Chapter 3

An Evaluation of Native Title Policies throughout Australia

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

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

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

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

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

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

Part 1: Evaluation of State and Territory policies

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

Negotiate not Litigate

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Nor does the protocol between the Queensland government and Queensland Indigenous Working Groups (QIWG), signed in 1999, provide further guidance on this issue. As indicated in the State profiles, the protocol establishes a process for policy development in relation to a number of native title related issues. The protocol ensures that the government's approach in relation to these issues will be developed through extensive consultation between government and the QIWG. The list of issues however does not include the development of a policy direction for the negotiation of native title agreements, including those ancillary to a determination and those made with traditional owner groups which may not meet the legal tests established under the *Native Title Act*.

In NSW, the Premier's Memorandum on Native Title and Indigenous Land Use Agreements (1999, No. 23) advocates ILUAs as a way of resolving native title issues. It provides direction to State government agencies considering the use of an ILUA in their dealings with Aboriginal people. The focus of the direction is on administrative and procedural issues rather than policy issues.

The Memorandum acknowledges that while not all matters may be capable of being resolved through an ILUA, in appropriate cases ILUAs can be a productive means of dealing with native title matters. The Memorandum is silent on whether this includes the use of ILUAs to augment or replace consent determinations. The Memorandum is also silent on the government's goals in negotiating an ILUA.

The Department of Lands' website also articulates the NSW government's approach to native title agreement-making. It states that a goal of native title agreements is 'to achieve fair and equitable outcomes for all parties'. However there is no detail as to what fairness and equity mean in the context of native title agreements or how they are to be achieved.

In Western Australia the Office of Native Title implements the government's native title policy. The policy, entitled *native title: agreement not argument,* set out in full in the State's profile in Chapter 2, undertakes to 'resolve native title issues by negotiation and agreement and cut currently projected expenditure on native title litigation by at least $2 million'.[8]

As set out in the WA profile, the government's platform of resolving native title claims through mediation and negotiation has been reiterated on a number of significant occasions since its election. It is clear the WA government is seeking ways to resolve claimant applications outside the litigation process. However,

7 Queensland Department of Natural Resources and Mines <www.nrm.qld.gov.au/nativetitle/policy/manual.html> accessed 17 December 2003.

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

there is no detailed policy framework for directing the negotiation of native title agreements to the economic and social development of the native title group.

Native title negotiations and agreement-making in South Australia and Northern Territory are, more than in any other State, directed to the economic and social development of the traditional owner groups.

In South Australia this policy direction is driven by the State-wide ILUA process rather than an articulated policy position. This process is described in the previous chapter in the policy profile of South Australia. Its features are:

(i) A high level of Indigenous participation in the negotiation process

The South Australian government's commitment to the State-wide ILUA negotiation process (also referred to as a State-wide Framework Agreement) means that native title negotiations involve a high level of participation by traditional owner groups. This is because, as part of this commitment, the government supports the establishment by the Aboriginal Legal Rights Movement (ALRM) of a system of participation which ensures that traditional owner groups have an opportunity not only to directly negotiate their claim, but also to assist in the formulation of the government policy which directs these negotiations. Participation at these levels ensures that the development objectives of the native title claim group will be integral to the negotiation of native title agreements.

Under this approach native title negotiations are not merely a conduit to a series of native title or non-native title outcomes aimed to benefit Indigenous people. They are also part of a process in which the capacity of traditional owner groups to determine their own objectives and to achieve these objectives can be exercised.

Under the State-wide ILUA process, ALRM has equal standing with other stakeholders on a series of side tables that consider policy approaches to a range of issues including mining, fishing, local government and pastoralism. These side table negotiations have resulted in three significant draft template agreements concerning pastoral interests, exploration interests and mining interests. More importantly, they are laying the foundation for strong workable relationships between Indigenous and non-Indigenous people well into the future.

The formulation of policy in this way, through transparent, representative processes, shows a commitment by the South Australian government to facilitating the native title groups' development objectives. The negotiation of processes through a series of side tables is a means by which the claimant group can integrate their objectives with those of other stakeholders. Enshrining policy positions as template agreements (ILUAs) between stakeholders ensures not only the government's commitment to the agreed approach but a commitment by all the relevant groups involved in the negotiation. It also contributes to the development of stable and harmonious relationships between stakeholders and provides the basis for future economic developments.

(ii) The State seeks to facilitate Indigenous development rather than impose it

Using negotiation as the process by which a State develops its policy approach to traditional owner groups ensures that the development objectives identified by Indigenous people, rather than the objectives identified by the State, have a central place in that policy. Through negotiation the State can be urged to develop strategies to facilitate achievement by the group of its own goals.

In South Australia the negotiation process is structured to be consistent with the time frames required by the claimant group to develop its capacity to achieve its development goals. In addition, the conduct of a series of negotiation tables devoted both to specific claims and to more general issues, allows traditional owner groups to be involved in the process even if their particular claim is not on the table. In this way the negotiation process itself is a mechanism for capacity development. It also ensures negotiations are not an all-or-nothing event and can be staged according to the critical stages of the development process.

Finally, the State-wide ILUA process in South Australia reflects the government's willingness to invest resources necessary to allow the group scope for capacity building. As discussed in Part 2 of this chapter in relation to funding, the SA government has buttressed the Commonwealth's inadequate funding of Native Title Representative Bodies to ensure the state-wide negotiation process can be seen through to its intended conclusion: the development of self-supporting and self-governing Indigenous communities.

In the Northern Territory a similar commitment to the economic and social development of traditional owner groups is demonstrated in the way the government conducts native title negotiations. The policy goals of the Office of Indigenous Policy expressly apply to these negotiations and include co-ordinating Indigenous economic development policy; developing options to improve the social well being and living conditions of Indigenous Territorians; and the development of effective Indigenous governance and capacity building to develop sustainable communities.

Just as important as these policy goals is the process by which they are formulated. The Indigenous Economic Forum '*Seizing our Economic Future'* conducted in March 2003 was the first of three fora designed to inform the government's policy in the area of economic development for Indigenous people in the Territory. A major focus of the forum was the sustainable economic use of country.[9]

The Relationship between States' Native Title Policy and their Indigenous Policy

While there is a failure by many States to fully develop policy objectives for native title negotiations, this policy gap could be filled if States were willing to align native title negotiations with the economic and social development objectives contained in their broader Indigenous policies. However, native title

9 *Seizing our Economic Future*, Issues Paper, p2. <www.indigenousforums.nt.gov.au/dcm/indigenous_policy/forums/pdf/Indigenous_Economic_Forum_2003_Issues_Paper.pdf> accessed 11 December 2003.

continues to be positioned outside this broader policy framework. In many cases the role of native title is patently absent from States' policy responses to the reconciliation process. Native title negotiations and agreements are not seen as part of the State's policy toolbox directed towards transforming the conditions of Indigenous people's lives.

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

I have already referred in Chapter 1 to the Harvard Project on American Indian Economic Development[10] and its finding that tribes that are successful in transforming their economic and social conditions are those which make their own decisions and have capable institutions of governance which reflect the cultural values of the tribal citizens. These findings reinforce my view that recognition of the distinct identity of Indigenous people and the cultural, economic and political values that characterise this identity are essential to the economic and social development agenda of Indigenous people. While the legal construction of native title in Australia has diminished the extent to which the law will recognise Indigenous laws and customs and decision-making structures, a broader approach to native title can give recognition to Indigenous identity as it manifests in the way of life of a vast array of traditional owner groups throughout this country. Negotiating development within the parameters of this broader understanding of native title provides an inbuilt mechanism for ensuring that many of the elements necessary to ensure the success of development policies are present.

Despite native title providing an ideal location to foster sustainable development for Indigenous people it is not included in the policy response of some governments to reconciliation. The two major policy responses to emerge from the reconciliation process which do facilitate the economic and social development of Indigenous people are, firstly, a "whole-of-government" approach to Indigenous policy and secondly, partnerships between government and Indigenous communities.[11] These two policy frameworks are discussed in detail in Chapter 1. They are also discussed in this year's *Social Justice Report*. In Chapter 1 I conclude that a whole-of-government approach, which requires government to integrate the responsibilities and policies of all the agencies

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

11 Council of Australian Governments (COAG) 'Whole of Government' initiative is managed by the Commonwealth and based on a COAG Communique released in November 2000. For more details see <www.pmc.gov.au/docreconciliationframework.cfm>.

concerned with providing services to Indigenous communities, is a very important element of achieving the sustainable development of these communities. However the implementation of this approach has been very limited and fails to ensure that Indigenous policies in all their manifestations are underpinned by consistent objectives. In particular it fails to ensure that native title policies are brought within or are consistent with strategies for achieving economic and social development.

The second policy response to reconciliation, the establishment of partnerships between Indigenous communities and governments, is also an important element of sustainable development. In the policy framework for sustainable development described at the beginning of this chapter, government can play an important role by facilitating the identification of development goals; assisting the group to build upon its assets, skills and knowledge to achieve those goals; helping the group identify which aspects of its asset skills and knowledge base may need to be supplemented; and facilitating the group to monitor and evaluate those strategies it has adopted to achieve its goals. This policy framework can be summed up as a partnership approach. It is a partnership, however, with a number of special characteristics.

First, for the approach to achieve sustainable development of the community, the dominant partner must be the Indigenous people. The Indigenous community must determine its policy objectives and strategies and control the way they are achieved. Decisions to this effect must be conducted by means of processes and institutions which the community respects and which reflect the group's cultural values. As discussed above, native title can provide a framework to ensure decisions are made in this way.

Second, the government's role in this partnership is to facilitate and assist the group to achieve its goals. The government should not take over the control of the process. Indigenous leader Gerhardt Pearson has put the situation thus:

> It is easy for government bureaucracies to accept so-called "whole-of-government" approaches, coordinated service delivery and so on. It is much harder for them to let go of the responsibility. On one hand we have the almost complete failure on their part to lead and facilitate social and economic development in Indigenous Australia. On the other hand, our experience is that the government bureaucracies are resistant to the transfer of responsibility to our people.[12]

Despite the limitations in the way the whole-of-government and partnership approaches have been applied, these two responses to reconciliation have provided an important foundation for economic and social development to occur in Indigenous communities. Yet in a number of cases States have not included native title in their response to reconciliation.

In NSW the government has responded to the reconciliation process with a plan of action aimed at strengthening Aboriginal leadership and economic

12 G Pearson, "Man Cannot Live By Service Delivery Alone", *Opportunity and Prosperity Conference*, Melbourne November 2003. Available at <www.capeyorkpartnerships.com>. Accessed 14 November 2003.

independence.[13] The plan builds on the concept of partnerships between government and Aboriginal people. In November 2002, the NSW Government, ATSIC and the NSW Aboriginal Land Council entered into the NSW Service Delivery Partnership Agreement, the purpose of which is to improve social, economic and cultural outcomes for Aboriginal and Torres Strait Islander people in NSW. There is no mention of native title in the document although the importance of traditional owners in national parks is referred to. The notion of partnerships and a whole-of-government approach is used in the limited sense of co-ordinating government service delivery to redress Indigenous disadvantage. It does not extend to recognising inherent rights as the basis for achieving better social and economic outcomes for Indigenous communities.

In Victoria, in September 2000, the then Department of Natural Resources and Environment[14] developed a comprehensive framework to assess its relationship with Indigenous communities to use it as a basis for delivery of services to Indigenous people. Out of this an Indigenous Partnership Strategy was developed in 2001 which contains eight initiatives, including capacity building, a partnership approach, Indigenous heritage as a component of land and resource management, and economic development.

The Wotjobaluk Agreement was developed in conjunction with the Department of Sustainability and Environment and Justice. It utilised a broad range of options available to the Victorian government. It is clear that elements of the Indigenous Partnership Strategy influenced the government's approach in the negotiation of this agreement, including the Government's willingness to recognise Indigenous custodianship of land and actively promote Indigenous participation in cultural heritage, land and natural resource management programs. This approach is comprehensive and could be further applied to ensure that the government's policy direction in all native title agreements is towards the economic and social development of Indigenous people. The Strategy could also be developed to provide criteria by which agreements that have been negotiated are evaluated and monitored to ensure they achieve their economic and social goals. This would provide a basis for a partnership between the government and the traditional owner group.

A key issue in Queensland is the interrelationship between native title and Indigenous concerns about cultural heritage and land and waters. Because many of these issues are dealt with by different government agencies, the State government is attempting to implement a whole-of-government approach to coordinate these various aspects.

Cape York offers an instructive study in the layering of policies and programs, both State and Commonwealth. Many of these policies and programs are related to, or impinge on, native title and affect the economic and social development of Indigenous people. In terms of regional policy approaches, the Commonwealth has made the Cape one of the trial areas for its Council of Australian Governments (COAG) whole-of-government approach under the

13 Partnerships: a New Way of Doing Business with Aboriginal People Premier's Memorandum No. 2001-06 at <www.premiers.nsw.gov.au/pubs_dload_part4/prem_circs_memos/prem_memos/2001/m2001-6.htm> accessed 10 November 2003.

14 Since December 2000, the Department of Sustainability and the Environment.

COAG Reconciliation Framework.[15] The COAG Cape York trial is designed to work collaboratively with the Queensland government's Cape York Partnerships approach, and specifically with the State government's response to the Cape York Justice Study, *Meeting Challenges, Making Choices*.[16] The latter program is the responsibility of the Department of Aboriginal and Torres Strait Islander Policy (DATSIP) which has established a Cape York Strategy Unit to implement its response. The response includes the appointing "Government Champions" (heads of Queensland government departments), who each have responsibility for developing effective relationships with particular communities in the Cape. *Meeting Challenges, Making Choices* sets out eight priority areas:

- Alcohol, substance abuse and rehabilitation
- Children, youth and families
- Crime and justice
- Governance
- Economic development
- Health
- Education and training
- Land and sustainable natural resource management.

One of the outcomes of Queensland's whole of government approach is the draft proposal *Looking after our Country Together.*[17] The proposal sets out three key objectives for the next ten years:

- Stronger Indigenous access to land and sea country
- Improved Indigenous involvement in planning and management of sea country
- Improved Indigenous involvement in and impact on natural resource planning and policy making.[18]

This discussion paper has been circulated through a series of community consultations between September and November 2003.

The Department of Natural Resources and Mines' Cape York Co-ordination Unit in Cairns has been set up to provide a coordinated approach to the economic, social, and environmental issues of the people in Cape York.[19] Although not directly involved in native title negotiations, the Co-ordination Unit plays a key role in the broader Indigenous issues relating to land and sea in Cape York, many of which involve native title holders or claimants and matters that are being dealt with in the context of native title or related negotiations.

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15 The Framework can be found at <www.dpmc.gov.au/docs/reconciliation_framework.cfm> See also D Hawgood, 2003 'Imagine what could happen if we worked together. Shared responsibility and a whole of governments approach', paper delivered at the *Native Title Conference*, Alice Springs, June 2003. Available at <www.aiatsis.gov.au/rsrch/ntru/conf2003/papers.htm>.

16 <www.mcmc.qld.gov.au/>.

17 <www.nrm.qld.gov.au/regional_planning/partnership/resources.html>.

18 <www.indigenous.qld.gov.au/partnerships>.

19 Queensland Government, Department of Premier and Cabinet Annual Report 2001-2002 at <www.premiers.qld.gov.au/about/annreport01-02/index.shtml>. Further information on Cape York Partnerships available at <www.premiers.qld.gov.au/about_the_department/publications/regional>.

These include the transfer of identified land and the establishment of Land Trusts under the *Aboriginal Lands Act 1991* (Qld) (ALA); and support for a number of Natural Heritage Trust (NHT) projects and for the implementation group for the Cape York Heads of Agreement eleven pilot properties. The Director-General of DNRM is the Mapoon community's "Government Champion" and the Co-ordination Unit assists with this work in co-operation with DATSIP's Cape York Strategy Unit. A particular program supported by the Unit with the assistance of NHT funding is the Land and Sea Management Centres currently located in Kowanyama, Pormpuraaw, Aurukun, Napranum, Mapoon, Injinoo, Lockhart River, Coen, and Hopevale.

Native Title and Indigenous Land Services (NT&ILS) officers and the Cape York Partnerships negotiating teams maintain ongoing liaison with the Cape York Co-ordination Unit, and with other government agencies with related responsibilities in the Cape, such as the Environmental Protection Authority (EPA) which administers the key Queensland legislation dealing with the environment.

This whole-of-government approach, adopted in Cape York as part of the COAG trials, ensures that the policies that apply to Indigenous people in that region are consistent across government agencies and directed to their economic and social development. A whole of government approach requires that these policy goals of economic and social development permeate native title policy. An important question for native title claimants and traditional owner groups in Queensland is whether the State government's response to reconciliation in the Cape will result in changes to the way in which native title is negotiated both in the Cape York region and throughout the State.

In Western Australia an important government response to the reconciliation process was the *Statement of Commitment to a New and Just Relationship between the Government of Western Australia and Aboriginal Western Australians.* The purpose of the Statement was:

> to agree on a set of principles and a process for the parties to negotiate a State-wide framework that can facilitate negotiated agreements at the local and regional level.[20]

This broad aim of developing strategies to support and assist Indigenous people has been cited as underpinning new policy developments in WA government departments. For example, the Department of Conservation and Land Management (CALM) consultation paper on joint management refers to the agreement as underpinning the policy shift on joint management. So too does the Department of Local Government and Regional Development in relation to its strategy 'Working with Indigenous People and Communities' which focuses on developing principles for the Department's work with Indigenous communities on capacity building, leadership and economic development.

There is no indication at this stage that native title will play a role in the government's commitment to a 'new and just relationship with Indigenous

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

people' or in the development of a State-wide framework to facilitate negotiated agreements at the local and regional level.

In July 2003 the Tjurabalan native title determined area, and the areas covering Balgo and Yagga Yagga Aboriginal communities, were identified as one of the Council of Australian Government's (COAG's) trial sites for a new coordinated approach to develop more flexible programmes and services for Indigenous communities.[21] As part of this coordinated approach, WA announced its commitment to the establishment of a permanent police presence in the region as a priority in response to the communities' concerns about alcohol and justice issues.

There is no indication from a policy perspective what role native title will play in the Tjurabalan trial even though, as one of the COAG sites, the trial will be based on a whole-of-government approach.

The Northern Territory government has integrated Indigenous economic development into its Territory-wide economic development strategy *Building a Better Territory*.[22] As part of this strategy the government seeks to 'enable Indigenous people to use their rights to land to advance their economic well-being and to boost Territory economic development'.[23] The strategies adopted to achieve this goal are firstly:

> Work with Indigenous landowners and their representatives to create a framework of investment certainty in relation to land tenure;

and secondly:

> Work with Indigenous landowners and their representatives to create economic and social development opportunities.

Each strategy outlines the actions needed to ensure their achievement.

The document also seeks to achieve a policy framework that co-ordinates policy programs across departments:

- a commitment to undertake a detailed examination of the various findings and proposals emerging from the Economic Forum.
- to establish a more coherent policy framework across the whole of the Northern Territory government in relation to Indigenous economic development at the Territory-wide and regional levels. This framework will identify the roles and responsibilities of individual departments and agencies in relation to program and policy responsibilities and will be available to all relevant stakeholders.
- the establishment of a permanent high-level task force on Indigenous economic development with nominated representatives from the NT government, industry, Commonwealth agencies, Land Councils and ATSIC. The role of this task force will be to identify key strategies and

21 *Tjurabalan and Region Indigenous Communities Join COAG Trial,* Joint media statement, Minister for Immigration and Multicultural and Indigenous Affairs, 2 July 2003.

22 *Building a Better Territory*, *The Economic Development Strategy for the Northern Territory,* June 2002.

23 *ibid*, p41.

directions, opportunities and barriers, establish and direct project teams where required, and deliver timely responses.[24]

The reconciliation process has caused States to rethink their policy objectives in many areas. No doubt, the legislative recognition of native title has also had an impact on the way governments are looking at their overall policies in relation to Indigenous people. For instance, since the recognition of native title, governments are more aware of regionalism as a basis for decision-making and are focusing on traditional decision-making and land management in their policy approaches. However, as is clear from the above discussion, native title has not been fully integrated into government policy making as a means of harnessing the power of Indigenous people's identity based on traditional laws and customs to achieve economic and social development.

In some states, governments are attempting to integrate native title negotiations with other government Indigenous policies by creating structural links between government agencies concerned with Indigenous issues and native title units. These initiatives are varied and include conducting regular liaison meetings, issuing internal memoranda on how native title issues should be dealt with, establishing protocols on communication between government departments, and installing representatives from relevant departments in the native title unit. These links are important in ensuring that native title negotiations are co-ordinated across government. However, they are not in themselves sufficient to ensure that native title negotiations are underpinned by policy objectives consistent with the broader Indigenous policy agenda. Nor do they necessarily direct native title negotiations to the economic and social development of Indigenous peoples.

What I urge in this Report is firstly, that native title policy is informed by the broader policy agenda directed to the economic and social development of Indigenous people and that secondly, the legal reocognition of inherent rights through native title is seen as a policy tool that contributes to this goal. However coordination of native title policy with broader Indigenous policies directed to economic and social development of Indigenous people should not weaken the capacity of specific Indigenous policy areas to pursue these goals. A whole of government approach to native title does not require that all native title issues be controlled by a single agency which amalgamates policy options, but rather that a multiplicity of policy options be directed to consistent goals.

For example, in Western Australia state departments and agencies have undertaken negotiations with Native Title Representative Bodies on a range of issues. These are outlined in the State profile. The Office of Native Title has overarching responsibility for whole-of-government coordination of native title matters. Whereas previously the NTRBs were able to achieve positive progress in relation to Indigenous land matters through bilateral discussions with particular departments, many of these discussions are now streamlined as part of native title negotiations with the Office of Native Title. While this may ensure consistency in the way native title is approached from claim to claim, it does not guarantee

24 <www.nt.gov.au/dcm/otd/publications/major_projects/economic_development_strategy/building_a_better_territory.pdf>.

that the native title negotiation is directed towards achieving economic and social development. In some cases streamlining in this way may mean that outcomes are delayed in their implementation pending the resolution of the claim. It may also mean that native title agreements are bolstered with outcomes which would have occurred in any case, and possibly earlier, as part of the State's planning process.

An example is including as a potential outcome of native title negotiations what was previously a commitment of the government to transfer lands from the Aboriginal Lands Trust (ALT) to Aboriginal communities. While its inclusion as part of a native title negotiation ensures that the policy is applied as a response to the particular needs of the group it should not be used as a bargaining chip in these negotiations. Nor should the implementation of this or any other policy directed to economic and social development be delayed as a result of its inclusion in the negotiation of native title.

The economic and social development of traditional owner groups requires a sound policy framework that offers a range of options which address the group's particular needs, plus criteria for evaluating their effectiveness. These can be achieved in a variety of ways. Native title is one of these ways and should be an integral component of a government's overall consideration.

Negotiations occur within a legal framework

The failure of many States to fully develop a policy direction for the negotiation of native title agreements means that the process takes place largely within a legal framework rather than a policy framework. Within the legal framework negotiation of native title takes place under pressure of a process in which litigation is either proceeding or pending. This is not to say that a range of agreements cannot be negotiated within this framework. However, the scope and content of those agreements are predominantly directed to addressing the legal issues that define the claim.

The imposition of the legal framework in the negotiation of native title to some extent is unavoidable. This is because the NTA requires all native title claims to be filed in the Federal Court as the first step in the process. The service of a claim is often the State's first notification that the traditional owner group seeks recognition of its traditional connection to a particular area of land. In addition, the amendments to the NTA mean native title applicants will not be entitled to the procedural rights of the future act provisions unless they satisfy the registration test established in the NTA. A precondition to this occurring is the filing of native title application in the Federal Court.

It is not argued in this Report that the legal rights of native title parties are not a necessary element of a native title policy in which the sustainable development of the group is paramount. Recognition of native title rights and interests could well provide to the group important assets on which development could be built, particularly where these native title rights and interests give the group control of the resources that are on the land. However, as outlined at the beginning of this chapter, the assets of the group are just one element of what is needed for it to achieve its own development objectives. The other elements are more likely to be addressed through negotiations directed to what is often

referred to as 'non-native title outcomes', through agreements which either complement or replace native title determinations. The policy framework advocated in this Report synchronises the three types of negotiations within the native title process towards the achievement of the group's development objectives.

The emphasis on the litigation model means that negotiations can suffer from the following shortcomings:

- The primary goal of the agreement is the settling of the native title claim once and for all
- Legal tests established under the NTA form the basis for negotiations
- The relationship between the State and native title claimants becomes adversarial

(i) Settling the native title claim once and for all

Because of the dominance of a litigation model in native title negotiations, the relationship between the State and the native title claim group begins with the filing of a native title claim and tends to end with the resolution of that claim either through litigation or by agreement of the parties. So too, throughout the negotiation process, time frames for negotiation tend to be regulated by the Court's requirement that the claim proceed at a particular rate. Even where the negotiations are directed to agreements which do not require a native title determination, there is an overriding concern to ensure that the native title claim is resolved with finality.

While the native title process provides an important trigger for the State to enter into a relationship with traditional owner groups who claim a continuing relationship with their traditional lands, negotiations structured around the resolution of a legal claim may not be conducive to the group achieving their development objectives.

In Chapter 1 I discuss an approach to negotiations in which time frames are responsive to the changing capacities of groups to achieve their development goals. The role of the State should be that of a partner assisting the group in this process. While the long term objective of the process is the independence of the Indigenous community, the State will continue to have a role until this objective is achieved. The resolving of a native title claim is not an indication that the group has achieved its development goals nor that the State no longer has a role in the capacity development of the native title claim group. The importance of appropriate time frames in the negotiation process was discussed in a review by the British Columbia Treaty Commission of the way in which treaties are negotiated in that province.[25]

The central recommendation of the review was that First Nations, Canada and British Columbia shift the emphasis in treaty-making to incremental treaties – building treaties over time. An incremental approach accords with a number of

25 British Columbia Treaty Commission, *Looking Back – Looking Forward*, BC Treaty Commission, Vancouver, British Columbia, 2001, p14. See Chapter 1 and 4 for further discussion of the review.

the principles of capacity development including a long term investment in the negotiation of agreements; ongoing learning and adaptation; the creation of partnerships; and development of long term relationships. Applying these principles to Australian native title negotiations could form the basis of a long term investment and partnership between government and traditional owner groups.

The Treaty Commission also noted the inadequacy of one-off agreements to address community development and governance. The review recommended that Canada and the British Columbia provincial governments provide contribution funding to allow First Nations to develop their human resources, governance and vision without the continuing pressure of tripartite negotiations.[26] Adapting these recommendations to the native title process would require restructuring negotiations so that they no longer revolve around a one-off agreement to settle native title claims.

The mediation of native title claims through the National Native Title Tribunal (NNTT) provides a forum in which to conduct negotiations directed to outcomes other than the settlement of a native title claim. The Tribunal's Three Year Strategic Plan for the period 2003-2005 indicates its willingness to develop 'broader and more comprehensive approaches to ensure that native title and related outcomes acknowledge the rights and interests of all those involved, and lead to lasting relationships'.[27] However it is important that the Tribunal's strategy also takes account of the capacity of native title agreements directed to 'related outcomes' to respond to the development needs of native title claimants, and the way in which the negotiation process must be structured to enhance this capacity.

(ii) Legal tests established under the NTA form the threshold for negotiations to occur

Agreements occurring within a litigation model are framed according to the legal tests which determine whether the rights asserted can be recognised and enforced by a Court. While State governments have generally indicated a willingness to negotiate an agreement even where these tests cannot be met, the tests still play a role in the negotiation process. Negotiation threshold tests, shaped by the legal tests, play a crucial role in determining whether, and if so how, the State will negotiate with traditional owner groups.

Negotiation threshold tests[28] differ from state to state but essentially require the claimants to provide to the state evidence that they are the biological descendants of the traditional owners,[29] that they can demonstrate continuing connection with the land of their forebears, and that they have continued to observe their traditional laws and customs. Through the connection report the state assesses whether the native title claimants have satisfied these three

26 *ibid,* p16.

27 National Native Title Tribunal, *Strategic Plan 2003-2005*, President's Introduction, <www.nntt.gov.au/about/strategic.html>.

28 Variously referred to as 'Connection Tests', 'Credible Evidence Test', 'Proof of Native Title'.

29 For a scientific-legal analysis of the "biological test" see L de Plevitz and L Croft "Aboriginality Under the Microscope: The Biological Descent Test in Australian Law" (2003) 3(1) *QUT Law and Justice Journal* 104-120.

conditions. In addition, the state needs to be satisfied that the rights claimed have not been extinguished by the granting of other inconsistent rights over the land. The state is generally responsible for compiling a tenure history to determine whether the rights and interests claimed have been extinguished.

Some States, guided by a broader policy direction towards the economic and social development of traditional owner groups, proceed to negotiate with native title claim groups when they are certain that the group with whom they are negotiating are the traditional owners of the relevant land. Under this approach a State may enter into negotiations with the traditional owner group either through the mediation process offered under the NTA or by means of their own processes without waiting for the collection of evidence by the claimant group in relation to the continuity of their connection, the continuity of their observance of traditional laws and customs and the compilation of a tenure history by the state. Where a consent determination is part of the overall negotiation process, the evidence necessary to satisfy a Court can be gathered during negotiations: it need not delay the commencement or progress of negotiations between the State and the claimant group.

However Western Australia, Queensland, New South Wales and Victoria have all adopted processes which require the claimant group to provide the State with evidence in relation to specified criteria as a pre-condition to native title negotiations. In Western Australia the criteria are contained in *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title*; in Queensland, the *Guide to compiling a Connection Report*; in Victoria, in the *Guidelines for Proof of Native Title*; and in New South Wales though not contained in a specific document the government refers to the *credible evidence test*.

These criteria are directly related to the legal tests by which native title rights and interests are proven to exist. The level of evidence required to meet the state's negotiation threshold differs from state to state and is not generally required to reach that presented in a contested hearing. Nevertheless the process can be likened to the settling of a legal claim whereby the state assesses the strength of the case against it and either settles or litigates in accordance with this assessment. I refer to this approach as the assessment model.

In my view native title negotiations should not be approached in this manner. Native title should be seen as an opportunity for both parties to satisfy important objectives: the State to engage with Indigenous people in a way which recognises and respects their traditional structures in order to satisfy important policy objectives; and the native title group to negotiate with the State in relation to securing rights and outcomes that address the particular needs of the group. Instead, the assessment model focuses the negotiation around the settlement of a legal claim. While the resolution of the native title claim may be one element of the negotiation process, the assessment model allows it to dominate the negotiation process.

The assessment model casts the State in the role of deciding whether it will negotiate the claim based on its assessment of the strength of the applicant's case. In contrast, the negotiation model assumes the right of claimant groups to a negotiated outcome based on their traditional connection to country. Where

the economic and social development of traditional owner groups is a priority of government, the question is not whether negotiations will proceed, but how they will proceed.

Government attitude towards negotiation has been a concern in Western Australia where the Office of Native Title has been reluctant in particular cases to engage in the mediation process both in terms of meaningful input and physical presence at formal mediation sessions convened by the Tribunal. The expressions of concern have not been limited to Native Title Representative Bodies. The Tribunal and the Federal Court have also expressed their disquiet. In a directions hearing in *Frazer v State of Western Australia*,[30] before French J in April 2003, many of the issues relating to the difficulties that Native Title Representative Bodies are experiencing in their negotiations with the State were raised.

The background was that although a group of native title applications in the Central Desert region of Western Australia had been referred to the Tribunal for mediation by the Federal Court, the negotiations had generally taken place between the applicants and the State of Western Australia without the involvement of the Tribunal. In a directions hearing a month earlier, the Court had sought submissions from the parties on the proper establishment and management of a negotiation timetable. The principal issue under consideration in the April hearing was the role of the Tribunal in the initiation and management of mediation. In the course of the proceedings, issues were aired relating to the State's guidelines and whether timely progress was being made.

In an affidavit filed on behalf of the State it was stated that although the relevant Land Council and the Court had identified the Martu application as a priority for mediation, it was not a priority for the State.[31] It was asserted on behalf of the State that:

> Determining whether there is a sufficient evidentiary basis upon which to found a negotiated outcome is an important step preliminary to any negotiations over the form of a determination of native title.[32]

The State also submitted that it would only be when the State was satisfied that connection could be made out from its own assessment of the material, that mediation of other matters contemplated in s. 86A(1) could proceed.[33]

French J did not agree. On the issue of the setting of priorities he said that:

> It is not open to any party, be it the State or a native title representative body or any other respondent, unilaterally to announce priorities for a particular region. This is an aspect of the mediation process. Any unilateral action by any party to an application which is not acceptable to others may result in a breakdown of the mediation process and its cessation by order of the Court.[34]

30 *Frazer and Ors v State of Western Australia* [2003] FCA 351.
31 *ibid*, at [6].
32 *ibid*, at [16].
33 *ibid*, at [17].
34 *ibid*, at [29].

His Honour also expressed concern about the delays that had occurred in the progressing of native title claims and stated his view that there was a need for 'a more systematic and focused approach'.[35]

In his decision French J attributed the cause of delays occurring in the mediation of native title claims to the 'gathering and collation of connection evidence, usually in the form of anthropological reports, and its assessment by the State'.[36] He also suggested that it may be preferable for the Court to hear:

> important elements of connection evidence from applicants themselves, in order to facilitate the preservation of that evidence, to give applicants an opportunity to tell their story to the Court at an early stage and to facilitate subsequent mediation.[37]

His Honour considered that this could be done either by reference to a suitably framed question of fact from the NNTT under s136D(1) NTA for a determination by the Court under s86D, or by the Court directing the hearing and determination of such issues.[38] His Honour also referred to the use of early neutral evaluation as an aid to mediation.[39]

A similar situation arose in *Karajarri People v State of Western Australia*[40] where a directions hearing was convened by North J on 2 October 2003 on the undetermined portion of the application. His Honour convened the Court because of his concern about the 'slowness of progress in the mediation'.[41] North J called for and received a mediation report from the Tribunal Deputy President, who had responsibility for the claim. His Honour described the report as 'disturbing' and as a consequence required the parties to give reasons on affidavit for the 'excessively long delay'.[42] Referring to the affidavit filed by the State in response to that direction, his Honour said that it appeared that the delay had been caused by the State's failure to 'make a response, as it had promised to do, to the then existing proposals of the applicants and the pastoralists'.[43] These proposals concerned the making of a consent determination by the parties. The matter has been adjourned.

While the Court's approach of directing the State to negotiate even when it is reluctant to do so ensures an ongoing dialogue between the parties it stops short of seeing negotiation as a legal right of Indigenous people to whom the State owes a fiduciary duty. In *Haida Nation v B.C. and Weyerhaeuser* the Court confirmed and expanded upon the fiduciary duty owed by the federal and provincial Crown to the Indian peoples of Canada. This duty gives rise to a legal right in the Haida and other Indian people to have the Crown enter into bona fide negotiations:

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35 *ibid,* at [32].
36 *ibid*, at [30].
37 *ibid*.
38 *ibid*.
39 Early neutral evaluation is currently being considered by the Goldfields Land and Sea Council and the ONT for one of the southern goldfields claims.
40 *Nangkiriny & Ors on behalf of the Karajarri People v State of Western Australia & Ors*, Directions, 2 October 2003, (Unreported).
41 *ibid,* p3.
42 *ibid*.
43 *ibid*.

> The fiduciary duty of the Crown, federal and provincial, is a duty to behave towards the Indian people with utmost good faith and to put the interests of the Indian people under the protection of the Crown so that, in cases of conflicting rights, the interests of the Indian people, to whom the fiduciary duty is owed, must not be subordinated by the Crown to competing interests of other persons to whom the Crown owes no fiduciary duty.[44]

This fiduciary duty provides a much stronger basis for a Court to order a government to enter into meaningful negotiations than that available in Australia, where, in effect, the order to attend mediations and negotiate is a procedural matter unrelated to the substantive rights of the claimant group.

Given that a number of states in this country have adopted an assessment approach to negotiating with native title claimants, there are some important principles that, if adopted, would ensure minimal obstruction of the negotiation process:

1. the criteria required to meet the negotiation threshold should not be based solely on applying the stringent legal tests for native title;
2. the criteria should be clear and unambiguous;
3. the criteria should be consistently applied;
4. the criteria should not be burdensome and oppressive on the claimant group;
5. the claimant group should receive, in a timely manner, reasons why they have not satisfied the criteria.

1. The criteria required to meet the negotiation threshold should not be based solely on applying the stringent legal tests for native title

While a number of states require the claimant group to provide the State with evidence in relation to legal criteria as a condition precedent to commencing negotiation, there are varying degrees to which the legal tests are applied. In Queensland the recently revised *Guide to Compiling a Connection Report* does not include any substantive discussion about the underlying legal issues that must necessarily inform the writing of a connection report. However it states that 'the author of a connection report may need to consider a number of key legal concepts that have been discussed in recent High Court decisions, particularly the *Yorta Yorta*[45] and the *Ward* decisions.[46] This emphasis on legal criteria can only raise the threshold for the commencement of negotiations or, once negotiations commence, reduce the scope of the negotiations to specific native title rights and interests.

The particular impact of the *Ward* decision is reflected by the requirement in Queensland for a connection report which provides a list of the native title rights and interests claimed, and a schedule of activities demonstrating the traditional

44 *Haida Nation v B.C. and Weyerhaeuser* 2002 BCCA 462, at para 62.
45 *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58.
46 *Western Australia v Ward* (2002) HCA 28.

law and custom of the native title claimant group.[47] No distinction is made in this context between a claim for an exclusive determination of native title under s225(e) NTA – that is, whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters to the exclusion of all others; or a non-exclusive determination under s225(c) and (d), that is, whether the native title rights and interests are co-existent with other interests.

Like Queensland, other states are revising their criteria for entering negotiations in response to these legal decisions. The effect of this is to increase the number of native title claimants who will be denied the right to enter into negotiations with the government. As a result, claimant groups will be denied access to a partnership with government essential to their sustainable development.

In Western Australia the *Guidelines for the Provision of Evidentiary Material in Support of Applications for a Determination of Native Title* were developed in response to a review of the native title claim process conducted in April 2001. The review undertook to develop a new set of principles to guide the state government's negotiations on native title determinations and agreements. At the time the WA government commissioned the review, 131 claims had been filed in the Federal Court in that state. Trial dates had been set for 34 of these claims and it was likely that all the remaining claims would end up in court.

The *Review of the Native Title Claim Process in Western Australia*, (the Wand Report) was released in November 2001.[48] It strongly endorsed the government's stated preference to resolve native tile claims by agreement. The report recommended that as part of the negotiation process towards consent determination, native title applicants should provide the state government with a connection report that satisfies ss 87 and 94 *Native Title Act.*

The report also pointed out that, although the government's assessment of native title for the purposes of s 87 NTA should be guided by legal principles, it should also be mindful of the context in which the assessment occurs, 'that of negotiation and mediation pursuant to a "special" process provided under the Act'.[49] Thus it recommends that in addressing sections 223 and 225 of the Act:

> it should not be necessary for native title applicants to establish native title to the extent required in a contested hearing of an application. In this context, the Government should be satisfied by a Connection Report based on credible evidence.[50]

The *Wand Report* also warned that the government should ensure that its assessment process 'does not operate as an alternative judicial process that is more appropriate for a Court than a negotiation'.[51]

The government announced its response to the *Wand Report* almost a year later in October 2002 and at the same time released its guidelines. At the time

47 *Guide to Compiling a Connection Report for Native Title Claims in Queensland*, October 2003, p9.
48 P Wand and C Athanasiou *Review of the Native Title Claim Process in Western Australia* (the *Wand Report)*, September 2001.
49 *ibid*, p83.
50 *ibid*.
51 *ibid*, p12.

of the announcement the government stated that 'with the aid of these guidelines, claimants and their representatives will be able to make a realistic assessment of their prospects of success in mediation or litigation'.[52]

While the guidelines restate the government's preference for native title determinations to be achieved by negotiation,[53] their title[54] and content herald a change of emphasis in the State's approach away from negotiation and consultation to a more legalistic, assessment-based model. The guidelines say that the State expects that connection reports will contain evidentiary material in sufficient detail to establish that the native title applicants:

- are the persons or groups of persons who hold native title
- hold, under acknowledged traditional laws and observed traditional customs, native title rights and interests, the nature and extent of which are clearly identified for the purposes of the terms of a determination as referred to in section 225(b) of the *Native Title Act 1993* (Cth), in the claimed area; and
- have maintained a connection with the claimed area.[55]

While the guidelines assert that Aboriginal evidence is 'the most important evidence in determining the continued existence of native title rights and interests', they also state that 'The Government may wish to further test the Aboriginal evidence contained in the connection reports 'on a case-by-case basis'.[56] The guidelines are silent on the question of what is meant by 'evidence' e.g. whether it is to be oral, written, sworn or how it could be 'tested'.

These requirements in the government's response are substantively different from the Wand recommendations. The context in which the interaction between the parties is to occur clearly goes beyond that of 'negotiation and mediation pursuant to a 'special' process provided under the Act',[57] to a process whereby the State itself appears to usurp the Federal Court's judicial power under s 94A, that is, that the State can make a judgment on whether the claimants have established the elements of s 225.

The guidelines acknowledge that 'the law relevant to the evidence required to establish the existence and nature of native title is developing through the case law' and advise that the State undertakes to review and amend the guidelines in accordance with such developments.[58]

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

53 *Guidelines for the provision of evidentiary material in support of applications for a determination of native title,* Office of Native Title, Department of the Premier and Cabinet, Government of Western Australia, October 2002, p2.

54 The previous guidelines were called *General Guidelines, Native Title Determinations and Agreements*.

55 *Guidelines for the provision of evidentiary material in support of applications for a determination of native title* at para 1.4.

56 *ibid*, at para 3.4.

57 *Wand Report*, *op.cit*, p83.

58 *Guidelines op.cit,* at para 7.1.

The WA government has advised that the guidelines have been under review since the 2002 High Court decisions in *Ward*[59] and *Yorta Yorta*[60] and the Federal Court decision in *De Rose.*[61] This review process has served to increase the uncertainty surrounding negotiations with the State. In NSW the government has indicated to parties that it is reviewing its credible evidence test in view of these decisions. However, because it has never published the original test it is unclear how the review might alter the negotiations threshold.

In Victoria the *Guidelines for Proof of Native Title* provides a flexible approach to the application of legal tests as a threshold to negotiations. The extent of evidence required against each of the criteria is on a sliding scale depending on what kind of outcomes the native title claimants are seeking (see Table 1 in Chapter 2). Where the applicants seek a determination, a greater level of connection is required than if the applicants are seeking outcomes other than native title determinations or ILUAs under the future act provisions.

The Victorian government can exercise flexibility in the application of its *Guidelines* in a number of different ways, including:

- Accepting evidence in a variety of forms, as long as the collective result can be assessed;
- Guaranteeing independent expert assessment of all connection evidence;
- Providing claimants with feedback on the strength of the evidence and allowing the claimants to provide supplementary material;
- Wherever appropriate, assisting claimants to access information within government that is relevant to their claims; and
- Maintaining an open approach to the possible outcomes of mediation of claims, including non-native title outcomes.[62]

Consent determinations recognising native title rights and interests may possibly be subject to appropriate evidence being provided. The *Guidelines* also state that alternatively, it may be possible to recognise rights 'that do not equate to native title rights but nevertheless establish that a particular Indigenous group has the primary cultural right to a particular place or area and that such rights will be recognised under an Indigenous Land Use Agreement'.[63] The *Guidelines* state that the Victorian government will make every effort to avoid unnecessary expense or inconvenience in resolving native title matters.

This flexible approach to negotiation thresholds allows negotiations to proceed where there is insufficient evidence to support a native title determination. In this way outcomes can be tailored to the characteristics and needs of the particular group.

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59 *Western Australia v Ward* (2002) 191 ALR 1.

60 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 194 ALF 538.

61 *De Rose v South Australia* [2002] FCA 1342. *De Rose* was a first instance decision by the Federal Court. The matter was appealed to the Full Federal Court. On 16 December 2003, the Full Federal Court overturned the findings of the first decision.

62 Native Title Unit, Department of Justice, Guidelines for Native Title Proof, State Government Victoria, September 2001, p4.

63 *ibid,* p5.

The Victorian guidelines demonstrate a welcome improvement on other less flexible, more arbitrary approaches. Despite this flexibility the relationship between Victoria and the claimant groups still assumes that the State will have a discretion to enter into negotiations depending on its assessment of the claim against legal criteria. This can be contrasted to an approach that assumes negotiations will occur and allows discussions around whether outcomes can include a consent determination or not to be resolved as part of that process.

2. The criteria should be clear and unambiguous

Where a State assesses the native title claim against legal criteria prior to entering negotiations with the claimant group it is important that there is a clear understanding by the group of what is required to satisfy the government's test. This ensures efficient use of the group's resources in compiling the evidence required.

In NSW for example the information required to establish 'credible evidence' is not clear. There are no published policy statements articulating the requirements, although native title claimants are handed a written document setting out what the NSW government requires when mediations commence.[64] The NSW government has said that it relies on the definition of native title as set down in s223 *Native Title Act 1993* (Cth) and as interpreted by the High Court.[65]

The failure to provide clear and unambiguous criteria for negotiation thresholds means that the government is given complete discretion to refuse to enter negotiations, even if the criteria are substantially satisfied. While the government may exercise its discretion in good faith, the claimant group cannot always be sure that this has occurred. This distrust in turn affects the future relationship of the parties where there may be a perceived conflict of interest because the State is in the superior position of assessing the claimant's case.

3. The criteria should be consistently applied

While it is inevitable each application must be dealt with by government on a case-by-case basis depending on the nature of the rights and interests being claimed, the coherence of the group and the prior tenure history of the area, it is important that the criteria are consistently applied in each case. This ensures fairness between groups and prevents the government's own agenda for a particular area from subverting the negotiation process.

4. The criteria should not be burdensome and oppressive on the claimant group

Connection tests can be burdensome on claimant groups. Obviously the tests can drain scarce resources if too stringently applied. Some States have sought to alleviate the resource implications of connection reports in various ways. In Queensland for instance the *Guide* makes it clear that:

64 Confirmed by Native Title Services NSW 2 October 2003.

65 Conveyed in interview between Aboriginal and Torres Strait Islander Social Justice Commissioner staff and NSW government representatives, during consultation process, September 2003.

> For purposes of mediation, the State is willing to accept the first documented contact as the primary reference point from which an inference might then be made back to the time of sovereignty…It is also recognised that the data more pertinent to an anthropological inquiry can only be found in recorded studies undertaken well after the date of first contact.[66]

States can also assist in providing information relevant to the claim. State departments often have the relevant records for establishing occupation of a particular area. It is important that claimant groups be offered access to this information.

Another way in which connection reports can be oppressive to claimant groups is when they are required to hand over material that is culturally sensitive. Every effort must be made to deal with this material sensitively in accordance with the requirements of Indigenous culture.

5. The claimant group should receive, in a timely manner, reasons why they have not satisfied the criteria

Many Native Title Representative Bodies are experiencing considerable difficulty in establishing a satisfactory dialogue with the State native title unit and in obtaining advice on how to satisfy the negotiation threshold requirements. A number of NTRBs reported that they have submitted connection reports but have not received any analysis of these reports from the government despite promises that it would provide feedback. Another complaint is that feedback has solely consisted of a statement as to whether or not the material supplied is sufficient to warrant a consent determination. This has fallen short of the expectation held by all Representative Bodies that the government would provide a detailed analysis of the reports, particularly where they have failed to fulfil the requirements of the criteria.[67]

Where native title negotiations are conditional upon the claimant group satisfying specified criteria it is important that these criteria are applied in a fair and efficient way. Even in these circumstances, the assessment model limits the opportunity that negotiation offers governments keen to address the economic and social development of Indigenous people. Subjecting the negotiation process to a threshold test that reflects to varying degrees the legal tests required to prove a claim has the effect of shifting the emphasis away from these policy goals towards the goal of resolving the outstanding claim.

In contrast to the assessment model some States proceed to negotiate with native title claim groups prior to assessing the merits of their legal claim, so long as they are confident they are dealing with the traditional owner group. Underlying this approach is an understanding of the opportunity that native title presents to governments guided by a broader policy direction towards the

66 Native Title and Indigenous Land Services, Guide to compiling a Connection Report for Native Title Claims in Queensland, Natural Resources and Mines, Queensland Government, October 2003, p5.

67 The *Wand Report* recommended that the government should clearly communicate to the native title applicants any issues arising from the connection reports that need to be addressed. *Review of the Native Title Claim Process, op.cit*, p12.

economic and social development of Indigenous people. Negotiating with the native title group is an opportunity to implement that policy in a way that takes account of the relationship between economic growth and the social and cultural context in which growth occurs.

In South Australia and the Northern Territory the negotiation process is not conditional on the claimant group satisfying the State that they meet the legal tests for native title. In Northern Territory the longstanding recognition of traditional ownership as a basis for legally recognised rights and interests in land has contributed to a relationship of trust between the present government and those representing the interests of native title claimants, the Northern Land Council and the Central Land Council. Consequently the government is confident that the group with whom it is dealing are the traditional owners of particular areas.

In relation to negotiations directed to consent determinations the government requires anthropological evidence which might ultimately satisfy a court that the determination agreed between the parties can be made. However, the government is willing to continue to negotiate with a native title claimant group while such evidence is being gathered. The Northern Territory government has indicated that it does not intend to set guidelines for Connection Reports, but intends to pursue the question of guidelines in collaboration with the NTRBs.

In South Australia negotiation threshold issues are directed to ensuring that the negotiation process between the native title claim group and the government is productive rather than ensuring that the legal criteria for establishing native title is met. This requires that any overlapping claims are resolved, that the group is reasonably cohesive and stable, and that it is willing to negotiate.

While the Crown Solicitor's Office has indicated that the South Australian government has no Connection Report criteria for Consent Determinations,[68] it intends to develop such criteria over the next 12 to 15 months. One proposal for establishing connection criteria is through a side table of the State-wide ILUA process.

(iii) Adversarial relationship between the State and the native title claim group

The imposition of a legal framework in the negotiation of native title structures the relationship between the state and the claimant group as adversaries rather than as partners with a shared goal in the sustainable development of the group. While some states adopt a more congenial approach in negotiations directed to non-native title outcomes, emphasis on a legal framework makes the State a respondent to a claim in which the applicant group seeks to burden its (that is, the Crown's) radical title to the land.

Under the approach advocated in this Report, the relationship between agreements aimed at native title determinations (generally referred to as native title outcomes) and agreements aimed at other outcomes (non-native title outcomes) is complementary, both aimed towards a similar goal of providing a basis for the economic and social development of Indigenous peoples.

68 See <www.iluasa.com./news_consent.asp>.

Unfortunately, the complementarity of agreements aimed at native title and non-native title outcomes is not reflected in the practices and positions that some states adopt in native title negotiations. As indicated, states are generally willing to negotiate non-native title agreements, although the range of outcomes available under this approach is often not articulated at a policy level. Consequently the types of agreements negotiated as non-native title agreements vary enormously depending on the circumstances of the case. Where the State, as manager of the land which is the subject of the agreement, has particular priorities for that land, claimant groups may be able to negotiate agreements that contribute to their development goals. In many cases however, non-native title outcomes do not contribute to the development process. Claimants unable to meet the legal tests have no bargaining power to ensure better outcomes.

Negotiations occur within Land Management framework

Negotiations between the State and native title claimants are not only directed towards the resolution of native title claims. The other framework in which negotiations are conducted is where the State, as managers of land and resources, seeks to utilise land or permit the public or private interests to utilise land that is the subject of a native title claim. In these cases the future act provisions of the NTA provide processes for the conduct of negotiations between the State and native title claimants and an opportunity for States to negotiate with traditional owner groups as if these groups had legally recognised rights to the land. The State profiles show that, as land managers, States invariably adopt a pragmatic rather than an adversarial approach to these negotiations, finding practical solutions to address the differing interests of the parties. States are realising that the recognition of native title does not necessarily stand in the way of the State's economic development or the public's recreational and conservation needs.

Native title claimants whose land is the subject of future acts are also benefiting from these negotiations. Agreement-making in itself requires a level of organisation and decision-making that builds the capacity of the group for future negotiation and development. The group is treated by the State as an integrated entity with rights and responsibilities to the land, much like the State's role as land managers. In addition, these agreements can provide an important foundation for the ongoing development of the group including employment opportunities, training and skill development, infrastructure investment and utilisation of cultural knowledge. As these agreements multiply, so too the capacity of the group to manage and build upon their successes improves.

Out of this experience some States are developing their own processes for integrating native title with their land management role. Indeed in many cases the States have responded to native title in a way that expands the policy framework of their land management regimes.

In Queensland a number of processes and protocols have been developed by both the State and Indigenous groups in response to a mutual desire to get on with business. These are outlined in the State profile and include the *Protocol between the Queensland Government and QIWG*, the *Statewide Model ILUA*, the *Native Title Protection Conditions* and the *Draft Rural Leasehold Land Strategy.*

This approach to integrating native title into the land management regimes of the State is commendable. The development of the various protocols and processes through effective consultation and negotiation with Indigenous groups and relevant stakeholders ensures that land usage that affects native title groups can be managed to the advantage of all parties.

One area of land management where the Queensland government is not responding to the recognition of native title however, is in their management of national parks. In this area, the refusal of the state government to agree to joint management, even where the continuity of native title in national parks has been accepted, is a stalling point in a number of native title claims.

The practice of the NSW government in relation to national parks has been to use important sections of the *National Parks and Wildlife Act 1974* (NSW) only to a very limited extent in their negotiation of native title claims. In 1996, Part 4A was inserted into the *National Parks and Wildlife Act 1974* (NSW) to establish a regime loosely modelled on the Northern Territory variation of hand-back, re-lease to the Crown, and joint management. Part 4A allows existing lands which form part of a National Park to be transferred as freehold title to the local Aboriginal Land Council established under the *Aboriginal Land Rights Act 1983* (NSW). The freehold title is then leased to the Minister, and a joint board of management is established, the majority of which comprises the Aboriginal owners of the freehold title. For example, Mutawintji National Park in the far west of NSW was handed back to its traditional owners in 1998. The benefit of Part 4A of the *National Parks and Wildlife Act* is to confer a form of title on Indigenous people who may be traditional owners but who are unable to establish their native title rights and interests in land under the NTA.

Other state governments are extending their land management approach to incorporate, not only native title rights as they are legally defined, but a broader policy agenda. For example, in Western Australia, Conservation and Land Management (CALM) has developed policy on joint management of national parks, reflecting a willingness to move beyond the strict legal definition of native title rights. Prior to the High Court's decision in *Western Australia v Ward*[69] there had been a general expectation that native title could coexist with conservation regimes on reserves and that joint management arrangements would be negotiated following successive determinations. However, the finding by the High Court that the vesting of reserves extinguished native title reduced the likelihood of joint management being achieved through this course of action.

In July 2003 CALM released a consultation paper, *Indigenous Ownership and Joint Management of Conservation Lands in Western Australia*. The paper proposed that title to conservation areas in WA could in future be held either as Crown land reserves or as inalienable freehold title held by an Aboriginal Body Corporate.[70]

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

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

When the Premier announced the release of the discussion paper on 11 September 2003 he said that the paper was in the context of being 'part of our commitment to reconciliation'.[71] He continued:

> The spirit of the paper relates to my recent comments about reconstructing Aboriginal communities. That is bolstering employment and training opportunities for Aboriginal people, giving them management responsibilities as well as protecting and preserving Aboriginal heritage.[72]

The WA government has indicated to Native Title Representative Bodies that it intends to put the necessary amending legislation before Parliament in the next session. These announcements suggest that the management of national parks is seen by the government to be outside the confines of native title and within a broader policy ambit.

In South Australia the relationship between land management policies and native title is integrated into the broader process of the state-wide framework agreement. As indicated, side tables enable a more detailed discussion of particular land management issues such as fishing, mining, pastoral interests, and local government. By enveloping these negotiations in a larger policy framework in which native title is the key concern, native title negotiations are not subservient to the state's land management issues. Both Indigenous and state priorities can be addressed through this integrated approach.

It can be seen from the above analysis of state policy, that integrating native title into a state's land management regime is capable of generating many benefits for both parties. This is particularly so where governments are extending their land management regimes to incorporate native title. However, there are limitations to an approach in which agreements generated by the intersection of these two processes, land management and native title, are the only basis for the economic and social development of Indigenous people.

The first limitation is that the capacity of this approach to generate benefits for native title claim groups depends on whether the land the subject of the claim happens to also be the subject of the state's land management responsibilities. Indigenous priorities often take second place to the priorities of the State in its land management role. Unless there is a broader policy framework, such as that in SA, that posits the group's development as a goal in its own right, then development will not occur for those claimant groups whose land has no priority in the state's land management regimes.

The second limitation is that, even where there is an intersection between the state's land management regime and a native title claim, the land management regime may not be capable of providing an economic and social development basis. Many state land management regimes provide for consultation with Indigenous people where developments are proposed on their land, but very few provide Indigenous people with a right to negotiate or share the benefits of that development process. For instance, in the Wotjobaluk agreement in Victoria, traditional owners were only given a right to be consulted over development in the core area. This points to a flaw in the existing regimes which extend

71 'Native rights for WA parks', *The West Australian*, September 11, 2003, p1.
72 *ibid*.

negotiation rights to Indigenous people. Yet the economic development of traditional owner groups is greatly enhanced by the right of Indigenous people to negotiate with developers over the nature and extent of the development. Based on this right Indigenous people could negotiate partnerships in relation to enterprises in which Indigenous input would be mutually rewarding both for themselves and for developers. The right to meaningful negotiation is a way for Indigenous people to control culturally inappropriate ventures or practices, while at the same time enhancing the group's social and cultural integrity.

The Relationship between Native Title and existing Indigenous land regimes

Native title is just one of a range of land regimes aimed at recognising the land rights of Indigenous people. The unique characteristic of native title is that the rights that are recognised emanate from the traditional laws of Indigenous people, not from the laws of non-Indigenous people. However the development of the law of native title through amendments to the NTA and restrictive interpretations by judges has severely limited the extent to which rights and interests arising from Indigenous laws and customs are recognised. This has had the effect of limiting the capacity of native title law to provide a sound basis for the economic and social development of Indigenous people.

In some states the recognition of native title, even in its limited sense, has caused disruption and division between Indigenous groups which have already been allocated rights to land under state legislation and those entitled to native title rights. This is particularly so where the allocation of rights under the existing state scheme is not based on traditional connection to land but on the people's status as residents of a particular area or their historical connection to that area. Yet there has been little effort by government to address these divisions so as to integrate native title into the system of land distribution regimes that already exist.

NSW case study

NSW has had Aboriginal land rights legislation since 1983. The *Aboriginal Land Rights Act 1983* (NSW) was enacted following a long period of activism by Aboriginal people throughout Australia for recognition of their prior ownership of, and traditional connection to, land and waters. The NSW Government's actions in enacting the Aboriginal land rights legislation long before the legal fiction of *terra nullius* was overturned by the High Court in 1992, was a remarkable and significant step at the time.

The *Aboriginal Land Rights Act* establishes a three-tiered network of Aboriginal Land Councils in NSW consisting of the NSW Aboriginal Land Council at the State level, thirteen Regional Aboriginal Land Councils and 120 Local Aboriginal Land Councils. To be a member of a Local Aboriginal Land Council, an Aboriginal person must reside in the local area or have an association with that area (for example, a cultural connection to the area).[73] Membership does not rely on demonstrating a traditional connection to the land. A person may be a member

73 *Aboriginal Land Rights Act 1983* (NSW), ss53 and 54.

of more that one Local Aboriginal Land Council but can only have voting rights in one council at any time.[74] Local Land Councils elect representatives to their Regional Aboriginal Land Council[75] and the regional councils elect councillors to the NSW Aboriginal Land Council.[76]

Claims can only be made by Aboriginal Land Councils established under the Act.[77] Claims are made over vacant Crown land that is not required for an essential purpose or for residential land at the time the claim is made. Land granted to Aboriginal Land Councils may be sold, exchanged, mortgaged or otherwise disposed of. This enables the Aboriginal Land Council to use the land as leverage for the economic and social development of the local Aboriginal community.

In 1994 the Act was amended to accommodate the interaction between its provisions and the NTA. Land, the subject of a native title determination application, is excluded from claims under the ALRA as is land over which there has been a determination that native title exists (s36 ALRA). Land claimed under the ALRA after 28 November 1994,[78] and granted to an Aboriginal Land Council, is held subject to any native title rights and interests existing immediately prior to the grant. The Aboriginal Land Council is not permitted to sell, lease, mortgage or otherwise deal in the land pending a determination of native title being made in respect of the land (ss36 and 40AA ALRA). Native title may also exist in respect of land acquired by claim lodged under the ALRA before 28 November 1994, but in this case any native title rights and interests are subject to the rights of the Land Council. The native title rights are suppressed, but not extinguished, by land activities taking place under the ALRA.[79]

Since the recognition of native title in 1992, a degree of tension has emerged between groups whose rights are based in the land rights system and traditional owners who might benefit from a native title claim. This has been particularly problematic at the local community level where the nature of the distinction between the two systems continues to create many misconceptions and misunderstandings.[80] The tension between the two systems led, in part, to the NSW Aboriginal Land Council surrendering its Native Title Representative Body functions at the end of 2001.

The NSW government has not utilised native title as a tool for addressing the social and economic development needs of traditional owner groups. In its opinion, the long history of land settlement in NSW has all but extinguished native title in the state. For example, the Western Division covers 42% of NSW and most of it is subject to perpetual leases similar to those which the High Court found had extinguished native title rights and interests in *Wilson v Anderson*.[81] Most of the rest of the state is subject to freehold title which

74 *ibid*, s55.
75 *ibid*, ss63 and 89.
76 *ibid*, ss107, 118 and 123.
77 *ibid*, s36.
78 The date on which the *Native Title (New South Wales) Act 1994* (NSW) commenced.
79 NSW Department of Aboriginal Affairs, Review of the Aboriginal Land Rights Act 1983 (NSW) Discussion Topics, DAA Sydney 1999-2000b, p76.
80 *ibid*.
81 *Wilson v Anderson* [2002] HCA 29, 8 August 2002.

extinguished native title before 23 December 1996. The government therefore believes there is very little land in NSW over which native title continues to exist, largely because valid extinguishment, dispossession and the widespread dispersal of Aboriginal people through colonisation and settlement by non-Indigenous people means that a continuing connection cannot be proved. The grant of freehold land to Aboriginal people under the ALRA is seen by the government as a far better way of dealing with the injustices of dispossession than the Commonwealth's native title legislation which relies on traditional connection. A grant of land under the ALRA, NSW is also seen as a preferable way of settling native title matters.

This view accounts for the scant policy development of native title in NSW and its isolation from the state's wider policies aimed at achieving social and economic development outcomes for Indigenous people. It also explains why there continues to be very slow progress resolving native title applications in NSW.

While the government's position was a commendable response to the history of colonisation in NSW at the time, it fails to respond to the opportunity that native title can offer traditional owner groups in NSW. The underlying assumption of the NSW Act is that almost complete dispossession of Indigenous people has already occurred in NSW and that the best legislative response is to compensate for this through its own land rights scheme.

However by seeing compensation as the only legislative response to dispossession the ALRA can become a further instrument of dispossession for those groups who continue to maintain a traditional connection to their land, and who seek restitution of their traditional rights. While the NTA may not be relevant for all Indigenous people in NSW, it may still provide a means for that State to engage with native title in a way which strives to achieve ongoing economic and social development for Indigenous people.

Native title offers a process by which traditional owner groups are brought into a relationship with the State through the lodging of a native title claim. Within this process there is capacity for States to adopt policies which broaden the scope of their negotiations with native title claim groups so that agreements can give recognition to the ongoing connection of Indigenous people to their land and provide an alternative and additional basis for the recognition of Indigenous peoples' economic and social rights.

The table below provides a very general overview of existing or proposed State and Territory Indigenous land regimes. It indicates the beneficiaries of the particular regime, the nature of the interests granted, the body entrusted with the management of the title and some of the powers held by these bodies. By highlighting these elements a comparison is invited between the way in which land has been or is proposed to be distributed under various state regimes and the way in which it is distributed through native title.[82]

82 Table based on material contained in F Way and S Beckett, *Land Holding and Governance Structures Under Australian Land Rights Legislation* Discussion Paper 4, Australian Research Council Collaborative Research Project, University of New South Wales, Murdoch University, 1999.

Overview of State based Land Legislation Regimes

South Australia

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Lands Trust Act 1966 (SA)	Transfer of reserve land (no provision for non-reserve land) subject to consent of Aboriginal Council for the area (if established).	Traditional owners	Freehold title, alienable with Ministerial consent. Mineral rights depend on conditions applied to leases by proclamation of Governor.	Aboriginal Land Trust. Chairperson and two other members appointed by Governor. All members must be Aboriginal. More members can be added on recommendation of Aboriginal Councils.
Pitjantjatjara Land Rights Act 1981, Maralinga Tjarutja Land Rights Act 1984	Transfer of Anangu Pitjantjatjara and Maralinga Tjarutja lands (former reserve land).	Traditional owners	Freehold title (inalienable).	Anangu Pitjantjatjara body corporate and Maralinga Tjarutja body corporate.
Proposed amendments to National Parks and Wildlife Act 1972 (SA) introduce co-management on national parks in SA	Tier 1: Where NPWA Reserves established over Aboriginal land.	Traditional owners	Aboriginal people retain title. Interests defined by management plan .	Co-Management Board (Aboriginal owners and government) with majority Aboriginal owners.
	Tier 2: Crown owned, co-managed parks.	Traditional owners	Defined by management plan.	Co-management Board appointed by goverment.
	Tier 3: Crown owned, co-managed parks.	Traditional owners	Defined by management plan. No co-management board. Co-managed by agreement between Minister and body representing Interests of Aboriginal group.	Minister/Director of NPWS

Northern Territory

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)	Grant of scheduled land or unalienated Crown land (or Crown land alienated to Aboriginal people) the subject of successful claim by traditional owners to the land.	Traditional owners	Grant of freehold; inalienable; land may be leased; land may be surrendered to Crown.	Aboriginal Land Trusts for benefit of traditional owners. Members of Trust nominated by relevant land council and appointed by Minister. Land Trust dependent on Land Council for funding and advice.
Environment Protection and Biodiversity Conservation Act (Cth), Pt 15, Div 4, Subdiv G	Commonwealth Reserves established in NT over Aboriginal-owned land (under ALRA) ie Kakadu and Uluru.	Traditional owners	Ownership subject to lease-back as a National Park.	Territory govt under lease-back; co-managed by Boards of Management (Aboriginal majority).
Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park 1987 (NT)	Transfer of title by Cobourg Peninsula Aboriginal Land, Sanctuary and Marine Park 1987 (NT).	Ownership held by Peninsula Sanctuary Land Trust in trust for 'the group' (selected by NLC).	Traditional owners entitled to use and occupy. Ownership subject to lease-back as a national park in perpetuity and to plan of management. Receive annual fee in relation to the lease.	Co-management by Cobourg Peninsula Sanctuary and Marine Park Board and Parks and Wildlife Commission of NT.
Nitmiluk (Katherine Gorge) National Park Act 1989 (NT)	National Park over Aboriginal land (ALRA).	Traditional owners	99 year lease-back to Conservation Land Corporation as national park.	Nitmiluk National Park Board, 13 members (8 Aboriginal) Prepare plans of management.

Northern Territory

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Parks and Reserves (Framework for the Future) Bill 2003	Three regimes 1) Parks and Reserves to be scheduled to Aboriginal Land Rights Act 1976 (Cth) (Schedule 1 parks and reserves).	Traditional owners	Freehold subject to 99 year lease-back arrangements and joint management agreement.	Aboriginal Land Trusts
	2) Parks and Reserves over which Parks Freehold Title granted (schedule 2 parks and reserves).	Traditional owners	Park freehold title (s9 Bill); inalienable; subject to native title interests; subject to 99 year lease-back to Territory; subject to joint management agreement.	Park Land Trusts
	3) Parks and Reserves over which native title may still subsist.	Traditional owners	Dedicated Crown Land subject to native title interests; subject to joint management agreement; no extinguishment.	Native title holders; ILUAs; right to negotiate in relation to mining.

Victoria

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Six Aboriginal Lands Acts: - Aboriginal Lands Acts 1970 and 1991; - Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987 (Cth); - Aboriginal Land (Manatunga Land) Act 1992; - Aboriginal Lands (Aborigines Advancement League) (Wall Street, Northcote) Act 1982; - Aboriginal Land (Northcote Land) Act 1989.	Transfer of freehold (some specify conditions for usage).	Specified organisations; residency conditions apply to membership of some organisations.	Transfer small areas of reserve or mission lands to trusts or Aboriginal organisations. Freehold with varying conditions applying eg land must be used for Aboriginal cultural and burial purposes.	Various, for example, Lake Tyers and Framlingham managed by Trusts; Manatunga Land to Aboriginal Cooperative; Ebenezer, Ramahyuck and Coranderrk Missions by their respective Aboriginal organisations.
Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth), Part 11A, ss21A - 21ZA pertaining to Victoria	Process for Local Aboriginal Community to advise Minister to make a declaration preserving Aboriginal place or Aboriginal object.	Local Aboriginal Community (specified in schedule to the Act).	Title to place or object.	Local Aboriginal community (usually established as a body corporate). Members not necessarily the traditional owners of the land declared to be 'Aboriginal place'.
National Parks Act 1975 (Vic)	No process for granting title.			

Queensland

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Protection and Restriction of the Sale of Opium Act 1897 (Qld) and its continuations to the Aborigines Act (1971)	Various 'protective' regimes allowed Minister to remove Aboriginal people to reserves.		Regulations governed behaviour on reserves, prohibited traditional rites and customs; government control over property and marriage. Reserves could be revoked to allow commercial exploitation of land.	Aboriginal and Islander Affairs Corporation trustee for surviving reserves.
Deed of Grant in Trust (DOGITs)	Grant of land (usually reserve land held in trust). No claim process.	Beneficiaries of trust are grantees, the Aboriginal community living on the land.	Grant of land in trust. Inalienable.	Trustee, usually community council (statutory body, an incorporated body, a group of individuals or a named individual).
Aboriginal Land Act 1991 (Qld) and Torres Strait Islander Land Act 1991 (Qld)	Aboriginal and Torres Strait Islander reserves, DOGITs etc transferred as Aboriginal and TSI land. Claims process for claimable land (incl available Crown land and transferred Aboriginal land). Must show traditional affiliation OR historical association OR economic or cultural viability. Preference shown for traditional affiliation where conflicting claims.	Grantees hold land for benefit of 'Aboriginal and Torres Strait Islander people and descendants'. Traditional owners and those with an historical association will potentially benefit from the legislation.	Deed of grant in fee simple or leasehold subject to Crown occupation and subject to native title.	Usually Community Councils as trustee appointed by Minister who must consider views of Indigenous people and, as far as practicable, act in a way that is consistent with Indigenous tradition.

New South Wales

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
Aboriginal Land Rights Act 1983 (NSW)	Transfer lands from Aboriginal Lands Trust; Claims process based on the status of the land, eg unoccupied Crown land not needed for public purpose.	Members of a Local Aboriginal Land Council (LALC) (all Aboriginal adults on Council roll). Membership is based primarily on residence but non-residents can be members by traditional association.	Freehold, except Western Division where perpetual leasehold granted; subject to native title; Mining on LALC land requires consent other than for gold, silver, coal and petroleum.	Three tiers of management from Local Aboriginal Land Council to Regional Land Council to State Land Council.
National Parks and Wildlife Act 1974 (NSW)	Minister may declare place to be 'Aboriginal place' if significant to Aboriginal culture, or 'Aboriginal area' to preserve and protect area.			State govt manages 'Aboriginal place' and 'Aboriginal area'.
	Part 4A Claim process for claimable land (under ALRA) or for land of cultural significance (schedule 14 lands) in national parks.	Local Aboriginal Land Council or NSW Aboriginal Land Council.	Freehold subject to immediate lease-back, subject to plan of management, subject to native title.	Board of management with Aboriginal majority. Board subject to control of Minister. Aboriginal negotiating panel to identify Aboriginal owners; advise minister re cultural significance of land for schedule 14 lands.

Western Australia

Legislation	Land Regimes	Beneficiaries	Interests granted	Land Management Body
No land rights legislation				
Reserves: Land Act 1933 (WA)	Power to Grant lease to Aboriginal persons; reserve land for benefit of Aboriginal inhabitants.	Aboriginal inhabitants, organisations and communities.	lease (fixed term or perpetuity)	nil
Aboriginal Affairs Planning Authority Act 1972 (WA)	Aboriginal Affairs Planning Authority (AAPA) can proclaim reserves for 'persons of Aboriginal descent'.	'persons of Aboriginal descent'	reserves	AAPA has duty to promote well being of Aboriginal persons of Aboriginal descent: s12.
	AAPA can transfer reserve land to Aboriginal Lands Trust.	Trust to acquire and hold land, whether in fee simple or otherwise, and to use and manage that land for the benefit of persons of Aboriginal descent: s 23.	Power to sell or lease subject to Minister's approval.	Aboriginal Lands Trust appointed by Minister (chairperson and 6 member of Aboriginal descent); Ministerial control over way Trust exercises functions.

Indigenous participation in policy formulation

The above discussion highlights the gaps in many State native title policies. Where native title negotiations are not directed through integrated policy objectives towards agreements which lay the foundation for economic and social development then the negotiations will instead be driven by other priorities, such as the need to resolve a legal claim or the land management priorities of the state.

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

Prior to the changes to the structure of ATSIC in 2003, it was envisaged that the ATSIC Office of Victoria would play a key role in the development of native title policy in that state. In November 2000 it signed a *Protocol for the Negotiation of a Native Title Framework Agreement for Victoria*. The other parties were the Victorian Attorney General (on behalf of the State of Victoria) and the Mirimbiak Nations Aboriginal Corporation as the NTRB for Victoria.

The Protocol provided for the negotiation of a Native Title Framework for Victoria and the resolution of native title claims through mediation and negotiation rather than litigation. The Protocol noted that the Framework was to provide for the development of Indigenous Land Use Agreements (ILUAs) that permit recognition, protection, and exercise of native title rights and interests, as well as providing for a simplified future acts regime. The Protocol also allowed for negotiation of broader outcomes including the provision of employment, training and enterprise development opportunities to Indigenous communities.

The ATSIC Victorian State Office began drafting the Framework in 2001, with a final draft completed in September 2002. The draft Framework recognised that the Victorian government's native title policy provided for a 'whole of government' approach to native title issues. In the Framework, ATSIC identified key policy initiatives required to ensure the achievement of native title and land justice outcomes for Aboriginal people in Victoria.

The Framework identified mechanisms in existing statutes that had the potential to operate effectively within the native title regime. It also identified other statutes that required significant amendment or review to ensure compatibility with the provisions of the *Native Title Act 1993* (Cth). For example:

- Amendments to the *National Parks Act 1975* (Vic) to provide for Aboriginal joint management arrangements for national parks;
- A review of the cultural heritage legislation[83] to ensure greater consistency with native title group aspirations and the *Native Title Act*;

83 This includes a Victorian Act, the *Archaeological and Aboriginal Relics Preservation Act 1972* (Vic) and the Commonwealth's *Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Part IIA: Victorian Aboriginal Cultural Heritage 1987)* (Cth).

- Various amendments to the *Fisheries Act 1995* (Vic);
- A state-wide Aboriginal land rights regime for Victoria; and
- Greater use of regional Indigenous land management institutions (within or outside a land rights regime), including appropriate funding.

The final draft of the Framework prepared by ATSIC Victoria was presented to the Victorian Government's Attorney-General, at a meeting on 26 September 2002. At that meeting, the State Government agreed to consider the draft Framework and to provide a response within six weeks of the meeting date. The Victorian Department of Justice has advised me of the Attorney-General's response to the *Framework* stating:

> … a number of the proposed policy initiatives had been addressed by Government in the context of native title policy development and implementation. These include provision for the establishment of co-operative management bodies over national parks and other crown lands, an increased say in cultural heritage protection, group access to certain natural resources, transfers of culturally significant land, and administrative funding (all of which form part of the Wotjobaluk in-principle agreement). These outcomes have all been possible without the need for legislative amendment. Pro-forma ILUAs have also been developed to facilitate agreements under the future act regime. At the same time, the Attorney-General acknowledged that the native title process would not address all Indigenous land aspirations in Victoria, and that other initiatives identified in ATSIC's *Framework* would be considered in the context of a policy framework aimed at responding to these broader aspirations.[84]

The *Victorian Indigenous Land Justice Strategy* which builds upon ATSIC's *Framework*, was proposed by the ATSIC Victorian State Advisory Committee and the ATSIS Victorian State Office to formalise the pursuit of Aboriginal land aspirations in Victoria. It covers matters such as native title, land ownership and acquisition, natural resource management and cultural heritage protection. The need for such a policy arose because of:

a) the limited extent to which Aboriginal land rights (whether in the form of native title, input into publicly-owned natural resource management decisions, authority over Aboriginal heritage) could currently be exercised; and

b) the significant hurdles to expanding this through the native title process because of the High Court's decision in *Yorta Yorta* and other cases.

The aim of the Strategy is to achieve meaningful land outcomes for Indigenous Victorians, both in terms of the extent of their land holdings, and the level of Indigenous involvement in land management decision-making. It also aims to improve the coordination of Commonwealth and Victorian government agencies with overlapping responsibilities in this area. These objectives are generally consistent with the COAG Reconciliation Framework[85] and the Ministerial

84 Correspondence from Department of Justice, Victoria to Aboriginal and Torres Strait Islander Social Justice Commissioner, 2 January 04.

85 <www.pmc.gov.au/docs/reconciliation_framework.cfm>.

Reconciliation Action Plans that have been developed and endorsed by various Ministerial Councils in the last two years.[86]

In 2003 ATSIC and ATSIS began working in partnership with relevant agencies to pursue the strategy. The agencies include the Indigenous Land Corporation (ILC), the National Native Title Tribunal (NNTT) and Victoria's Native Title Representative Body (Native Title Services Victoria), as well as Caring for Country (CFC), a Victorian community initiative which administers several ILC and National Heritage Trust funded programs in Victoria.

The *Victorian Land Justice Strategy* proposes to encompass a number of existing initiatives at State and Commonwealth levels, namely:

- ATSIC's Native Title Framework for Victoria (discussed above);
- Outcomes from native title determination applications (eg *Yorta Yorta*, *Wotjobaluk*);
- Indigenous Land Corporation's Regional Indigenous Land Strategy for Victoria (RILSV);[87]
- Caring For Country's Strategy for Aboriginal Managed Land in Victoria (SAMLIV). This strategy presents information on Aboriginal owned and managed lands throughout Victoria, discusses a state-wide framework for Indigenous land and water management, and contains recommendations on sustainable resource management policies and programs as they relate to the Indigenous people of Victoria;
- The State's existing land rights legislation;
- Commonwealth and State cultural heritage arrangements;
- The State government's proposed Dispossession Policy; and
- National/state park management arrangements.[88]

The ATSIS Victorian State Office has in recent weeks hosted a number of "Land Justice Information Forums" around the state, at which each of the five Commonwealth agencies (ATSIC, NNTT, ILC, NTSV and CFC) provided information on the respective roles of their organisations in relation to native title, land acquisition, land management, natural resource management and other land related issues.

At a meeting between ATSIC, ATSIS and the Victorian Attorney-General on 24 June 2003, the Victorian government announced its intention to develop a Cabinet submission on Indigenous land justice in Victoria. The details are yet to be released by the government. The announcement has implications for ATSIC's Victorian Indigenous Land Justice Strategy as it is expected that the Cabinet submission will address many of the issues that ATSIC intends to pursue through its strategy (that is, land claims settlement, cultural heritage reform).

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86 See for example, the Environment and Heritage Ministers *'Action Plan to Advance Reconciliation'* at: <www.ephc.gov.au/heritage/action_plan_herit.html>. See also *'Environment Australia's Reconciliation Action Plan'* at <www.ea.gov.au/indigenous/fact-sheets/rap.html>.

87 <www.ilc.gov.au> then follow the prompts to Land Acquisition.

88 See for example, <www.parkweb.vic.gov.au/resources/13_0202.pdf>.

ATSIC Victoria now does not expect the Victorian government to sign the Native Title Framework.[89] Nevertheless, the Framework continues to be a valuable document given the usefulness of the intense consultation process involved in developing it. For ATSIC and ATSIS the Framework continues to reflect the issues which claimants around the state want on the table when negotiations begin.

The Framework and the Victorian Indigenous Land Justice Strategy provide the basis of a comprehensive policy framework for native title negotiations and are consistent with the government's broader Indigenous policies. They present an opportunity for the Victorian government to demonstrate its commitment to partnerships with Indigenous people not only in the implementation of government policy but also in its formulation.

The conduct of a series of Indigenous Economic Fora in the Northern Territory is another way of ensuring Indigenous participation in native title policy-making and getting Indigenous comments and perspectives on government proposals. The Northern Territory government's positive response to the forum held in Alice Springs in March 2003 indicates its intention to ensure that participation through the forum will result in policy initiatives and changes in line with the views expressed.

As discussed above, NSW's native title policy is less developed than other states, partly based on its conviction that the NSW Act adequately provides the Indigenous people of NSW with a basis for economic and social development. Of the native title policy that does exist, none has been formulated with the effective participation of Indigenous people.

In Western Australia in early 2001, the Government conducted a number of policy reviews in relation to native title processes. The *Review of the Project Development Approvals System (*the *Keating Review 2002)*[90] sought to develop a system of government decision-making that is coordinated and integrated, clear and unambiguous, and that is balanced between community and developer needs. However, in doing so the Review failed to engage with Indigenous interests and presented native title rights as an impediment to development.[91] The *Technical Taskforce on Mineral Tenements and Land Title Applications*,[92] aimed at expediting the processing of the backlog of mineral tenement applications of land under native title claim also utilised the review process to reach its conclusions. The most substantial review, in terms of focussing on native title, was the *Review of the Native Title Claim Process in Western Australia* (the *Wand Report*),[93] which reviewed the WA government's

89 Consultations with ATSIC Victoria, October 2003.

90 <www.doir.wa.gov.au/documents/investment/PremiersProjectApprovalsFinalReport(1).pdf> accessed 18 December 2003.

91 I made submissions to this Review in 2001 and available at <www.humanrights.gov.au/social_justice/native_title/submissions/independent_review.html>.

92 P Wand and C Athanasiou, *Technical Taskforce on Mineral Tenements and Land Title Applications, Final Report,* Government of Western Australia, 2001.

93 *Review of the Native Title Claim Process in Western Australia,* Report to the Government of Western Australia, September 2001.

native title negotiating principles. The *Wand Report* developed a set of principles to guide the government's negotiations on native title determinations and agreements, taking into account other states' practices, resourcing, the role of connection reports, and the relevant legal framework.

While some of these reviews allowed extensive consultation with Indigenous people, they did not amount to effective participation which includes the prior and informed consent of Indigenous people to the policy goals adopted, their implementation and their evaluation.

Queensland, through utilising an agreement-making approach to policy development, ensures a greater level of participation than the consultation model adopted in policy reviews. Substantial Indigenous participation in the development of particular native title policies, mainly those directed to the State's land management practices, occurred in the development of the protocol agreed between the Queensland government and the Queensland Indigenous Working Group in 1999. However the protocol, as well as other framework agreements developed in Queensland, remains within the confines of a land management approach and does not provide an overall policy direction for native title negotiations.

Only South Australia has extended the agreement-making model for policy development to native title negotiations generally through its State-wide ILUA.[94]

Legal recognition of native title rights and interests may provide an important asset that contributes to the achievement of the group's development objectives. However there are other aspects of native title negotiations which create a positive benefit for native title claimants. This chapter has noted both the deficiencies of some state models of dealing with native title. While uncovering positive and workable models where policy on social and economic development has been soundly based on negotiations with Indigenous people conducted in an atmosphere of equality and respect. The native title framework if properly and fully used can provide such an atmosphere.

94 See the case study on the South Australian Statewide ILUA in Chapter 2.

Part 2: Evaluation of Commonwealth native title policy

The Commonwealth government's native title policy has a significant influence on the capacity of native title agreements to contribute to the economic, social and cultural development of native title claim groups. Two avenues through which Commonwealth policy penetrates native title agreement making are:-

- the Commonwealth's participation in native title litigation
- the Commonwealth's funding of participants in the native title process

The Commonwealth also negotiates native title agreements through the future act processes of the NTA where the Commonwealth proposes developments over land the subject of a claim. While some important agreements have resulted from these processes, the discussion below focuses on the effect of Commonwealth policy on agreements between parties to native title litigation.

Commonwealth's participation in native title litigation

The Commonwealth participates in native title litigation either as a party with a property interest in the land affected by the claim, or as the administrator of the NTA with a policy interest in the Court's interpretation or application of the legislation to the claim before it. As at 1 June 2003, the Commonwealth was a party to 191 native title applications out of 620 in total.[95]

Negotiate not Litigate

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

As indicated in my discussion of State and Territory policies[96] a preference for negotiation over litigation provides an invaluable opportunity for governments and traditional owner groups to ensure that native title agreements respond to policies directed to the economic and social development of the native title claim group rather than to the demands of the legal system. While negotiations aimed at identifying the terms of a consent determination are subject to the requirement that the Court needs to be satisfied that it can make the orders sought, there is sufficient scope within the process to allow parties to focus their negotiations on determinations which facilitate this policy goal.

95 According to the NNTT, as at 1 July 2003 there are 622 applications in the Federal Court, and 362 have been formally referred to the NNTT for mediation.

96 See Chapter 2.

For instance in the *Yorta Yorta*[97] case the High Court left open the question of whether a change in the way in which a community acknowledges and observes their traditional laws and customs constitutes a break from those laws and customs or whether it constitutes an adaptation to changing circumstances. Parties have considerable latitude to prefer an approach that allows recognition of native title.

There is also scope in negotiations over how to describe the native title rights and interests held by the group, allowing descriptions which give recognition to more economically productive rights and interests through a native title determination.

In this regard the *Yorta Yorta* case allowed for the recognition of rights that, while based on traditional laws and customs, had evolved and changed over time to manifest in a contemporary form. This principle allows the parties a great deal of scope in defining the contemporary form that traditional rights can take. In the *Miriuwung Gajerrong* decision[98] the High Court's concern that native title rights were described to a high degree of specificity arose from the need to compare these rights with other rights that had been created or presently exist over the land. Through this comparison the question of extinguishment could be resolved. However the Court did not require as a matter of principle that native title rights be defined in a specific way, either as rights to use the land or as rights to carry out activities on the land. Rights that are broadly defined, including rights to exclusive possession, are capable of recognition as native title rights.

Within these legal parameters, there may be scope for the parties to direct negotiations towards consent determinations which provide a strong basis for the group's ongoing economic development. For instance, where possible preference should be given to recognising the group's right to control and commercially develop resources on the land rather than to non-exclusive use of resources. The recognition of the group's decision-making powers and structures in relation to the land is also capable of recognition by a court and forms a powerful basis for the ongoing social and cultural development of the group.

This is not to argue that there is unlimited scope for the Commonwealth and other parties to agree to consent determinations of this nature. For instance a Court could not make orders by consent in which it is clear that native title had been extinguished as a result of the operation of the NTA. I argue above, in my evaluation of State and Territory native title policies, that because of the limitations in the capacity of the NTA to give legal recognition to rights that provide a basis for the development of the group, States should negotiate agreements with native title claimants which address this deficiency. This can occur either through agreements which complement the native title determination, or by agreements which replace the determination with a comprehensive set of outcomes and processes on which development can be based.

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

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

However, where there is an opportunity to give legal recognition to traditional owners inherent rights through consent determinations and particularly where such rights can provide a basis for or contribute to the economic, social and cultural development of the group, then governments, both State and Federal, should conduct the negotiations in such a way as to maximise this opportunity.

The Commonwealth government's native title policy does not direct its negotiations with native title claim groups to this end. The policy objectives are as follows:

- certainty of rights recognised,
- consistency with the common law,
- compliance with the *Native Title Act 1993* (Cth), and
- transparency of process.[99]

The Attorney-General's speech to the Geraldton Native Title Representative Bodies Conference in 2002[100] gives further elucidation on what these four principles mean in their application to negotiations concerning consent determinations:

- Certainty of rights requires that native title rights be very specifically described because a consent determination describes the rights and interests that are binding against the whole world, (paragraph 29).
- In relation to consistency with the common law, a consent determination cannot recognise rights not recognised by the common law, (paragraph 31).
- In relation to compliance with the NTA, consent determinations must be consistent with and comply with the requirements for determination set out in the NTA, (paragraphs 32 to 34).
- In relation to transparency, all parties to a consent determination should be given the opportunity to be satisfied that it properly represents the legal position, including connection material (paragraph 38).

This explanation confirms that in relation to the negotiation of consent determinations the government's policy is to apply the law in a narrow legalistic way. The effect is that their negotiations can limit the potential of native title determinations to contribute to the economic, social and cultural development of the group.

Such an approach accounts for comments received from many NTRBs about the delay and obstruction caused by the Commonwealth in many of the cases in which it seeks to have an effect upon the way in which the NTA is interpreted and applied.

The Commonwealth's reluctance to agree to a consent determination in the Wotjobaluk application illustrates this point. In this matter the Victorian government and the Wotjobaluk people, after several years of negotiations,

99 <www.ag.gov.au/www/nativetitleHome.nsf/HeadingPagesDisplay/Native+Title+Litigation?OpenDocument>, accessed 24 December 2004.

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

had reached in-principle agreement around November 2002. An element of the overall agreement was consent to a determination that native title existed over approximately two percent of the claim area and did not exist over any other part. The native title rights in the two percent area were limited to non-exclusive rights to hunt, fish, gather and camp along the banks of the Wimmera River, in accordance with all existing laws and regulations.

Yet despite the moderate terms of this determination the Commonwealth delayed its agreement for a further year only offering in-principle support on 21 November 2003 with the release of a media statement by the Attorney-General. The terms of that statement were:

- The proposed settlement will provide substantial certainty over a large area of the Wimmera in Victoria, including a formal court determination that native title does not exist over 98% of the claim area;
- The rights proposed to be recognised over 2% of the claim area are similar to those enjoyed by the public; and
- Negotiations are continuing and the Commonwealth's final agreement is subject to an appropriate negotiated outcome being reached with all the other parties.

The Attorney-General concluded the media release with the claim that the Government's in-principle agreement highlights it willingness to give effect to its policy of seeking to reach outcomes through negotiation rather than litigation wherever possible.

The media release more importantly reveals the terms on which the Commonwealth is willing to give effect to its policy of agreement. These are not terms which seek to maximise the economic, social and cultural opportunities for traditional owner groups through recognition of their inherent rights. The emphasis is rather on the limited opportunities available to native title claimants through the recognition of their rights, for example 'rights similar to those enjoyed by the public' on recreational land. The choice of words and the primary emphasis on 98% of the area not affected by native title demonstrates the Commonwealth's policies of agreement-making.

A further illustration of the Commonwealth's reluctance to negotiate consent determinations with native title parties is the matter of *Wik Peoples and the State of Queensland and Others and* Another, where His Honour Justice Drummond expressed concern and frustration at this attitude:[101]

> Look, I am just very concerned about the Commonwealth's attitude. There doesn't seem to be any indication – I mean, I'm not aware of what the problems are so far as the Commonwealth is concerned, and there's no sign of any movement as between the Commonwealth and the applicants to resolve those concerns. …but I say the Commonwealth has the capacity to be a huge spanner in the works because, while it's possible that the time may come, contrary to the view I've taken earlier, to hive off issues for determination by litigation and making a consent determination in

101 Federal Court of Australia, No. QG 6001 of 1998 *Wik Peoples and State of Queensland and Others and Another*, Transcript of Proceedings, Friday, 6 September 2002, p5.

> relation to the balance of the matter if that looks appropriate, that can't be done if the Commonwealth doesn't decide that it wants to do something and take some action to doing that something.

In particular, the following exchange records His Honour's frustrations with the Commonwealth:[102]

> HIS HONOUR: … it would be very unfortunate if the reason this determination can't be made by consent and this enormously ancient Wik case Part B can't be resolved is that the Commonwealth, of all parties, is responsible for the delay.
>
> MR SWAN (for the Commonwealth): Your Honour, you can be assured that the Commonwealth will take serious note of the comments you have made this morning.
>
> HIS HONOUR: No, that's just words, Mr Swan. I've made these comments on about three prior occasions, and I'm still being assured solemnly that I can be certain about these things. …The time has come for the Commonwealth to put its cards on the table. Does the Commonwealth say that…it considers the only way that Wik Part B can be resolved…is by litigation?"
>
> MR SWAN: That's certainly not in accordance with my instructions, your Honour.

Later:

> HIS HONOUR: The time has come when I am no longer prepared to accept the repeated assurances from those at the bar table appearing for the Commonwealth that I can be assured that all is well as between the Commonwealth and the applicants.

The outcome of that particular hearing was that His Honour directed the applicants to deliver, by 24 January 2003, the applicants proposals for the trial of the issues outstanding as between the applicants and all parties who had not indicated that they were prepared to agree on a draft consent determination.

Justice Drummond has since retired and Justice Cooper is now the judge of the Federal Court that is handling this matter. Justice Cooper expressed similar concerns about the Commonwealth's delay in bringing the matter to a satisfactory conclusion in September 2003. Cooper J was concerned that the Commonwealth's delay was costing taxpayers because the Commonwealth was also funding all the other parties and respondents (except the State).

The following exchange in September 2003 records similar frustrations to those of Justice Drummond more than a year earlier:[103]

> HIS HONOUR: Mr Baden Powell, is the Commonwealth in any of these? [Negotiations to reach a consent determination]
>
> MR POWELL: Yes, your Honour. It does have an interest in the areas the subject of negotiations for proposed determination. We have no objections

102 *ibid*, pp5-6.

103 Federal Court of Australia, Cooper J, No. QG 6001B of 1998, Q 6029 of 2001, Q 6005 of 2003, QG 6016 of 1998, QG 6119 of 1998, QG 6155 of 1998, Q 6008 of 2003, Q 6009 of 2003, Q 6010 of 2003, Directions Hearing, Extract of Transcript of Proceedings, Monday, 15 September 2003, pp16-17.

> to the proposed course of action from the applicants. The Commonwealth has a preference for a mediated outcome for the matter generally. The Commonwealth would prefer a longer period of time if that's possible and we would appreciate your Honour extending the period perhaps even beyond the end of November.
>
> HIS HONOUR: Why? What does the Commonwealth want to say? Come on, the biggest litigant in Australia, more resources than anybody else, why can't you make the time?
>
> MR POWELL: We will make the time available, your Honour—-
>
> HIS HONOUR: Yes.
>
> MR POWELL: — but we also want to have enough time to consider the terms of the draft determination as well as connection issues. But we will endeavour to meet the time-frame proposed by Mr Hunter but would appreciate any further – a further time that the Court may extend.
>
> HIS HONOUR: Well, all right. What's the issue i[n] relation to the Commonwealth in this sense? Is there particular land holdings that are subject to the claim that the Commonwealth has an interest in or is it simply administering the Act the Commonwealth has got the interest in? So what is it the Commonwealth wants the extra time for?
>
> MR POWELL: There are some drafting issues and there's also the question of connection, your Honour.
>
> HIS HONOUR: Has the Commonwealth been participating in the attempts to mediate this matter?
>
> MR POWELL: Yes, your Honour.
>
> HIS HONOUR: And these matters of connection haven't been addressed in the mediation process.
>
> MR POWELL: They have but it's also a matter of obtaining instructions as well, your Honour. They have been addressed to a certain extent in mediation.

Mr Hunter, representing the claimants, expressed his clients' concerns about the delays being caused by the Commonwealth, to which his Honour replied:

> HIS HONOUR: No, I'm not – nobody is suggesting the Commonwealth wants to derail. I'm simply saying that the Commonwealth really has got the resources, has been on notice for this claim for a long time and you've sat here and you've heard how everybody else is keen to get on with it and believe that they are close. The last thing that the Commonwealth would want would be for it all to fall over now simply because it lost momentum.
>
> And the last thing I know the Commonwealth would want – would want it to go to trial having regard to the resources that would be involved in a lengthy Court proceeding. So that the Commonwealth has got as much reason to get this matter resolved as everybody else at the Bar Table and I'm sure that those instructing you would want you to —-
>
> MR POWELL: That is indeed the case, your Honour.
>
> HIS HONOUR: — expressed that view, I'm sure. All right. Well, the Commonwealth, I would have thought, can do as well as the pastoralists and can make known by the end of November what its attitude is in relation to these matters.

His Honour then directed the parties to present their views on particular issues by the end of November 2003. The matter is now listed for a further directions hearing in February 2004. By that time it will be almost four years since the Wik People presented the Queensland Government with the terms of a consent determination.

Integrating Native Title Policy into Commonwealth's Indigenous Policy

The failure of the Commonwealth to direct the negotiation of native title agreements towards the economic, social and cultural development of the group puts native title policy development at odds with the Commonwealth's broader Indigenous policy direction.

The Commonwealth's Indigenous Policy can be found on OATSIA's website.[104] The Office has a Statement of Corporate Directions which outlines its vision, objectives and strategies.[105] OATSIA's vision is '[a]n Australia where Indigenous Australians share equality of opportunity and social and economic wellbeing with their fellow Australians, where they are free from discrimination, and where their cultures and heritage are respected and sustained'.[106]

OATSIA's Statement of Corporate Directions also contains a number of specific objectives and strategies. One objective is to '[a]ddress disadvantage to ensure Indigenous Australians are able to participate fully in Australia's social and economic life'.[107] One of the strategies for achieving that objective is '[e]xploring opportunities for Indigenous people to gain economic and social benefits from land use and ownership'.[108]

Two important mechanisms for achieving this goal have emerged out of the reconciliation process. These are, firstly a whole-of-government approach to Indigenous policy and secondly, partnerships between government and Indigenous communities. These two policy frameworks are discussed in the context of native title in Chapter 1.

In November 2000, the Council of Australian Governments ('COAG') agreed that all governments would work together to improve the social and economic well being of Indigenous people and communities.[109] The framework is based on three priority areas for government action:

- Investing in community leadership and governance initiatives;
- Reviewing and re-engineering programs and services to ensure they deliver practical measures that support families, children and young people. Governments should look at measures for tackling family violence, drug and alcohol dependency and symptoms of community dysfunction; and
- Forging greater links between the business sector and Indigenous communities to help promote economic independence.

104 <www.immi.gov.au/oatsia/publications/directions_statement.htm> accessed 23 December 2003.
105 *ibid*.
106 *ibid*.
107 *ibid*.
108 *ibid*.
109 <www.pmc.gov.au/docs/reconciliation_framework.cfm> accessed at 23 December 2003.

Consistent with these broader objectives, COAG agreed in April 2002 to trial working together with Indigenous communities in up to ten regions to provide more flexible programs and services based on priorities agreed with communities.[110]

Yet in neither the COAG trials nor the policy programs initiated through the Commonwealth government's response to reconciliation has consideration been given to the potential of native title to contribute to the policy goals of providing Indigenous people with a foundation for their economic and social development. Nor does the Commonwealth's native title policy reflect these broader goals so integral to practical reconciliation.

The failure to align native title policy with the government's broader Indigenous policy objectives means the opportunity to harness the power of Indigenous peoples own cultural and social structures to bring about economic transformation is lost.

Also lost is the opportunity to ensure that any economic development that does occur is sustained by the social and cultural values of the group. The concept of sustainable development recognises that economic development is not just the exploitation of resources wherever they happen to exist, but also must take account of the relationships in which development occurs, including the cultural values of the community.

The relationship of Indigenous people to their land is widely recognised as a basis for their cultural values and identity and as such must be taken into account in the policies aimed at achieving sustainable economic development. Obvious examples of economic development founded on the traditional cultural values of a community are the initiatives around tourism and Indigenous art. However the notion of sustainable development does not require that industries be restricted to particular types, but that all developments, from mining to tourism, take account of the needs of the cultural values of a community and occur with their informed consent.

Native title provides an important frame of reference by which participation and economic development can transform the conditions of Indigenous peoples lives. Yet its capacity to contribute to this process has been hampered, first by a legal framework that operates to restrict rather than maximise these outcomes, and second by the failure of government to integrate native title into the range of policy options available in achieving this goal.

Commonwealth funding of native title system

The second avenue through which Commonwealth policy affects native title agreement making is the Commonwealth's funding of participants in the native title system. The amount of funds provided to participants and the relative allocation of funds between participants determines whether the native title process can contribute to the economic and social development of Indigenous peoples.

Chapter 2 of my *Native Title Report 2001* criticised the way in which the Commonwealth distributes funds to institutions and individuals within the native

110 <www.icc.gov.au> accessed 23 December 2003.

title system. My criticisms were twofold. First, the Commonwealth fails to provide sufficient funds to NTRBs to carry out their statutory functions so as to ensure the recognition and protection of native title. Second, the distribution of funding between the institutions within the native title system favours those institutions whose role is to manage the resolution of native title over and above those institutions whose role is to represent the interests of native title holders. The result of this inequity is that the priorities of the former institutions dominate the native title system. In particular I criticised the way in which the funding prefers a litigation model over a negotiation model, there being insufficient funds for the latter to be fully developed while funds are being devoted to ensure the Federal Court is equipped to dispose of native title cases within a short period of time. However, as outlined above this process is frustrated by the Commonwealth's own delays.

The inequities of the Commonwealth's distribution of funds to participants in the native title system have not been addressed. As shown in the outline of the Commonwealth's funding regime above, there has been no response by the Commonwealth to either my criticisms or to the criticisms of other participants in the system, including State governments and industry.[111]

Respondent funding

In 2002-2003 over $10million was provided to respondent parties, other than State and Commonwealth parties, to participate in native title proceedings. A threshold issue for evaluating the merits of funding such respondents is determining what interests they have in those proceedings. There is no doubt that a respondent with interests in the land the subject of a native title claim would have an interest in the claim. However the NTA and the common law have guaranteed that respondent's interests cannot be affected by a native title claim because upon the creation of the respondent's interest, no matter whether it is an easement over the land, a license to carry out activities on the land, or a freehold title to the land, native title is extinguished wherever there is an inconsistency between the two sets of interests. Even where there is no inconsistency the non-extinguishment principle applies to ensure that the activities that the respondent carries out on the land are in no way affected by native title rights and interests. In this sense co-existence can be interpreted as a euphemism for a hierarchy of interests in which native title is subservient to, and ineffectual against, all other interests.

Noel Pearson, in the Mabo Lecture addressed to the Native Title Representative Bodies Conference in Alice Springs in 2003 put it this way:[112]

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111 On 9 October 2003, the Western Australian Deputy Premier released a media statement, *Commonwealth must rethink native title funding,* in which he criticises the Commonwealth for the 'chronic under-funding of native title representative bodies' and calls on the new Attorney-General to address the issue as a matter of urgency. In support of his statement the release also cites examples of other stakeholders drawing attention to the under-funding of NTRBs. These included the Deputy President of the NNTT, mining company Rio Tinto, the former First Assistant Secretary of the Native Title Division in the Attorney-General's Department and the Hon. Eric Ripper, Deputy Premier, Government of Western Australia, 9 October 2003.

112 Pearson, N, *Where We've Come From and Where We're At with the Opportunity that is Koiki Mabo's Legacy to Australia,* Mabo Lecture, Native Title Representative Bodies Conference, Alice Springs, 3 June 2003.

> [N]ative title could never result in anyone losing any legal rights they held in land or in respect of land. Where native title existed in its own right under the common law or where native title co-existed with other tenures – the native title could not result in the extinguishment or any derogation whatsoever of any rights granted by the Crown or by legislation. So why wouldn't non-indigenous Australians embrace a title which could never dispossess them of their own accrued rights and titles?
>
> We forget this second point too easily. In fact it is probably not even a matter of forgetting, because we have never planted this point in our own heads in the first place – and we have never succeeded in getting Australians to understand this truth: the truth that native title is not about anyone else losing any legal rights that they have accumulated in the 200 years since colonisation. We have never convinced anyone of the truth that native title is all about the balance, it is all about the remnants, it is all about what is left over – and no finding of native title can disturb the rights of any other parties other than the Crown.[113]

Later he posed the question:

> So if all of the rights and interests of the third parties are guaranteed at law and can never be affected by a finding of native title – why are third parties allowed to become parties to native title claims? Why are they treated by governments and the courts as if they have rights and interests that are at stake – when they do not? Why are they funded by the Commonwealth Government to represent themselves in these claims?[114]

The result of providing financial support to third parties to participate in proceedings in which their interests cannot be affected is to encourage a litigation approach to native title, not a negotiation approach. This is contrary not only to the Commonwealth's own policy on native title but also to that of the States. As Pearson points out:

> Experience has shown that if there is a third party that (a) has all of his rights and interests already guaranteed at law – and therefore he can never lose anything, and (b) has all of his costs paid for by the Attorney General of the Commonwealth – then of course these third parties are not going to be amenable to negotiated settlement of claims, and will resist recognition until the cows come home, or the native titleholders have surrendered most of their rights.[115]

It is noteworthy, that information provided by the Attorney-Generals department to the Senate Estimates Committee at a hearing on 13 February 2003,[116] supports Pearson's analysis, with an increasing proportion of respondent funding directed towards litigation:

113 *ibid*, p3.
114 *ibid,* p6.
115 *op.cit.*
116 Senate Legal and Constitutional Legislation Committee, QoN 236 and QoN 238, 31 May 2002.

Table 1: Proportion of Commonwealth grants to respondents for agreements/litigation

	00/01	01/02	02/03	Totals
Agreement	84%	90%	52%	84%
Litigation	16%	10%	48%	16%

This table identifies the substantial percentage increase in funding of respondents for litigation in 2002/03. This is contrary to the purported commitment of the Commonwealth to negotiate agreements rather than litigate.

A further issue is the different levels of accountability required from NTRBs compared to those receiving Commonwealth assistance as third parties to native title claims. For example, NTRBs are required to prepare annual reports that are tabled in Federal Parliament and comply with strict funding guidelines imposed by ATSIS. This is not the case for respondent recipients of the Commonwealth's financial assistance. In addition numerous independent reports have been commissioned on the efficiency and effectiveness of the NTRBs, but no assessment has been carried out as to the efficiency, effectiveness or accountability of the funding provided to respondent parties.

In the Torres Strait, the Attorney-General's funding for respondent parties has allowed the Queensland Seafood Industry Association (QSIA) to be a party to all the land claims, even though it has no interest above the high water mark. QSIA was also represented in the recent Darnley Island case[117] in which the question of the effect of public works was litigated, even though it was arguing identical points to those put by the State. This kind of involvement where there are no interests at stake, increases costs, and raises longer term tensions.

Funding to Native Title Representative Bodies (NTRBs)

The failure of the Commonwealth government to respond to the many calls to increase the funding of NTRBs is not only contrary to the government's own policy of preferring negotiation over litigation, it is also contrary to its human rights obligations.

As indicated in my previous discussions of State and Commonwealth policies, their preference for negotiation over litigation is the first step in ensuring that native title agreements can be directed to the broader policy goal of addressing the economic and social development of the native title claim group rather than the demands of the legal system. While the subject of native title negotiations may be quite different, ranging from consent determinations, agreements ancillary to a determination, to agreements which do not include a native title determination, the relationship between these three levels of negotiation is clarified by understanding their common underlying purpose – the economic and social development of the traditional owner group.

117 *Erubam Le (Darnley Islanders) 1 v State of Queensland [2003]* FCAFC 227 (14 October 2003).

In order to achieve this purpose NTRBs must have the capacity, both in terms of resources and skills to engage in negotiations at all three levels. Obtaining a native title determination by consent of the parties is just one way of securing the group's development base. Where consent determinations are insufficient for this purpose, agreements negotiated to augment a court determination should ensure that, as a package, the two elements of the agreement (the determination element and the non-determination element) achieve the development objective. Further, agreements with traditional owner groups who are unable to meet the legal tests for a native title determination or whose native title rights and interests have been extinguished by previous grants could nevertheless achieve similar outcomes through agreements that addressed development needs.

The under-funding of NTRBs means that, in representing the native title claim group, they are compelled to put their scarce resources into the immediate demands of the native title system rather than fully engage in the various levels of negotiation triggered by the native title process. Consequently NTRBs cannot maximise the capacity of native title agreements to lay the foundation for the achievement of Indigenous peoples' human rights.

The underfunding of NTRBs is reflected in the stringent grant conditions imposed by ATSIS, the body administering the funds. The grant conditions stipulate that purpose of funding is to enable NTRBs to perform functions and exercise powers in accordance with Division 11, Part 3 of the NTA and the NTRB strategic plan.[118] In addition to this general requirement, the funding guidelines specifically prevent NTRBs from using funding to cover costs associated with economic development or land management activites,[119] nor support reference groups or steering committees in relation to land or waters where native title has been recognised.[120] These limitations on the use of funding may not apply if the NTRB can demonstrate that these activities are related to their functions and powers under the NTA. However, as highlighted in Chapter 2, ATSIS retains discretion to determine funding allocations.

Subjecting funding to these conditions fails to appreciate the complementarity between the various levels of agreement making triggered by the native title process. Further, it restricts NTRBs to processes and negotiations prescribed by the NTA rather than allowing them to utilise other mechanisms for the realization of rights and interests, i.e., heritage legislation. As discussed above, consent determinations are just one way of securing the traditional owner group's development base and, depending on the strength of the claim, may be insufficient for this purpose. The capacity of NTRBs to negotiate more comprehensive agreements which complement or replace native title determinations is severely limited.

118 Aboriginal and Torres Strait Islander Services, *2003-04 General Terms and Conditions of Grant to bodies recognised as Native Title Representative Bodies under the Native Title Act 1993*, ATSIS, 2003, para 5.1.

119 *ibid,* para 6.2(h).

120 *ibid,* para 6.2(j).

NTRBs are also concerned that ATSIS will introduce six monthly funding which will further restrict their ability to freely represent their constituents and further strain their resources in terms of financial reporting and their ability to attract and retain experienced professional and administrative staff. In addition, short-term funding cycles undermine the ability of NTRBs to establish long term vision and planning. The Commonwealth Grants Commission in its 2001 *Report on Indigenous Funding* identified a 'long term perspective to the design and implementation of programs and services, thus providing a secure context for setting goals'[121] as a key principle for improving the allocation of resources to meet Indigenous need. Capacity development as discussed in Chapter 1 also emphasizes the importance of a long term investment in achieving development goals. Limited funding cycles therefore create significant barriers for enabling long term planning for NTRBs and implementing capacity development initiatives.

In my *Native Title Report 2001* I argued that native title, as an expression of inherent rights, and as a vehicle for economic and social development, should not be subjected to short term funding grants. To do so is to confuse it with temporary programs directed to community services. Native title is not a special measure or service program. It is not a temporary measure that can be removed once the disadvantage it aims to redress is overcome. It is the recognition of Indigenous laws, culture and land. As an expression of inherent rights its continuous funding should be guaranteed.

Yet the imposition of these conditions is a response to the critical under-funding of NTRBs. Without enough money to go around, hard decisions must be made as to how expenditure will be prioritised. In recognition of this situation many State governments are contributing their own funds to NTRBs so as to ensure that developments and projects within their state are not impeded and their policy goals in relation to native title can be met.

The Western Australian government has recently made funding available to NTRBs for an extra Future Act officer in each region. This initiative was one of the recommendations made by the WA Technical Taskforce on Mineral Tenements and Land Title Applications to expedite the processing of the backlog of mineral tenements applications on land under native title claim.[122] Funding is dependent on the NTRB entering into a regional heritage agreement with the State to expedite the granting of prospecting and exploration licenses. There has been reluctance on the part of NTRBs to enter into this funding arrangement on the grounds that the amount of the grant is arbitrary, it does not reflect the true costs of employing an additional officer and there are concerns about the terms of the agreement.

Queensland, as mentioned in Chapter 2 is also providing funding for NTRBs to employ additional staff to deal with future act matters and become involved in capacity building, assisting the native title group to set up their own process for response, such as the issuing of notices and holding of meetings. Assistance

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

122 *Technical Taskforce on Mineral Tenements and Land Title Applications*, *Final Report*, Government of Western Australia, 2001, p19.

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

The South Australian government confirms that the Aboriginal Legal Rights Movement (ALRM) has received insufficient funding from ATSIS to enable them to negotiate.[123] As a result the South Australian government has provided funds totalling $5.4 million to 30 June 2003, plus an additional $1.5 million for the current financial year. The South Australian government considers that negotiated outcomes are more cost effective than the $4 million it took to litigate the De Rose Hill native title claim.

The South Australian government has also provided funding to ensure that the State-wide ILUA process can be sustained. To this end it has provided one-off funding to the Congress of Native Title Management Committees, which provides instructions to the ALRM and has significant involvement in the ALRM's policy. The future funding of the Management Committees is considered critical by the South Australian government for ensuring that Indigenous people in South Australia have a culturally appropriate vehicle for providing the ALRM with instructions for advancing the negotiation of their native title claims.

The inadequate funding of NTRBs relative to their functions has had the cumulative effect of undermining their capacity to fully and effectively engage in the native title process. In addition, the distribution of funds to other institutions and individuals within the native title system also affects the way in which NTRBs must allocate the scarce resources they do receive. Of increasing concern is the way in which the Commonwealth's allocation of funds to third parties wishing to participate as respondents in the native title claim process is funnelling NTRBs resources towards litigation rather than addressing the needs of the claimant group.

Funding to Prescribed Bodies Corporate

As mentioned in Chapter 2, as at 30 May 2002, a total of 20 corporations have been determined to be Prescribed Bodies Corporate (PBCs) and registered on the National Native Title Register, thereby becoming Registered Native Title Bodies Corporate (RNTBCs).[124]

Under the *Native Title Act 1993* (Cth), RNTBCs are the legal entity that hold or manage native title on behalf of native title holders after a determination by the Federal Court that native title exists. The number of RNTBCs is expected to grow as the number of determinations of native title increases over time. Yet there is a lack of resources for prescribed bodies corporate. This is a significant

123 State of South Australia (Indigenous Land Use Negotiating Team), *Submission to Commonwealth Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund*, October 200, available at <www.aph.gov.au/senate/committee/ntlf_ctte/report_19/submission/sub06.doc> access 22 December 2003.

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

flaw in the native title system. It inhibits native title holders from achieving broader social, economic and cultural development for their community despite having a determination that their native title continues to exist.

In answer to questions on notice from Senator McKiernan about funding for RNTBCs and whether financial provisions are made to enable them to effectively carry out their legal obligations, on 31 May 2002 the Attorney-General's Department provided the following answer:

> Part 11, Division 3 of the *Native Title Act 1993* (Cth) allows NTRBs to provide certain services to RTNBCs (for example, facilitation and assistance services) if the RNTBC requests the NTRB to provide those services and their provision would be in accordance with the NTRB's prioritisation policy.
>
> ATSIC grant conditions allow NTRBs to use ATSIC grant funding to perform their statutory functions in respect of RNTBCs and to assist with the establishment costs for new PBCs (i.e. corporations set up by native title holders to perform functions of a RNTBC, but which have not yet been registered on the National Native Title Register). ATSIC grant conditions preclude NTRBs from meeting the ongoing operating costs of RNTBCs.
>
> ATSIC is currently conducting a research project to obtain data on the structure and projected activity of RNTBCs Australia-wide. It is expected that this data will inform the development of strategies to assist RNTBCs to deliver on their responsibilities.[125]

The report noted that PBCs 'have two fundamental purposes: firstly, protecting the native title, and secondly, delivering the necessary certainty required in the management of property interests'.[126] The Executive Summary of the report provides an insight into some of the issues confronting PBCs and RNTBCs.

> RNTBCs have a range of important statutory functions under the Act and the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (PBC Regulations). Both trustee and agent RNTBCs broadly have the functions of:
>
> - managing the native title;
> - entering into native title related agreements; and
> - holding in trust and investing monies paid to the native title group resulting from dealings in their native title, as well as other functions at the general direction of the native title group members.
>
> One of the most important statutory functions of RNTBCs is to consult with, and obtain the consent of, relevant native title holders before making native title decisions that would affect their native title rights or interests.
>
> Only associations incorporated under the *Aboriginal Councils and Associations Act 1976* (Cth) can be nominated by the native title holders to hold or manage the determined native title.

And specific corporate governance and regulatory compliance obligations under this *Act* must be met for RNTBCs to maintain their status as legally incorporated

125 Senate Estimates Committee Question on Notice No. 244, 31 May 2002.

126 Anthropos Consulting Services, Seantore Brennan and Rashid (2002) *ATSIC Research Project into the issue of Funding for Registered Native Title Bodies Corporate,* for ATSIC Native Title and Land Rights Centre, Canberra, October 2002.

associations under the *Act*. If not, they will not be in a position to properly discharge their statutory functions.

> Thus the native title management regime establishes two distinct but interdependent categories of activity for RNTBCs which require resourcing for their statutory performance… These two categories are (a) the performance of their statutory functions as set out in the *Native Title Act 1993* (Cth) and the PBC Regulations, and (b) meeting their specific regulatory compliance obligations as required under the *Aboriginal Councils and Associations Act 1976* (Cth).

The report notes that the costs associated with establishing and registering RNTBCs are considerable and that the nature and extent of such costs has never been given any detailed consideration. Currently, the establishment costs for most RNTBCs are being met by the NTRBs and by state-funded organisations such as community councils. Even if NTRB funding includes an amount for establishing RNTBCs it is still hopelessly inadequate. In some cases there are no resources to meet establishment costs for RNTBCs.

In relation to funding, the report notes:

- NTRBs have statutory functions that permit them to assist RNTBCs if requested;
- Present funding of NTRBs is inadequate to enable the NTRBs to effectively perform all their statutory functions;
- Since 1998 NTRBs have been required to prioritise the performance of their statutory functions;
- Priority is being given to claims related work and as a consequence, NTRBs are not able to provide RNTBCs with any assistance, in some cases including with establishment costs;
- Under current funding conditions NTRBs are not able to support the operating costs of RNTBCs or to assist RNTBCs to meet their compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth);
- It was initially envisaged that NTRBs would be able to support RNTBCs;
- It could be argued that ATSIC could remove the restriction on NTRBs from supporting RNTBCs;
- ATSIC's view is that the funding made available solely for the performance of NTRB statutory functions which includes meeting PBC establishment costs;
- ATSIC maintains however, that the funding for NTRBs was never intended to support the ongoing costs of RNTBCs or for meeting their statutory functions.

The report provides an insight into the dilemna facing ATSIS when inadequate funding requires it to choose between funding organisations at the expense of another, both of which are integral to the operation of the native title system.

> In addition, ATSIC argues that the funding provided by Government was significantly less than identified as being needed in the Parker Report,[127]

127 Parker, P, *Review of Native Title Representative Bodies,* Aboriginal and Torres Strait Islander Commission, 1995.

> and less than the funding sought in Cabinet submissions. ATSIC sought increases of $22.2M in 1995-96 (and received $13.95M) and $37M in 1996-97 (receiving $27.7M). Over the past five financial years, Government funding to ATSIC for native title has remained at similar levels – $40.8M in 1996-97 and $42.5M in 2000-01. In light of these funding constraints, the effects of which have only increased since the 1998 amendments to the *Native Title Act 1993* (Cth) increased NTRB statutory functions, and the need to prioritise the recognition of native title, ATSIC subsequently decided that it was only prepared to fund RNTBC establishment costs, rather than the ongoing costs of performing functions and meeting regulatory compliance requirements".[128] (Anthropos *et al* 2003:3)

The losers in the difficult choice facing ATSIS are the PBCs:

> "RNTBCs currently receive no government funding to perform their statutory functions under the *Native Title Act 1993* (Cth) or meet their regulatory compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth). Nor do NTRBs receive adequate funding for the discharge of their statutory functions under the *Native Title Act 1993* (Cth), which impacts particularly on their capacity to provide assistance to RNTBCs. As a result, existing RNTBCs are, on the most part, essentially dysfunctional, have no infrastructure and are unlikely to be meeting existing regulatory compliance requirements under the *Aboriginal Councils and Associations Act 1976* (Cth). They are accordingly vulnerable to failure and being wound up. This would put at risk both the protection and management of native title, and the certainty required by land and resource management stakeholders." (Anthropos *et al* 2003:4)

The report advocates that:

- NTRBs be given additional funding to assist native title holders in the incorporation, nomination and registration of RNTBCs; and
- RNTBCs be funded either directly or indirectly so that they have the capacity to meet their minimum regulatory compliance obligations under the *Aboriginal Councils and Associations Act 1976* (Cth) and perform their statutory functions under the *Native Title Act 1993* (Cth), so as to deliver the certainty required by Government and other parties in dealings concerning native title.

It is the role of Prescribed Bodies Corporate to turn the results of negotiations into workable models for the sustainable development of the traditional owner group. Therefore they must be properly resourced in order to manage the native title assets, and to govern and lead the group into a self-determining entity. Without funding, PBCs will fail in the most important task of ensuring that the needs and aspirations of the group are identified and addressed so that sustainable development can occur.

128 *op.cit,* Anthropos Consulting Services, p3.

Native Title Representative Bodies and Prescribed Bodies Corporate are the major entities through which the economic and social development of native title groups will occur. Native Title Representative Bodies are the interface between the legal and political system that decides who gets what out of native title. Their capacity to negotiate the best result for traditional owners, either through the courts or through the government, depends on their being properly resourced.