Chapter 1

Native title and the right to development

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

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

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

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

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

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

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

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

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

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

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

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

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

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

And later:

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

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

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

11 *ibid,* para 39.

By the twentieth century:

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

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

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

12 *ibid,* para 43.

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

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

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

The right to development[14]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Non-discriminatory Development

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

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

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

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

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

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

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

Participatory Development

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

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

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

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

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

23 *ibid,* para 6.

24 DRD, preamble, para 2.

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

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

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

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

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

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

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

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

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

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

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

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

Culture and Development

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

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

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

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

28 NTA, s43A.

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

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

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

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

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

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

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

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

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

Development that realises economic, social and cultural rights

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

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37 *ibid.*

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

39 *ibid,* at para 149.

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

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

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

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

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

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

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

41 UDHR Article 17(1).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Self-Determined Development

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

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

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

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

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

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

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

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

Human Rights Committee (HRC)

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

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

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

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

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

Committee on Economic, Social and Cultural Rights (CESCR)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

55 *ibid*, para 86.

56 *ibid*, para 86.

57 *ibid*, para 144.

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

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

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

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

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

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

60 *ibid,* p8.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sustainable development

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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73 *ibid.*

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

A sustainable development framework for native title negotiations

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

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

Sustainable Development Relies on an Effective Process

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

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

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

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

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

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

Sustainable Development Requires Capacity Development

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

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

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

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

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

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

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

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

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

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

A locally driven agenda[80]

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

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

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

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

Building on local capacities and assets

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

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

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

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

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

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

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

Ongoing learning and adaptation

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

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

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

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

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

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

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

An incremental approach

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

Treaty-making in British Columbia

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

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

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

An incremental approach

The central recommendation in the Treaties Commission Review was that:

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

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

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

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

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

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

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

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

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

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

Long term investments

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

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

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

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

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

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

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

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

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

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

Integration of activities

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

98 *op.cit*, fn56.

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

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

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

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

Sovereignty

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

Governing institutions

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

Cultural match

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

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

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

Strategic thinking

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

Leadership

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

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

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

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

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

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

Partnerships

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

101 Cornell, *op.cit*, p8.

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

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

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

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

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

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

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

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

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103 Rio Declaration principle 7.

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

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

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

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

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

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

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

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

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

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

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