

The report overview:

It's time to talk

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Today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.¹

2008 was a significant year for Aboriginal and Torres Strait Islander peoples with far reaching effects, although not limited to, native title.

After 11 years of conservative rule under the Howard Government, that saw Indigenous peoples' native title rights and interests severely degraded under the Wik 10 Point Plan, the election of the Labor Government raised an opportunity to renew the relationship between the State and Australia's Indigenous peoples.

The National Apology in February was a significant and historic event that recognised the devastating impact of Stolen Generation policies. These policies facilitated the dispossession and removal of Indigenous peoples from their traditional lands, resulting in the disruption of connection to their country and their culture. This has in turn impacted greatly upon the ability or success of Aboriginal and Torres Strait Islander peoples claiming native title, with the cruel twist that the more an Aboriginal or Torres Strait Islander has been hurt by government policy, the less likely they are to have their native title recognised. I was honoured to represent the Stolen Generations and their families in giving the formal Indigenous response to the Apology.

This new opportunity has also resulted in an early announcement from the Attorney-General to reconsider the current adversarial approach of the native title system and encouraged States and native title stakeholders to engage in native title negotiations in a more flexible manner.² This approach was complemented with the introduction of policies aimed at improving the social and economic situation of Aboriginal and Torres Strait Islander peoples. Some of the policies are inextricably linked to native title and the rights of Indigenous peoples to their lands, waters and natural resources. For example, in the new government's National Platform and Constitution, the Australian Labor Party stated that it:

- understands that land and water are the basis of Indigenous spirituality, law, culture, economy and well-being
- acknowledges that native title and land rights are both symbols of social justice and valuable economic resources to Indigenous Australians

1 Prime Minister of Australia, Apology to Australia's Indigenous Peoples, House of Representatives, Parliament House, Canberra, 13 February 2008. At: http://www.pm.gov.au/media/speech/2008/speech_0073.cfm.

2 Attorney-General, *Speech*, (Speech delivered at the Negotiating Native Title Forum Brisbane, 29 February 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/Speeches_2008_29February2008-NegotiatingNativeTitleForum (viewed March 2008).

- recognises that a commitment was made to implement a package of social justice measures in response to the High Court's Mabo decision, and will honour this commitment
- fully supports native title as a property right under Australian law.³

1. The Native Title Report 2008

As with previous reports submitted by the Aboriginal and Torres Strait Islander Social Commissioner, this year's report will examine the operation of the native title system and its affect on the exercise and enjoyment of human rights by Aboriginal and Torres Strait Islander peoples during the 2007-2008 reporting period. It will also discuss the effect of changes that were made to the native title system during 2007 under the previous Government's native title reform process.

The report also considers three important native title cases before the courts during the 2007- 2008 reporting period; Noongar, Rubibi and Griffiths. This discussion is followed by a discussion of the Blue Mud Bay case which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth). These cases highlight particular human rights implications for Aboriginal and Torres Strait Islander peoples, including:

- the compulsory acquisition of lands where no other interests in the land exist
- the ever present issues of connection and continuity
- the extinguishment of native title rights and interests
- the legitimacy of elements of traditional law and custom such as descent and succession.

In addition to examining the progress the government has made in achieving rights and equality for Indigenous peoples, and how the government can complement its symbolic Apology with practical, beneficial changes to the native title system, the theme of the Native Title Report 2008 includes the topical issues of climate change and water. It is in this context that I also consider the protection of Indigenous knowledge in policies and processes developed in response to these issues.

In examining these issues, and more particularly the effect they have on Indigenous peoples in Australia, I make a number of recommendations aimed at heightening the participation and engagement of Indigenous peoples in addressing these issues.

In order to invoke the imagination, I have also included two case studies which explore first hand the potential impacts of climate change on a number of human rights of the Indigenous peoples, particularly those living on the Torres Strait Islands and the Indigenous nations of the Murray-Darling Basin.

As I have endeavoured to do in previous reports, the Native Title Report 2008 considers issues relevant to Aboriginal and Torres Strait Islander peoples now and for the future.

I welcome the early actions of this Government and hope that they make every effort to work with Indigenous peoples across Australia to build on the positive energy that was felt on the 13 February 2008, the day of the Apology to the Stolen Generations, to ensure that we as a nation can finally move towards building sustainable Indigenous communities.

3 Australian Labor Party, Australian Labor Party National Platform and Constitution (2007). At: <http://www.alp.org.au/platform/>, chapter 13, paras 91-104 (viewed July 2008).

1.1 The Native Title Report 2008 – Summary

(a) Chapter 1

Chapter one, 'The Year in Review', is precisely that.

I also take the opportunity to revise significant events concerning Aboriginal and Torres Strait Islander peoples, and the effect of these upon native title. The ensuing time since the federal election has seen the historic National Apology, an indication of support for the *Declaration of the Rights of Indigenous Peoples*, and the active attempts of the Attorney-General and federal, state and territory Ministers to develop a new relationship between Indigenous and non-Indigenous Australians, coupled with a new attitude to native title. I welcome the reinvigorated approach being afforded to native title, and am hopeful of tangible, reportable changes occurring in the coming year.

(b) Chapter 2

In my *Native Title Report 2007*, I voiced my concerns over the impacts on the human rights of Indigenous peoples under the amendments to the native title system as enacted in 2007. This year I examine the practical effects the changes have had. The overwhelming response I received from stakeholders regarding the amendments was that they have had little to no impact thus far. However, this was coupled with ongoing concern that they do not go far enough in meeting the desired outcomes of the preamble of the Native Title Act, or assuring Indigenous peoples' rights.

Chapter 2 examines the various amendments such as the relationship between the Tribunal and the Federal Court, and amendments to the Registration Test, Native Title Representative Bodies (NTRBs), respondent funding and Prescribed Bodies Corporate (PBCs). I then consider the impact of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth), and the concurrent changes that are required to enable NTRBs and PBCs to comply with the regulatory requirements. I conclude the chapter by proffering some suggestions, based upon observations and feedback I have received from stakeholders, as to how the system can be improved.

(c) Chapter 3

Chapter 3 considers three important native title cases before the courts in 2007-2008; Noongar, Rubibi and Griffiths, followed by a discussion of the Blue Mud Bay case which related to the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (ALRA). These cases highlight how the *Native Title Act* and other legislation impacts on the human rights of Aboriginal and Torres Strait Islander peoples. Ten determinations were made throughout the year, and eight claims were struck out.

The Noongar people met with disappointment when the Full Federal Court determined that Justice Wilcox had erred in making a determination of native title, particularly with regards to continuity requirements, the effects of white settlement and connection.

However, the Rubibi appeal, was successful, widening further the original native title determination in overturning some of the findings on extinguishment. Despite this positive outcome, the length and technical nature of the case demonstrates a litigious trend on the part of governments, contrary to the conciliatory approach they have committed to.

The High Court in Griffiths, the third case, found that native title rights and interests can be compulsorily acquired for the benefit of private business, thus providing confirmation that the Northern Territory Government can acquire native title rights and interests for any purposes whatsoever, including for the private benefit of a third party. Ultimately, due to a change of government, the native title was not acquired, but the case raises serious questions regarding acquisition.

And finally, the Blue Mud Bay decision gave cause for celebration to the Northern Territory's coastal Aboriginal population. The High Court recognised that the ALRA provides exclusive possession rights to the intertidal zone, extending to 80% of the Territory's coast line. I conclude the chapter by discussing possible reform to prevent the slow, technical and litigious progress of native title claims as seen all too often. Even where a determination is made, it is subject to appeal, or comes at the end of a long and frustrating journey.

(d) Chapter 4

In keeping with the theme of the Seventh Session of the United Nations Permanent Forum on Indigenous Issues, being 'Climate Change and its impacts on Indigenous peoples', I have considered this issue in the context of concerns raised by Indigenous Australians.

Chapter 4 provides an analysis of the international and domestic climate change policy and legislative framework with an aim to highlighting the existing mechanisms that may be drawn upon to ensure the development of climate change policy is extensive and adequately addresses the relationship to Indigenous peoples rights and interests in this regard.

(e) Chapter 5

Chapter 5 provides a discussion on the first topical issue covered by this report, the impacts of climate change on Australia's Indigenous peoples. A number of suggestions are offered in relation to the development of strategies to prepare in advance for these impacts. In addition, I discuss the opportunities arising from climate change, the potential for Indigenous peoples to take full advantage of such opportunities, and the level of assistance that will be required in order for people to secure benefits. This discussion is central to the Government's position that Indigenous peoples leverage their assets, the Indigenous estate, to achieve economic development.

I also discuss the work that Indigenous communities around the country are already doing to respond to climate change and to start preparing to engage in emerging carbon markets. However, I stress the need for Government to ensure that Indigenous people are fully engaged in this debate at all levels to guarantee the greatest possible outcomes.

(f) Chapter 6

The second topical issue considered in chapter 6 of this year's report is water. This topic is particularly important in light of the expected impacts from climate change as well as ongoing drought. While it is understood that water is a global concern, the discussion contained in this chapter highlights the specific concerns for Indigenous Australians including addressing the pressures but also being able to access the opportunities through working with Government on water management. Issues such as access to cultural water rights to fulfil cultural responsibilities, including environmental conservation, as well as the lack of protection of these rights to water under the current legislative framework that governs water resources is considered throughout this chapter.

(g) Chapter 7

In the context of both climate change and water, the protection of Indigenous peoples' knowledge's is an issue that is relevant to both. Particularly, where the use of Indigenous knowledge's has been identified as a vital component to responding to issues such as climate change and biodiversity conservation. Chapter 7 considers the lack of protection afforded under current intellectual property laws such as copyright and patenting and considers the need for the development of a mechanism which provides protocols around the use, access, and ownership of Indigenous knowledge's that includes a protection regime. Such a regime may include provisions similar to copyright and patenting. However these provisions would be in accordance with the traditional law and customs that govern this use and appropriation, and provide for the unique communal nature of this knowledge.

2. Recommendations

The following recommendations address the concerns raised in Native Title Report 2008.

Recommendations: Chapter 2

- 2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples.
- 2.2 That the Australian Government respond to the recommendations made in the *Native Title Report 2007* on the 2007 changes to the native title system.
- 2.3 That the Australian Government and the National Native Title Tribunal draft a comprehensive and clear guide to the registration test. The Australian Government should consider whether further guidance on the registration test should be included in the law, through regulation or through amendment to the Native Title Act.
- 2.4 That the Australian Government monitor the impact of the Queensland NTRB amalgamations on the bodies' operation, and provide direction, assistance and resources to those bodies which require it.
- 2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.
- 2.6 That once the CATSI Act has been implemented, the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, together review the impact the law has on Indigenous corporations. In particular, the review should examine the impact of the CATSI Act on PBC's' ability to protect and utilise their native title rights and interests.
- 2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBC's' capacity to operate.

Recommendations: Chapter 3

- 3.1 That the Australian Government pursues consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be to amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city.
- 3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.
- 3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state:

In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223:

 - whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander
 - whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander.
- 3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.

Recommendations: Chapter 4

- 4.1 That the Australian Government formally support and develop an implementation strategy on the Declaration on the Rights of Indigenous Peoples as a matter of priority.
- 4.2 That particular attention be paid to the impacts of climate change on Indigenous peoples in the formulation of Australia's climate change strategies. The recommendations of the United Nations Permanent Forum on Indigenous Issues (on the special theme of climate change and Indigenous peoples) and the provisions of the Program of Action for the Second International Decade of the World's Indigenous People provide important guidance in this regard.
- 4.3 That the Australian Government review the existing domestic mechanisms that are relevant to Indigenous peoples and climate change, and identify any inconsistencies or impediments and where further policy development or amendment is required.
- 4.4 That the Australian Government actively engage Indigenous Australians in post Kyoto negotiations, particularly in relation to the utilisation of the Kyoto mechanisms, international investment in carbon abatement, and issues around the urban migration of both internally displaced peoples and those that will require relocation in the region.
- 4.5 That the Australian Government actively engage Indigenous Australians in the development of the Carbon Pollution Reduction Scheme, particularly in relation to:
 - a. the protection and maintenance of Indigenous lands, waters, natural resources, and cultural heritage
 - b. to identify and facilitate access to economic opportunities arising from carbon abatement and mitigation.
- 4.6 That the regulatory framework for Australia's climate change policy guarantees and protects Indigenous peoples' engagement and participation. This should include Indigenous involvement in all aspects of climate change law and policy such as development, implementation, monitoring, assessment and review.

Recommendations: Chapter 5

- 5.1 That the Australian Government's focus on the economic aspects of Indigenous inclusion in climate change policy is extended to include social, cultural and environmental policy considerations.
- 5.2 That the Australian Government consider the particular impact of climate change on Indigenous peoples' human rights and ensure these are addressed when developing responses.
- 5.3 That in developing and implementing climate change policy, the Australian Government ensure that Indigenous communities are not further disadvantaged. The Australian Government should ensure that:
- Indigenous peoples do not bear an inequitable proportion of the cost of climate change
 - Indigenous peoples existing rights and interests are not jeopardised
 - Indigenous peoples' rights to lands and water, access to carbon resources, and other rights and interests are enhanced and fully protected.
- 5.4 That government departments which have specific responsibilities for Indigenous affairs (for example, FaHCSIA and Attorney-General's Department), work closely with departments responsible for climate change policy to ensure that the social, cultural, environmental and economic impacts of climate change on Indigenous peoples are identified and addressed. For example, how native title and land rights can help facilitate opportunities arising from climate change and carbon markets.
- 5.5 That the Australian Government fulfil its commitment to develop a legislative framework that provides for Indigenous participation in carbon markets that includes national principles for engagement with Indigenous peoples, including:
- the full participation and engagement of Indigenous peoples in negotiations and agreements between parties
 - the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.
- 5.6 That the Australian Government ensure an ongoing commitment to these recommendations by seeking bipartisan support for Indigenous participation and engagement in climate change policy.

Recommendations: Chapter 6

- 6.1 That in accordance with international law and Australia's international obligations, the Australian Government:
- i) protects and promotes Indigenous peoples right to the equal exercise and enjoyment of their human right to water, by ensuring their full and effective participation and engagement in the development and implementation of water policy
 - ii) recognises and respects the importance of Indigenous traditional ecological knowledge and management of biodiversity and conservation, including water
 - iii) give greater consideration to the relevance of international mechanisms such as the Ramsar Convention and the Convention on Biological Diversity in the development of water policy.
- 6.2 That governments fully recognise the significance of water to Indigenous peoples and incorporate their distinct rights, including as water users, to water, the environment, economic development, participation and engagement into the *Water Act 2007*. In particular, the *Water Act* should be amended to include a distinct category that provides for "Indigenous cultural water use" and access entitlements.
- 6.3 That the Government amend the Native Title Act to extend the right to negotiate to apply to water resources, including development and extraction applications, and water management planning.
- 6.4 That governments develop and include in the National Water Initiative, specific guidelines on how to implement Indigenous water rights:
- i) that the National Water Commission give higher priority to ensuring that the values and interests of Indigenous peoples are considered, including:
 - the explicit inclusion of Indigenous interests in Water Plans
 - recognition and protection of existing rights and interests held by Indigenous peoples, including native title and cultural heritage rights
 - consistency across jurisdictions in providing for the recognition and protection of Indigenous rights and interests
 - consistency across jurisdiction in implementing Water Plans and National Water Policy.
 - ii) that National Water Policy includes explicit links to climate change policy.
- 6.5 That government departments that have specific responsibilities for Indigenous affairs (for example, the Department of Families, Housing, Community Services and Indigenous Affairs and the Attorney-General's Department) work closely with the Department of Environment, Water, Heritage and the Arts, and the Department of Climate Change, to ensure that the social, cultural, environmental and economic impacts and opportunities for Indigenous peoples arising from water and climate change are identified and addressed.

- 6.6 That Australian governments commit to a framework that provides for Indigenous participation in water policy that includes national principles for engagement with Indigenous peoples, including:
- the adoption of, and compliance with, the principle of free, prior and informed consent
 - the protection of Indigenous interests, specifically access to our lands, waters and natural resources and ecological knowledge
 - the protection of Indigenous areas of significance, biodiversity, and cultural heritage
 - the protection of Indigenous knowledge relevant to climate change adaptation and mitigation strategies
 - access and benefit-sharing through partnerships between the private sector and Indigenous communities
 - non-discrimination and substantive equality
 - access to information and support for localised engagement and consultation.

Recommendations: Chapter 7

- 7.1 That the Australian Government engage Indigenous peoples around the country to develop a legislative framework that provides for protection of Indigenous knowledge's and a protocol for the use of this knowledge.
- 7.2 That all governments amend relevant legislation and policy, such as the Native Title Act, Cultural Heritage legislations and various land rights regimes, to ensure consistency with the proffered national legislative regime framework. This should extend to all legislation that relates to Indigenous peoples and their rights and interests such as education, health, tourism, the arts and so on.
- 7.3 The proffered national legislative regime framework should be applied to all climate change and water policy and processes, including domestic and international negotiations relating to carbon, water and environmental markets.