). At http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf (viewed 22 September 2010).

158 For a summary of the criticisms of the consultation process, see Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions] and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), pp 28–34. At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 22 September 2010).

159 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (15 February 2010), pp 27–28 (V Patullo, North Australian Aboriginal Justice Agency).

160 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), pp 51–54 (B Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

161 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009). At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 22 September 2010).

The Australian Government has reported that it adjusted the consultation process in response to early feedback from CIRCA.[162] However, Alison Vivian has noted that CIRCA was contracted to assess whether the 'consultations were undertaken in accordance with the engagement and communication strategy, rather than in accordance with best practice indicia for consultation with Indigenous communities'.[163] Further, the Government did not respond to some of the serious concerns raised by CIRCA 'in relation to the openness and fairness of the meetings and workshops, and the content covered during those meetings'.[164]

I am pleased that the Government was prepared to review its processes, and was open to adjusting these processes where necessary. However, there were several ways that this process could have been improved to ensure that it was consistent with best practice standards for consultation and engagement, including those considered in section 3.2, above, and in Appendix 4.

How did the Australian Government approach the consultations?

As I discuss in section 3.2, above, the objective of a consultation process should always be 'to obtain the consent or agreement of the indigenous peoples concerned'.[165] Further, consultation procedures should themselves be the product of consensus.

There has been criticism that this consultation process was not the product of consensus, and that it 'was going to be problematic given the absence of Indigenous involvement in its design and implementation'.[166] As I discuss at section 3.2, the involvement of affected Aboriginal and Torres Strait Islander peoples in the design and implementation of consultation processes is essential.

It is concerning that the Australian Government did not appear to approach the consultations on the redesigned NTER measures with the objective of obtaining the free, prior and informed consent of the peoples affected by the measures. As stated in the Future Directions Discussion Paper, the Government believed that the current measures should continue but it wanted to 'hear community views about continuing the NTER measures and how they could be changed to deliver greater benefits'.[167] This is worrying given the 'current measures' the Government proposed to continue were implemented without consultation.

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162 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 18. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

163 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 55. Also see Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 5. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

164 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 56.

165 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 21 September 2010).

166 A Vivian, 'The NTER Redesign Consultation Process: Not Very Special' (2010) 14(1) *Australian Indigenous Law Reporter* 46, 58.

167 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 23. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

When asked by the Community Affairs Committee whether the Australian Government's purpose in undertaking the consultations was to obtain the free, prior and informed consent of the peoples affected by these measures, a representative of FaHCSIA responded:

> The answer is no. The reason for that is because the purpose of the consultations is set out in the discussion paper and the other documents. Those purposes related to resetting the relationship continuing the Northern Territory Emergency Response and reinstating the Racial Discrimination Act, ... That was the purpose that the consultations were entered into for ...[168]

If this was the Government's starting point, I question how much scope there was within the consultation process for Aboriginal people to genuinely influence the Government's decision-making processes.

Was the Australian Government open to responding to the concerns of Aboriginal people affected by the measures?

In several respects, it appeared as if the Australian Government had a predetermined outcome in mind in entering into the consultations and that it was not truly open to responding to the concerns of Aboriginal people. A number of stakeholders raised this concern during the Community Affairs Committee's hearings.[169] Overall, the Government proposed that 'the individual measures should continue to operate in much the same way as they have been operating'.[170]

The Government's engagement and communication strategy had two overarching objectives:

> The first is to reset the relationship between the Government and the Indigenous people in the NT. It will do this by:
>
> - Reiterating the original purpose of the NTER;
> - Reiterating the major achievements to date;
> - Reiterating this Government's commitments including what it has delivered to date;
> - Explaining the Government's current position on the NTER, in particular its position on each of the specific measures;
> - Explaining why the Government is conducting these consultations; and
> - Explaining the longer term agenda.
>
> The second objective is to collect and record feedback from stakeholders on the benefits of the various NTER measures, and how they could be made to work better.[171]

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168 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 58 (A Field, Department of Families, Housing, Community Services and Indigenous Affairs).

169 See, for example, Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), pp 38–39 (A Vivian, Jumbunna Indigenous House of Learning (Research Unit), University of Technology, Sydney), 41 (J Altman); (15 February 2010), p 32 (A Pengilley, North Australian Aboriginal Justice Agency).

170 Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 9. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

171 Australian Government, quoted in Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 7. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/sec2.htm (viewed 25 November 2010).

This framework appears to limit the type of feedback the Government would consider as part of its process to 'redesign' the NTER. Noticeably absent from this framework is the objective of involving Aboriginal peoples in the decision-making process as to whether the NTER measures should be redesigned, removed or retained.

Some issues were not even open for discussion as part of the consultation process. For instance, the Future Directions Discussion Paper did not invite people to comment on the powers to compulsorily acquire Aboriginal town camps and to obtain statutory rights over Aboriginal land. These provisions have not been 'redesigned'.

While the statutory provisions regarding the five-year leases were reviewed as part of the consultation process, the Government did not appear to be open to considering any significant redesign or the removal of these provisions.

In the Future Directions Discussion Paper, the Government proposed only minor changes to the legislative provisions relating to the five-year leases. The question of whether the provisions should continue was not part of the 'Questions for discussion during consultation' set out in the Future Directions Discussion Paper.[172] In the *Native Title Report 2009*, the previous Social Justice Commissioner expressed concern that community residents were only being asked for comment on the proposed amendments, as the Australian Government had already formed the view that the five-year leases had operated for the benefit of Aboriginal residents and proposed to continue them.[173]

As a representative of the Central Land Council (CLC) submitted to the Community Affairs Committee,

> it is misleading to simply put to a community, 'What are your views about the five-year leases, because they have been of benefit and if we did not have the five-year leases, we would not be able to carry out all these things in your communities'. It was not presented as though the five-year leases were not in fact leases but compulsory acquisitions of Aboriginal land … How you present information is critical to the feedback that you receive. This is where we have concerns about the consultation process. It was designed to emphasise the benefits of the measures. There is no evidence that we can see that shows that there was a balanced approach to try and give people the full suite of information you may need to make, for example, a decision around something like five-year leases or land tenure arrangements.[174]

The Government has stated that the Future Directions Discussion Paper was only a starting point for discussions, and that 'the consultations were conducted in the spirit of genuine consultation and engagement'.[175]

This does not appear to have been the case with respect to the five-year lease provisions. As the Government reports, the changes to the five-year lease provisions

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172 See Australian Government, *Future Directions for the Northern Territory Emergency Response: Discussion paper*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 18. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/future_directions_discussion_paper/Pages/default.aspx (viewed 22 September 2010).

173 T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009*, Australian Human Rights Commission (2009), pp 154–155. At http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 22 September 2010).

174 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (17 February 2010), p 10 (J Weepers, Central Land Council).

175 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 3. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 22 September 2010).

were 'in line with those proposed in the [Future Directions] Discussion Paper'.[176] It is therefore questionable whether the Government created a space for Aboriginal peoples to be genuinely involved in the decision-making processes as to whether the provisions regarding the five-year leases should be 'redesigned', retained or removed altogether.

Were the consultations conducted, and was the information provided, in an accessible way?

The NTER legislation, and its relationship to the RDA, is complex and difficult to understand. A representative of FaHCSIA informed the Community Affairs Committee that considerable effort was taken to draft the Future Directions Discussion Paper in plain English to ensure that measures were clearly explained. Government Business Managers and Indigenous Engagement Officers were also available to explain the consultations.[177]

Yet, I am concerned that some people affected by the NTER measures were not always able to participate in the consultations in a fully informed manner. For example, CIRCA found that the Future Directions Discussion Paper:

- was not accessible for those with limited English language skills
- did not have any visual imagery to assist understanding or engage the audience
- used formal 'government' language.

Also, insufficient time was provided for people to read the Future Directions Discussion Paper in the Tier 3 meeting that CIRCA observed.[178]

In addition, the Australian Government has recognised that, during the consultations:

> There were frequent comments that people did not understand the leasing arrangements and there was some confusion between five-year leases, township leasing and voluntary leasing.[179]

This confusion may be attributed, in part, to the complexity of the measures and how difficult it is to explain them in the timeframe allowed for consultations. For example, the CIRCA Report found that

> it was difficult in the Tier 2 meetings to have an open discussion as the level of understanding and knowledge of the measure varied, and there was not time to fully explain the measure. This was true for five-year leases …[180]

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176 Australian Government, *Policy Statement: Landmark Reform to the Welfare System, Reinstatement of the Racial Discrimination Act and Strengthening of the Northern Territory Emergency Response,* Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 10. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/policy_statement_nter/Pages/default.aspx (viewed 22 September 2010).

177 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 53 (R Heferen, Department of Families, Housing, Community Services and Indigenous Affairs).

178 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 18. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 19 October 2010).

179 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 11. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 3 August 2010).

180 Cultural & Indigenous Research Centre Australia, *Report on the NTER Redesign Engagement Strategy and Implementation: Final Report* (2009), p 13. At http://www.fahcsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_engagement_strategy/final_report_09_engage_strat.PDF (viewed 3 August 2010).

The lack of appropriate interpreting services was a further barrier to effective communication. The *Will they be heard?* report on the NTER consultations found that 'a number of the consultations were seemingly conducted with a presumption of English proficiency' and without interpreters.[181] This is especially problematic given the complexity of some of the measures under review. It is also important that affected communities have sufficient time to digest the information before providing feedback.

FaHCSIA noted that it had engaged interpreters on a 'wide-ranging basis'[182] and worked closely with the Northern Territory Aboriginal Interpreter Service to ensure interpreters were available as much as possible. However, FaHCSIA observed that interpreters were sometimes not available to attend consultation meetings, and that governments acknowledge that more has to be done to build the capacity of interpreting services.[183]

The Community Affairs Committee recognised these concerns. It recommended that the Australian Government maintain its commitment to increase the capacity of Indigenous interpretative services in the Northern Territory and in Aboriginal and Torres Strait Islander communities across Australia.[184]

As I discussed in section 3.2, above, governments need to provide full and accessible information about a measure to ensure that Aboriginal and Torres Strait Islander peoples can participate in decision-making in an informed way. It is impossible for anyone to give their free, prior and informed consent to a measure if they do not fully understand the issue and the possible impact of the measure.

Was there sufficient consultation to address the elements of a special measure?

The Australian Government has claimed that it has 'delivered on its commitment' to reinstate the RDA.[185] Yet, the statutory provisions regarding the five-year leases remain inconsistent with the RDA.[186]

As explained above, the NTNER Act now provides that the object of the statutory provisions regarding the five-year leases is to enable special measures to be undertaken. However, the absence of consent and the limitations of the Government's

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181 A Nicholson, L Behrendt, A Vivian, N Watson & M Harris, *Will they be heard? – a response to the NTER Consultations June to August 2009* (2009), p 11. At http://intranet.law.unimelb.edu.au/staff/events/files/Willtheybeheard%20Report.pdf (viewed 3 August 2010).

182 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (4 February 2010), p 12 (B Smith, Department of Families, Housing, Community Services and Indigenous Affairs).

183 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (26 February 2010), p 53 (R Heferen, Department of Families, Housing, Community Services and Indigenous Affairs).

184 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), p xi (recommendation 1). At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/index.htm (viewed 22 September 2010).

185 The Hon J Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, 'Racial Discrimination Act to be restored in the Northern Territory' (Media Release, 22 June 2010). At http://www.jennymacklin.fahcsia.gov.au/mediareleases/2010/Pages/jm_m_rda_22june2010.aspx (viewed 22 September 2010).

186 See Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), paras 31–49. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 22 September 2010).

consultation process brings into question the characterisation of the five-year lease provisions as special measures.

As stated above, the Special Rapporteur noted that the original NTER measures were not preceded by adequate consultations. He did not accept that the discriminatory aspects of the original NTER measures qualified as special measures. The Special Rapporteur further noted that, with respect to the redesigned measures, there are

> significant criticisms against the very consultative process that the Government contends meets the standard of free, prior and informed consent. Thus, open to question is the extent to which the Government's proposed NTER reforms can indeed be said to count on broad support among the affected indigenous people.[187]

The Special Rapporteur noted that the Australian Government's own report of the results of the consultations showed 'that there is an absence of broad or even substantial acceptance by indigenous communities of the rights-impairing aspects of the NTER measures'.[188]

Indeed, the Government has reported mixed views on the five-year lease provisions. Some participants 'expressed frustration and confusion over lease arrangements'.[189] In this context, I agree with the Law Council of Australia that it is

> very difficult to comprehend how [the five-year lease provisions] can conceivably be characterised as special measures in circumstances where a majority of those consulted simply did not understand or did not see any benefit in them.[190]

Some organisations have gone further to suggest that five-year leases are directly against the wishes of Aboriginal residents.[191] For instance, the CLC conducted a survey of six communities in 2008 to document the experiences and opinions of Aboriginal people in Central Australia in relation to the NTER. The CLC found:

> The overwhelming majority of respondents (85 percent) were opposed to 5 year leases. Reasons for opposition to 5 year leases included: the leases gave government more control over communities…the leases overrode the rights of traditional landowners, the leases were put in place without any consultation and the boundaries of the leases were inappropriate…[192]

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187 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 65. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

188 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 34. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

189 Australian Government, *Report on the Northern Territory Emergency Response Redesign Consultations*, Department of Families, Housing, Community Services and Indigenous Affairs (2009), p 46. At http://www.facsia.gov.au/sa/indigenous/pubs/nter_reports/Documents/redesign_consultations/default.htm (viewed 22 September 2010).

190 Commonwealth, *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (25 February 2010), p 12 (S Pritchard, Law Council of Australia).

191 ANTaR, 'Concerns remain about the Northern Territory Emergency Response' (Media Release, 25 November 2009). At http://www.antar.org.au/media/concerns_remain_about_the_NTER (viewed 2 August 2010). See also *Official Committee Hansard: Reference: Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009,* Senate Community Affairs Legislation Committee (17 February 2010), p 5 (D Avery, Central Land Council).

192 Central Land Council, *Northern Territory Emergency Response: Perspectives from Six Communities* (2008), p 6. At http://www.clc.org.au/Media/issues/intervention/CLC_REPORTweb.pdf (viewed 18 October 2010).

In addition, the Australian Human Rights Commission believes that the five-year lease provisions cannot constitute special measures under the RDA.[193] As explained above at section 3.3, laws that:

- authorise property owned by an Aboriginal or Torres Strait Islander to be managed by another without their consent

or

- prevent or restrict an Aboriginal or Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander

are specifically excluded from the special measures exemption in the RDA.[194]

However, the Community Affairs Committee found that the redesigned measures are special measures. The redesigned income management measures were the exception to this finding, as the Committee accepted that these measures were non-discriminatory.[195]

I remain of the view that, to be consistent with the RDA, measures relating to the management of land must be taken with the consent of the landowners. Therefore the redesigned provisions regarding the five-year leases remain inconsistent with the RDA in this respect.[196]

(iv) Conclusion

During the consultations on the redesigned NTER measures, Laynhapuy Homeland Mala Leaders at Yirrkala told the Australian Government that:

> Our responses to your questions in this consultation must not be used by the Australian Government to argue for the continuation of the NTER, Intervention or justify what has been done to date.[197]

Similar concerns were expressed to CERD in its August 2010 examination of Australia (see Text Box 3.4).

193 Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010). At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 18 October 2010).

194 *Racial Discrimination Act 1975* (Cth), ss 8(1), 10(3).

195 Senate Community Affairs Legislation Committee, Parliament of Australia, *Report on the Social Security and Other Legislation Amendment (Welfare Reform and Reinstatement of Racial Discrimination Act) Bill 2009 [Provisions]; Families and Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (2009 Measures) Bill 2009 [Provisions]; Families, Housing, Community Services and Indigenous Affairs and Other Legislation Amendment (Restoration of Racial Discrimination Act) Bill 2009* (2010), p 24. At http://www.aph.gov.au/Senate/committee/clac_ctte/soc_sec_welfare_reform_racial_discrim_09/report/report.pdf (viewed 22 September 2010).

196 See Australian Human Rights Commission, *Submission to the Senate Community Affairs Committee Inquiry into the Welfare Reform and Reinstatement of Racial Discrimination Act Bill 2009 and other Bills* (10 February 2010), para 146. At http://www.humanrights.gov.au/legal/submissions/sj_submissions/2010_welfare_reform.html (viewed 2 August 2010).

197 concerned Australians, *This Is What We Said: Australian Aboriginal people give their views on the Northern Territory Intervention* (2010), p 54.

Text Box 3.4: Graeme Innes, Race Discrimination Commissioner, appears before the Committee on the Elimination of Racial Discrimination[198]

I now turn to Rosie and Djiniyini, two Aboriginal elders who have traveled from Central Australia to deliver an urgent message about the survival of their Aboriginal brothers and sisters, and sons and daughters, living under the Northern Territory Emergency Response. You have both told me you decided to participate because you hoped it could ease your own, and your communities, despair. You both told me you have felt a need to step back from developments with the Northern Territory Intervention, to see and I quote "what is left of us mob".

Rosie and Djiniyini, you are descendants of ancient peoples, the world's oldest continuing culture, and you do not need me, or the Australian Government, to speak for you. But may I repeat your messages:

You did not consent to the Northern Territory Intervention.

You said that the Intervention is not a special measure.

You said that it is not a positive or concrete measure to strengthen your communities, culture or customary practice. It has had the opposite effect. It has removed people from their lands, and their own distinct practices and world values. And you said that without land and community at your spiritual centre, every Aboriginal person in Australia will be lost.

I am concerned that voices such as these were not heeded during the consultation process. As I have discussed in this section:

- the people affected by the NTER measures were not always able to participate in the consultations in a fully informed manner
- the Australian Government did not appear to approach the consultations with the objective of obtaining free, prior and informed consent
- the consultations did not appear to create a space for Aboriginal peoples to be genuinely involved in the decision-making processes as to whether the five-year leases should be retained, removed or redesigned.

As such, the consultation process did not reflect the principles for meaningful and effective consultation, such as those set out in section 3.2 and Appendix 4.

I fully support the Special Rapportuer's call for the Australian Government to

> fully purge the NTER of its racially discriminatory character and conform it to relevant international standards, through a process genuinely driven by the voices of the affected indigenous people.[199]

(c) What can we learn from these consultation processes?

Undoubtedly, the Australian Government has taken some important steps towards improving its relationship with Aboriginal and Torres Strait Islander peoples. However,

198 G Innes, *Commissioner appears before CERD Committee at the UN* (Speech delivered at the 77th session of the Committee on the Elimination of Racial Discrimination, Geneva, 11 August 2010). At http://www.humanrights.gov.au/about/media/speeches/race/2010/20100811_CERD.html (viewed 18 October 2010).

199 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), Appendix B, para 66. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 8 September 2010).

the consultation processes profiled in this Chapter illustrate that the Government can further improve the way it engages with us in several important respects.

(i) There is a need for a new consultation and engagement framework

In this Chapter, I have highlighted the need for the Australian Government to make additional efforts to ensure that its consultation processes are meaningful and effective.

For example, the Australian Government needs to ensure that Aboriginal and Torres Strait Islander peoples have access to adequate information about the nature and potential impact of a proposed measure. This information needs to be accessible and easy for the communities affected by the measure to understand. This may require further funding and support for translation and interpretation services.

The Government must also structure consultation processes such that we are afforded adequate time and resources to engage in our own decision-making processes. Further, the Government needs to choose the location of consultation sessions carefully in order to ensure that those most affected by a proposed measure are able to participate and have their views considered.

Most importantly, the Government needs to work with us from the outset to design appropriate consultation processes. The Government needs to work in partnership with us to build consultation processes from the ground up if it is serious about rebuilding relationships with us.

I believe that there is a clear need for a framework to guide governments in the development of consultation processes regarding reforms to law, policies, programs and development processes that may affect our rights.

I recommend that the Australian Government work with Aboriginal and Torres Strait Islander peoples and our representatives to develop a new, comprehensive consultation and engagement framework.

While specific consultation processes should always be the product of consensus, such a framework could guide the development of appropriate processes on a case-by-case basis. The framework should apply across federal ministries, departments and agencies, with consideration given as to how best to promote the framework at a state and territory level and among parliamentary committees.

I believe that the elements of effective and meaningful consultation identified in this Chapter provide a useful starting point for discussions. Further, this framework should explicitly acknowledge the minimum standards affirmed in the Declaration. In this way, the framework would be a powerful way of implementing the Declaration.

(ii) There needs to be a cultural change within governments

Creating a meaningful and effective consultation process is not just about ensuring adequate timeframes and providing sufficient resources. Governments need to fundamentally change the way they approach consultations.

We cannot build relationships based on partnership and mutual respect if consultations are simply an exchange of information concerning a fixed, predetermined policy position. Governments need to be truly prepared to listen to us and accommodate our concerns. They cannot approach consultations with a set legislative or policy outcome in mind.

In order to find long-term solutions to the problems facing our communities, we need to be effective participants in decision-making processes that affect our rights to our lands, territories and resources. I do not believe that this was the case in the two consultations processes that I have profiled in this Chapter.

In short, governments need to change the way they do business. They need to build their own cultural competencies, and their ability to work with us. This highlights the need for greater education and training within governments about our human rights.

As discussed in Chapter 1, as Social Justice Commissioner I will seek to build an understanding of, and respect for, our rights to our lands, territories and resources throughout Australia. I believe that the process of developing a new consultation and engagement framework could itself facilitate the emergence of a deeper understanding of our rights within governments. Our human rights need to be a primary consideration in any consultation process.

I am concerned that the Australian Government appears to have continued a disturbing trend of characterising as a 'special measure' certain legislation that in fact limits our human rights.[200] As the Special Rapporteur has stated:

> [I]t would be quite extraordinary to find consistent with the objectives of the Convention, that special measures may consist of differential treatment that limits or infringes the rights of a disadvantaged group in order to assist the group or certain of its members. Ordinarily, special measures are accomplished through preferential treatment of disadvantaged groups, as suggested by the language of the Convention, and not by the impairment of the enjoyment of their human rights.[201]

I am concerned that the Australian Government appears to have asserted that the reforms reviewed in this Chapter are special measures without sufficiently considering the basis for this claim. Of utmost concern is the fact that the Government does not appear to have given due consideration to the issues of consultation and consent in its assessment of whether these reforms are special measures.

The Australian Government should ensure that any consultation document regarding a proposed legislative or policy measure that may affect our rights contains a statement that details whether the proposed measure is compatible with international human rights standards. This analysis should:

- explain whether, in the Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

Such a statement could promote an open dialogue about the impact of the proposed measure on our rights, and encourage the Australian Government to explicitly consider our human rights at the earliest stages of law and policy-making. It can also equip us with the information that we need to engage in consultations, and to test the Government's assertions, in a fully informed way.

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200 For further discussion, see J Hunyor, 'Is it time to re-think special measures under the Racial Discrimination Act? The case of the Northern Territory Intervention' (2009) 14(2) *Australian Journal of Human Rights* 39, p 63.

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

3.5 Conclusion

In this Chapter, I have illustrated several ingredients of a meaningful and effective consultation process. I have also considered whether the Australian Government has paid adequate attention to issues of consultation and consent in relation to two law reform initiatives that were pursued during the Reporting Period. I consider that there is a clear need for the Australian Government to change the way that it engages with us in relation to matters that would affect our rights to our lands, territories and resources.

Meaningful consultation can forge new relationships between Aboriginal and Torres Strait Islander peoples and governments. It can also lead to the development of lasting and effective policy solutions. Yet, as observed by the CLCAC, '[i]t is unfortunate that consultation of this nature is so rare'.[202]

I believe that the nature and quality of the Australian Government's consultation processes can indicate the strength of its commitment to 'reset' its relationship with us. If it is serious about developing relationships based on partnership and mutual respect, the Government must engage with us in a meaningful way before adopting or implementing matters that would affect our rights to our lands, territories and resources. By working with us and respecting our rights, rather than imposing laws and policies upon us, governments can go a considerable way towards building stronger relationships with us.

There is some cause for optimism. For example, the Chairperson of the South West Aboriginal Land and Sea Council (SWALSC), Graeme Miniter, has commented:

> SWALSC seemed to be drawn into more and more discussions and consulted in ever increasing ways … We should never be complacent, but there are signs that the work done to try to faithfully represent Noongars on major issues is beginning to influence the way governments and industry engage with Noongars. We are always aiming for strong and respectful two way relationships. This is not always possible but seems to be more common than it was.[203]

I am particularly pleased that the National Congress of Australia's First Peoples was established during the Reporting Period.[204] I believe that this organisation will play a crucial role in building and strengthening relationships, and in supporting effective engagement, between governments and Aboriginal and Torres Strait Islander peoples.

As I stated in Chapter 1, one of my priorities as Social Justice Commissioner is to promote effective engagement between governments and Aboriginal and Torres Strait Islander peoples. To this end I will continue to monitor the adequacy of government consultation processes during my term.

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202 Carpentaria Land Council Aboriginal Corporation, *Submission in relation to proposed housing and infrastructure amendments to the* Native Title Act 1993 *(Cth)* (4 September 2009), para 7.12. At http://www.clrc.gov.au/www/agd/rwpattach.nsf/VAP/(3A6790B96C927794AF1031D9395C5C20)~Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf/$file/Carpentaria+Land+Council+Aboriginal+Corporation+Submission.pdf (viewed 30 September 2010).

203 G Miniter, 'Chairperson's Report' in South West Aboriginal Land and Sea Council, *Annual Report 2009* (2009), p 5. At http://www.noongar.org.au/images/pdf/annual-reports/Annualreport_2009.pdf (viewed 30 September 2010).

204 National Congress of Australia's First Peoples, `New Congress to Represent Aboriginal and Torres Strait Islanders' (Media Release, 2 May 2010). At http://www.humanrights.gov.au/about/media/media_releases/2010/41_10.html (viewed 11 January 2010).

Recommendations

3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should:

- explain whether, in the Australian Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent
- pay specific attention to any potentially racially discriminatory elements of the proposed measure
- where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure
- be made publicly available at the earliest stages of consultation processes.

3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.

3.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a consultation and engagement framework that is consistent with the minimum standards affirmed in the *United Nations Declaration on the Rights of Indigenous Peoples*. Further, that the Australian Government commit to using this framework to guide the development of consultation processes on a case-by-case basis, in partnership with the Aboriginal and Torres Strait Islander peoples that may be affected by a proposed legislative or policy measure.

3.4 That Part 4 of the NTNER Act be amended to remove the capacity to compulsorily acquire any further five-year leases. Further, in respect of the existing five-year lease arrangements, that the Australian Government implement its commitment to transition to voluntary leases with the free, prior and informed consent of the Indigenous peoples affected; and that it ensure that existing leases are subject to the *Racial Discrimination Act 1975* (Cth).

Appendix 1: Acknowledgments

The Aboriginal and Torres Strait Islander Social Justice Commissioner thanks the following people and organisations for their assistance in preparing the *Native Title Report 2010*.

Parry Agius, CEO	South Australia Native Title Services
Louise Anderson, National Native Title Registrar	Federal Court of Australia Registry
Peter Arnaudo, Acting First Assistant Secretary, Social Inclusion Division	Attorney-General's Department
Paul Barrett, CEO	Jabalbina Yalanji Aboriginal Corporation
Anthony Beven, Registrar of Indigenous Corporations	Office of the Registrar of Indigenous Corporations
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Christina Colegate, Communications Officer (Policy & Research)	Yamatji Marlpa Aboriginal Corporation
Vanessa Drysdale	Dhimurru Aboriginal Corporation
Rosalind Hanf, Manager, Strategic Projects & Planning	National Native Title Tribunal
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Yoshi Hirakawa, Project Manager, Board Support & Program Office	Torres Strait Regional Authority
The Hon Rob Hulls MP	Former Victorian Deputy Premier, Attorney-General and the Minister for Racing
Nolan Hunter, Deputy Director	Kimberley Land Council
Glen Kelly, CEO	South West Aboriginal Land and Sea Council

John T Kris, Chairperson	Torres Strait Regional Authority
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Graeme Neate, President	National Native Title Tribunal
Keryn Negri, Manager	Department of Justice, Victoria
Virginia Newell, Coordinator – Leasing	Central Land Council
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Marita Stinton, Senior Legal Officer	Cape York Land Council
Romany Tauber, Manager (Land Justice and Policy)	Native Title Services Victoria Ltd
Khatija Thomas, Legal Officer	South Australia Native Title Services
Jayne Weepers, Senior Policy Officer	Central Land Council

Appendix 2:
Native Title Report 2009 recommendations[1]

Recommendations: Chapter 2

2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.

2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.

2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.

Recommendations: Chapter 3

3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.

3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.

3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.

3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.

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

3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.

3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.

3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.

3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.

3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.

3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.

3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.

3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.

3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* to provide greater transparency in the respondent funding process.

3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:

- repealing section 26(3) of the Native Title Act
- amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)
- reviewing time limits under the right to negotiate
- amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination
- shifting the onus of proof onto the proponents of development to show their good faith
- allowing arbitral bodies to impose royalty conditions.

3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.

3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.

3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.

3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

- the prospect of a negotiated outcome being reached
- the resources of the parties
- the interests of the other parties to the proceeding.

3.20 That the Australian Government:

- consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
- support further research into 'best practice' or 'model' agreements.
- support further research into best practice negotiating processes.

3.21 That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.

3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.

3.23 That the Australian Government ensure that NTRBs are sufficiently resourced to access expert advice.

3.24 That the Australian Government provide further support to initiatives to provide training and development opportunities for experts involved in the native title system.

Recommendations: Chapter 4

4.1 That the Australian Government amend the *Northern Territory National Emergency Response Act 2007* (Cth) to end the compulsory five-year leases, and instead commit to obtaining the free, prior and informed consent of traditional owners to voluntary lease arrangements.

4.2 That the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), be removed.

4.3 That the Australian Government meet with the Aboriginal land councils to discuss other ways of introducing broad scale leasing to communities on Aboriginal land in the Northern Territory, which do not require communities to hand over decision-making to a government entity.

Appendix 3:
Elements of a common understanding of free, prior and informed consent[1]

1. What

- ***Free*** should imply no coercion, intimidation or manipulation.
- ***Prior*** should imply that consent has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes.
- ***Informed*** should imply that information is provided that covers (at least) the following aspects:
  - the nature, size, pace, reversibility and scope of any proposed project or activity
  - the reason(s) for or purpose(s) of the project and / or activity
  - the duration of the above
  - the locality of areas that will be affected
  - a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit-sharing in a context that respects the precautionary principle
  - personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others)
  - procedures that the project may entail.
- ***Consent***

  Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Consultation requires time and an effective system for communicating among interest-holders. Indigenous peoples should be able

1 Extract from United Nations Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples (New York, 17–19 January 2005)*, UN Doc E/C.19/2005/3 (2005), paras 46–49. At http://www.un.org/esa/socdev/unpfii/en/workshopFPIC.html (viewed 19 November 2010).

to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women are essential, as well as participation of children and youth, as appropriate. This process may include the option of withholding consent.

Consent to any agreement should be interpreted as indigenous peoples have reasonably understood it.

2. When

- FPIC should be sought sufficiently in advance of commencement or authorization of activities, taking into account indigenous peoples' own decision-making processes, in phases of assessment, planning, implementation, monitoring, evaluation and closure of a project.

3. Who

- Indigenous peoples should specify which representative institutions are entitled to express consent on behalf of the affected peoples or communities. In free, prior and informed consent processes, indigenous peoples, United Nations organizations and Governments should ensure a gender balance and take into account the views of children and youth, as relevant.

4. How

- Information should be accurate and in a form that is accessible and understandable, including in a language that the indigenous peoples will fully understand. The format in which information is distributed should take into account the oral traditions of indigenous peoples and their languages.

5. Procedures/mechanisms

- Mechanisms and procedures should be established to verify free, prior and informed consent as described above, inter alia, mechanisms of oversight and redress, including the creation of national ones.
- As a core principle of free, prior and informed consent, all sides in a FPIC process must have equal opportunity to debate any proposed agreement/development/project. 'Equal opportunity' should be understood to mean equal access to financial, human and material resources in order for communities to fully and meaningfully debate in indigenous language(s), as appropriate, or through any other agreed means on any agreement or project that will have or may have an impact, whether positive or negative, on their development as distinct peoples or an impact on their rights to their territories and/or natural resources.
- Free, prior and informed consent could be strengthened by establishing procedures to challenge and to independently review these processes.
- Determination that the elements of free, prior and informed consent have not been respected may lead to the revocation of consent given.

It is recommended that all actors concerned, including private enterprise, pay due attention to these elements.

Appendix 4:
Features of a meaningful and effective consultation process[1]

1. The objective of consultations should be to obtain the consent or agreement of the Aboriginal and Torres Strait Islander peoples affected by a proposed measure

In all cases, States should engage in '[a] good faith effort towards consensual decision-making'.[2] Consultation processes should therefore be framed 'in order to make every effort to build consensus on the part of all concerned'.[3]

2. Consultation processes should be products of consensus

The details of a specific consultation process should always take into account the nature of the proposed measure and the scope of its impact on indigenous peoples. A consultation process should itself be the product of consensus. This can help ensure that the process is effective.

3. Consultations should be in the nature of negotiations

Governments need to do more than provide information about measures that they have developed on behalf of Aboriginal and Torres Strait Islander peoples and without their input. Further, consultations should not be limited to a discussion about the minor details of a policy when the broad policy direction has already been set.

Governments need to be willing and flexible enough to accommodate the concerns of Aboriginal and Torres Strait Islander peoples, and work with them in good faith to reach agreement. Governments need to be prepared to change their plans, or even abandon them, particularly when consultations reveal that a measure would have a significant impact on the rights of Aboriginal and Torres Strait Islander peoples, and that the affected peoples do not agree to the measure.

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1 This Appendix summarises the 'Features of a meaningful and effective consultation process' set out in Chapter 3 of the *Native Title Report 2010*.

2 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 50. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 19 October 2010).

3 J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, Report to the Human Rights Council, 12th session, UN Doc A/HRC/12/34 (2009), para 48. At http://www2.ohchr.org/english/bodies/hrcouncil/12session/reports.htm (viewed 19 October 2010).

4. **Consultations need to begin early and should, where necessary, be ongoing**

   Aboriginal and Torres Strait Islander peoples affected by a law, policy or development process should be able to meaningfully participate in all stages of its design, implementation and evaluation.

5. **Aboriginal and Torres Strait Islander peoples must have access to financial, technical and other assistance**

   The capacity of Aboriginal and Torres Strait Islander communities to engage in consultative processes can be hindered by their lack of resources. Even the most well-intentioned consultation procedure will fail if Aboriginal and Torres Strait Islander peoples are not resourced to participate effectively. Without adequate resources to attend meetings, take proposals back to their communities or access appropriate expert advice, Aboriginal and Torres Strait Islander peoples cannot possibly be expected to consent to or comment on any proposal in a fully informed manner.

6. **Aboriginal and Torres Strait Islander peoples must not be pressured into making a decision**

   Aboriginal and Torres Strait Islander peoples should be able to participate freely in consultation processes. Governments should not use coercion or manipulation to gain consent.

   In addition, Aboriginal and Torres Strait Islander peoples should not be pressured into decisions through the imposition of limited timeframes.

7. **Adequate timeframes should be built into consultation processes**

   Consultation timeframes need to allow Aboriginal and Torres Strait Islander peoples time to engage in their decision-making processes and cultural protocols.

   Aboriginal and Torres Strait Islander peoples need to be given adequate time to consider the impact that a proposed law, policy or development may have on their rights. Otherwise, they may not be able to respond to such proposals in a fully informed manner.

8. **Consultation processes should be coordinated across government departments**

   Governments should adopt a 'whole of government' approach to law and policy reform, pursuant to which consultation processes are coordinated across all relevant departments and agencies. This will assist to ease the burden upon Aboriginal and Torres Strait Islander peoples of responding to multiple discussion papers and reform proposals.

9. **Consultation processes need to reach the affected communities**

   Government consultation processes need to directly reach people 'on the ground'. Given the extreme resource constraints faced by many Aboriginal and Torres Strait Islander peoples and their representative organisations, governments cannot simply expect communities to come to them.

Governments need to be prepared to engage with Aboriginal and Torres Strait Islander peoples in the location that is most convenient for, and is chosen by, the community that will be affected by a proposed measure.

10. Consultation processes need to respect representative and decision-making structures

Governments need to ensure that consultations follow appropriate community protocols, including representative and decision-making mechanisms.

The best way to ensure this is for governments to engage with communities and their representatives at the earliest stages of law and policy processes, and to develop consultation processes in full partnership with them.

11. Governments must provide all relevant information and do so in an accessible way

To ensure that Aboriginal and Torres Strait Islander peoples are able to exercise their rights to participate in decision-making in a fully informed way, governments must provide full and accurate information about the proposed measure and its potential impact.

This information needs to be clear, accessible and easy to understand. Information should be provided in plain English and, where necessary, in language.

Further Information

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Native Title Report 2010

Aboriginal and Torres Strait Islander Social Justice Commissioner

In his first *Native Title Report*, Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda identifies the themes that will guide his work relating to native title during his five-year term.

The *Native Title Report 2010* also reviews a selection of developments in native title law and policy that occurred during the reporting period (1 July 2009 – 30 June 2010).

In particular, the *Native Title Report 2010* examines two ways that governments can rebuild relationships with Aboriginal and Torres Strait Islander peoples – by improving agreement-making processes; and through meaningful and effective consultation and engagement with Aboriginal and Torres Strait Islander peoples.

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