Chapter 1
The year in review

In November 2007, Australia elected a new federal government. With the new government came new policies aimed at improving Aboriginal's and Torres Strait Islander's social and economic situation. In the new government's National Platform and Constitution,[1] 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
- 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
- fully supports the statutory recognition of inalienable freehold title under the *Aboriginal Land Rights (Northern Territory) Act 1976* and the right of property owners to provide free, prior and informed consent to any major changes affecting their interests
- believes that negotiation produces better outcomes than litigation and that land use and ownership issues should be resolved by negotiation where possible
- will facilitate the negotiation of more Indigenous Land Use Agreements and ensure that traditional owners and their representatives are adequately resourced for this task
- believes that the independence of native title representative bodies should be supported to enable them to freely advocate on behalf of the people they represent. It will evaluate the performance of these bodies against transparent indicators, including how satisfied traditional owners are with the service they have received
- will address the chronic staffing retention issues of native title representative bodies by supporting professional development and mentoring opportunities
- will ensure adequate resourcing for the core responsibilities of Prescribed Bodies Corporate.

1 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).

These are welcome commitments which, if fulfilled, could greatly improve the human rights of Aboriginal and Torres Strait Islander peoples. This chapter outlines the progress that has been made over the past 12 months to improve the native title system. However, there is still a long way to go before these commitments can be said to have been realised.

1. The Declaration on the Rights of Indigenous Peoples

The *Declaration on the Rights of Indigenous Peoples* (the Declaration) was adopted by the General Assembly of the United Nations on 13 September 2007. It was adopted with 143 countries voting in favour, 11 abstaining and 4 voting against. Regrettably, Australia was one of the four countries which voted against the Declaration.

However, this does not detract from the significance of the Declaration, which was the culmination of over two decades of negotiations at the United Nations and fierce advocacy by indigenous peoples from all over the world since the 1970s. It reaffirms that indigenous people are entitled to all human rights recognised in international law without discrimination. But it also acknowledges that without recognising the unique collective rights of indigenous peoples and ensuring protection of our cultures, indigenous people can never truly be free and equal.

Significantly for indigenous peoples' rights relating to their lands and waters, Articles 25-32 provide for:

- rights to maintain traditional connections to land and territories
- ownership of such lands and protection of lands by the government
- establishment of systems to recognise indigenous lands
- rights to redress, and compensation for lands that have been taken
- conservation and protection of the environment
- measures relating to storage of hazardous waste and military activities on indigenous land
- protection of traditional knowledge, cultural heritage and expressions and intellectual property
- processes for development on indigenous land.[2]

With the change of Australia's federal government in November 2007, there was a change in position on the Declaration; the new government indicated it will support the Declaration, but that support is yet to be formally indicated.

Once this occurs, the challenge will be for the government and Indigenous peoples to together develop partnerships based on the principles set forth in the Declaration and on the basis of mutual respect.

2 *Declaration on the Rights of Indigenous Peoples,* GA Resolution 61/295 (2007) A/RES/61/295. At: http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed July 2008).

2. The National Apology

The first significant event of the new government occurred on 13 February 2008 when the Prime Minister, Kevin Rudd made the National Apology to the Stolen Generations of Australia's Indigenous peoples in the House of Representatives:

> We apologise for the laws and policies of successive Parliaments and governments that have inflicted profound grief, suffering and loss on these our fellow Australians… Until we fully confront that truth, there will always be a shadow hanging over us and our future as a fully united and fully reconciled people. It is time to reconcile. It is time to recognise the injustices of the past. It is time to say sorry…We apologise for the hurt, the pain and suffering that we, the parliament, have caused you by the laws that previous parliaments have enacted. We apologise for the indignity, the degradation and the humiliation these laws embodied.
>
> …
>
> Our challenge for the future is to embrace a new partnership between Indigenous and non-Indigenous Australians…The truth is: a business as usual approach towards Indigenous Australians is not working. Most old approaches are not working. We need a new beginning. A new beginning which contains real measures of policy success or policy failure. A new beginning, a new partnership, on closing the gap with sufficient flexibility not to insist on a one-size-fits-all approach for each of the hundreds of remote and regional Indigenous communities across the country but instead allows flexible, tailored, local approaches to achieve commonly-agreed national objectives that lie at the core of our proposed new partnership.[3]

It was a historic day for the country, and I was honoured to represent the Stolen Generations and their families and give a response to the government. In my response I acknowledged the significance of the event for the future:

> It's the day our leaders – across the political spectrum – have chosen dignity, hope and respect as the guiding principles for the relationship with our first nations' peoples. Through one direct act, Parliament has acknowledged the existence and the impacts of the past policies and practices of forcibly removing Indigenous children from their families. And by doing so, has paid respect to the Stolen Generations. For their suffering and their loss. For their resilience. And ultimately, for their dignity.
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> …
>
> This is not about black armbands and guilt. It never was. It is about belonging. The introductory words of the 1997 *Bringing them home* report remind us of this. It reads:
>
> > *...the past is very much with us today, in the continuing devastation of the lives of Indigenous Australians. That devastation cannot be addressed unless the whole community listens with an open heart and mind to the stories of what has happened in the past and, having listened and understood, commits itself to reconciliation.*
>
> By acknowledging and paying respect, Parliament has now laid the foundations for healing to take place and for a reconciled Australia in which everyone belongs.
>
> …
>
> Let your healing, and the healing of the nation, begin.[4]

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3 Commonwealth, *Parliamentary Debates,* House of Representatives, 13 February 2008, p 167 (The Hon Kevin Rudd MP, Prime Minister).

4 T Calma, *Let the healing begin* (Speech delivered in response to government to the national apology to the Stolen Generations, Canberra, 13 February 2008). At: http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20080213response_to_gov_to_the_national_apology_to_the_stolen_generations.html (viewed February 2008).

The National Apology came 10 years after an Australian Human Rights Commission [then the Human Rights and Equal Opportunity Commission] report *Bringing them home,*[5] an inquiry into the tragic policies of successive Australian governments to forcibly remove Aboriginal and Torres Strait Islander children from their families and homes. Nationally, between one in three and one in ten Indigenous children were forcibly removed from their families and communities between 1910 and 1970. These policies continue to impact considerably on the lives of Indigenous Australians across the country.[6]

The policies for which the Prime Minister gave the National Apology can not be separated from the native title system today. When the governments' policies forcibly removed children, they broke their integral connection to their lands, families and culture. This break in connection has meant that in the eyes of the Australian legal system, many Aboriginal and Torres Strait Islanders have lost their native title rights and interests. It is a cruel aspect of native title law 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 realised.

3. A new approach to native title?

Only time will tell how the government complements its symbolic National Apology with practical changes that are beneficial to Indigenous Australians. In the context of native title and land rights, one member of the High Court has already said:

> Honeyed words, empty of any practical consequences, reflect neither the language, the purpose nor the spirit of the National Apology.[7]

Not long after the National Apology the new Attorney-General reflected that in the past, native title, which is '[a]n opportunity for reconciliation has all too often become an instrument of division'. He recognised that native title has a crucial role to play in forging a new relationship between Indigenous and non-Indigenous Australians, and is an opportunity to develop new attitudes and new ways of thinking and doing things, because through native title, 'we acknowledge Indigenous peoples ongoing relationship to land'.[8]

In the spirit of building a new relationship, the Attorney-General outlined that the government's attitude to native title will be a flexible approach that produces both symbolic and practical outcomes. This will be achieved through negotiating agreements and avoiding litigation. The government will:

> [Avoid] unduly narrow and legalistic approaches to native title processes that can result in the further dispossession of Aboriginal and Torres Strait Islander people.[9]

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5 Australian Human Rights Commission, *Bringing them home: National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (2007). At: http://www.humanrights.gov.au/social_justice/bth_report/index.html (viewed June 2008).

6 For more information see Australian Human Rights Commission, *Bringing them home: National inquiry into the separation of Aboriginal and Torres Strait Islander children from their families* (2007). At: http://www.humanrights.gov.au/social_justice/bth_report/index.html (viewed June 2008).

7 *Northern Territory v Arnhem Land Aboriginal Land Trust* [2008] HCA 29, 71 (Kirby J).

8 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).

9 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).

This new attitude to native title is welcome. I hope that it will lead to tangible results and will go some way to addressing the continuing native title gridlock that I reported on in my *Native Title Report 2007.* However, this in itself is not enough.

Since then, the Attorney-General has met with states' and territories' Ministers for Native Title under the theme 'making native title work better'. The only public outcome of this meeting to date was a communiqué which outlined actions that the Ministers will pursue in order to improve native title. These include:[10]

- Resolution of claims – the Ministers will establish a Joint Working Group on Indigenous Land Settlements to develop policy options for developing broader native title settlements.
- Commonwealth financial assistance – the Ministers will develop an agreement about how the federal government can finance the states and territories in such a way to facilitate settlement of native title.
- Ministerial meetings – the Ministers will meet once a year.

Beside these general commitments, the communiqué stated that all the Ministers had agreed to a flexible and less technical approach to native title and committed their governments to taking a more flexible view, considering also how the process might be able to achieve real outcomes for Indigenous people.[11] At the time of writing this Report, none of the actions outlined in the communiqué had been commented on any further.

Throughout the year Jenny Macklin, the Minister for Families, Housing, Community Services and Indigenous Affairs, has also made various references to the government's new approach to native title and what that might include.

Minister Macklin concentrated her comments on how the native title system could be improved so that it has greater benefits for Indigenous Australians. Encouragingly, Minister Macklin has recognised that native title is one aspect of a National Indigenous Economic Development Strategy. However, comments in her 2008 Mabo Lecture raised a number of issues concerning the Government's approach to native title that the Attorney-General has not yet provided a public response to. Two of these are worth mentioning here.

Firstly, Minister Macklin talked about a review of native title, which was reported in the media as a government commitment to 'overhaul' the whole native title system.[12] Consequently, many stakeholders expressed hope and support for such a review which would be an important opportunity to fix many significant problems with the system. Much of the annual national Native Title Conference 2008 centred on discussions about what a review could achieve. However, to date the Attorney-General has not voiced his support nor made any other announcements about a comprehensive review. As a result, there was unnecessary confusion and effort spent by Indigenous people and other stakeholders about what the government plans to do, which Minister will be responsible for it, and what changes the government will consider.

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10 Attorney-General, 'Native Title Ministers' Meeting Communiqué' (media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008).

11 Attorney-General, 'Native Title Ministers' Meeting Communiqué' (media release, 18 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_18July-Communique-NativeTitleMinistersMeeting (viewed 21 July 2008).

12 P Karvelas & P Murphy, 'Labor to overhaul native title law', *The Australian*, 22 May 2008. At: http://www.theaustralian.news.com.au/story/0,,23738718-2702,00.html (viewed May 2008), and K Parker, 'Native Title to get overhaul', *Koori Mail,* 4 June 2008.

Minister Macklin also announced through the year that the government will explore ways of ensuring that money flowing to communities from mining agreements[13] lasts for generations and is used to 'make a difference to their lives and the lives of their children and grandchildren'.[14] She reflected that it would be a shame if the huge proceeds from the mining boom were not used to close the gap between Indigenous and non-Indigenous Australians; that the benefits from the mining boom should be harnessed for the benefit of the community. To further this, Minister Macklin established a small informal working group to discuss how this could be achieved. There has been no public outcome from these discussions to date.

While I acknowledge and commend the government's record spending and commitment to closing the gap between Indigenous and non-Indigenous Australians, many Indigenous communities who are engaged in mining agreement negotiations are forced to use this process to access funds to provide essential services to their communities, for example dialysis machines and other health and education services. Many of these essential services are provided by the government to Australians living in urban and rural centres. However, the government's provision of infrastructure and resources is minimal in remote communities, of which Indigenous people constitute a large proportion of the residents. The government should provide these services consistently across Australia, ensuring all people's international human rights, for example their rights to food, water, health and education, are realised.

If essential services and infrastructure are provided by government, communities can complement them with outcomes achieved through the private agreements made with mining and resource companies to provide for future activities that they themselves prioritise. In order for communities to make the most from these negotiations, government should assist to build their capacity to undertake negotiations on a fair and equitable basis, with an equal seat at the table.

While the new government is finding its feet with Indigenous rights relating to land and water, around the country states and territory governments are progressing. Some examples include Victoria and the Australian Capital Territory.

13 In this context, the Minister is referring to agreements made between communities and mining companies under the Right to Negotiate provisions of the Native Title Act. The Act provides for negotiations and agreements to be made between native title holders or registered native title claimants; and the miner, explorer or prospector who will benefit from the 'future act', that is, the granting of a mining or exploration tenement. As the agreements, and any ancillary agreements, that are made under the Native Title Act are not public, there is no publicly available figure of how much money is flowing to Indigenous communities through these agreements, nor how those funds are being spent.

14 Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap,* (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008).

Text Box 1: Victoria's new approach to land justice

Even before the new Federal Government made the National Apology, the human rights landscape for Aboriginal people in Victoria was improving.

On 1 January 2008, Victoria's *Charter of Human Rights and Responsibilities Act 2006* came into effect. Its preamble recognises Aboriginal Victorians' special importance 'as descendents of Australia's first people, with their diverse spiritual, social, cultural and economic relationship with their traditional lands and waters.' It commits to recognising specific human rights of Victorian Aboriginal people to maintain their relationship with the land and waters.[15]

Alongside the new human rights charter, the Victorian government started working on finding a new way of approaching native title which will be more flexible, non-technical and cover a broad range of issues, not just native title.

In March 2008, the Victorian government established a Steering Committee to oversee the development of a Victorian Native Title Settlement Framework. The Steering Committee is chaired by Professor Michael Dodson and made up of representatives from the Victorian Traditional Owner Land Justice Group and government department representatives who are working together to develop a way for Traditional Owners groups to negotiate agreements with the state, either as an alternative or along side a native title determination.[16] The goal of the Steering Committee is to create a better way of negotiating native title that delivers faster outcomes and a fair goal for all.[17] The Government recognised that:

> Such a broad approach is particularly pertinent in Victoria, where the onerous bar set by the courts in Yorta Yorta of proof of the continuous existence and vitality of a pre-sovereignty normative society through to the current day is so difficult to reach, given the history of dispossession and dispersal in this state.[18]

The Steering Committee is to report to the Victorian Government by the end of 2008.[19]

15 *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 19(2).

16 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

17 Attorney-General of Victoria, 'Mick Dodson to head Government's alternative framework for negotiating native title', (Media release, 13 March 2008).

18 R Hulls, Attorney-General of Victoria, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 16 September 2008.

19 Attorney-General of Victoria, 'Mick Dodson to head Government's alternative framework for negotiating native title', (Media release, 13 March 2008).

Text Box 2: The Australian Capital Territory – establishing the bases for good relationships and agreements[20]

Despite the fact the ACT has only two native title determinations being actively pursued, and no Native Title Representative Body, there are recent developments in the ACT which should provide the basis for good relationships and agreements between the government and the ACT's Indigenous population. Firstly, the preamble of the *Human Rights Act 2004* (ACT) recognises Indigenous peoples as the first people of Australia:

> Although human rights belong to all individuals, they have special significance for Indigenous people – the first owners of this land, members of its most enduring cultures, and individuals for whom the issue of rights protection has great and continuing importance.

Recently, the ACT government established an elected Indigenous representative body, recognising that '[t]he abolition of the Aboriginal and Torres Strait Islander Commission removed the opportunity for the Indigenous community to consult and negotiate with governments. The ACT government recognised the need for the local Indigenous community to have a voice and established an Indigenous representative body'. The Elected Body provides advice to the ACT government relating to 'connection to land' issues in the ACT.

The ACT further cements these positive developments with a commitment to dealings 'with the native title system being based on the principle of free, prior and informed consent of Indigenous participation in order to be effective and sustainable.'

3.1 Trickle down of the new policy approach

The new government's approach to native title has started to trickle down through the system via policy announcements and minor legislative change, and it has been commented on by the High Court.[21] However, no significant progress has been made to address the many major problems with the native title system.

Throughout the year no amendments were made to the *Native Title Act 1993* (Cth) (the Native Title Act). The regulations for Prescribed Bodies Corporate (PBCs), that are a necessary part of the changes made to the system in 2007, are still being drafted.[22]

20 J Stanhope, ACT Minister for Indigenous Affairs, Correspondence to T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, Australian Human Rights Commission, 9 September 2008.

21 See the discussion in Chapter 3 of *Griffiths v Minister for Lands, Planning and Environment* [2008] HCA 20 (Kirby J).

22 For more information on the 2007 changes, see chapter 2 of this Report and T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008). At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport07/index.html.

One notable policy change was announced. In July 2008, the Attorney-General stated that the Commonwealth will now recognise that non-exclusive native title rights can exist in territorial waters up to 12 nautical miles from the Australian shoreline.[23] This is a welcome change that means the Commonwealth Government's approach is consistent with the states' approach and may help negotiating settlements in a number of claims.

Throughout the year, the Federal Court continued to determine native title. Over the reporting period, ten native title determinations were made, all of which determined that native title exists over some or all of the determination area. Of these, one determination was litigated and nine were consent determinations.[24] Four court decisions relating to native title and land rights are discussed in detail in chapter 3 of this Report.[25]

(a) The Evidence Act Amendment Bill 2008

In May 2008, the Evidence Act Amendment Bill was introduced in the House of Representatives. If it is passed,[26] evidence of the existence or content of traditional law and custom in courts will be able to be presented without breaching the hearsay rule or the opinion evidence rule.[27] The amendments apply to any Commonwealth law where traditional law and custom can be considered.

I welcome this amendment, which addresses some of the limitations of the western legal system in taking into account the oral nature of Aboriginal and Torres Strait Islander traditional law and custom.

However, the amendments will not resolve the problems of significant language and cultural barriers to Aboriginal and Torres Strait Islander witnesses who are giving oral evidence in court. This is a problem that is perpetuated by the nature of native title law and what the witnesses are being asked to prove:

> [native title and land claim cases require] Aboriginal witnesses to demonstrate their traditional connections to Aboriginal land. Some witnesses appear reticent or even inarticulate, despite their actual, considerable knowledge of Aboriginal traditions. However, there are also highly acculturated Aboriginal witnesses; ironically, such witnesses may be criticized by opposing counsel essentially for their Anglo-Australian cultural literacy, so that such witnesses will be depicted as not, or less, "traditional" than their less acculturated counterparts and, therefore, have their status as Aboriginal traditional owners of land discounted—or at least questioned. For these vulnerable

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23 12 nautical miles is the distance of the Australian territory under international maritime law. States and Territories have jurisdiction out to the 3 nautical mile mark and over vessels on intrastate voyages. The federal government has jurisdiction from the 3 nautical mile mark outwards. The previous federal government only recognised native title to Australia's territorial waters at the time of sovereignty, which was approximately 3 nautical miles from the shoreline. Attorney-General, 'A More flexible Approach to Native Title', (Media release, 17 July 2008). At: http://www.attorneygeneral.gov.au/www/ministers/RobertMc.nsf/Page/MediaReleases_2008_ThirdQuarter_17July2008-AMoreFlexibleApproachtoNativeTitle (viewed 21 July 2008).

24 See Appendix 1 for more information on the determinations that were made during the year, including how long each determination took.

25 See Appendix 2 for the key statistics on the native title system throughout the year.

26 The Evidence Act Amendment Bill was referred to the Senate Legal and Constitutional Affairs Committee on 18 June 2008. The Committee reported on the Bill on 25 September 2008, giving its support.

27 Section 59 of the *Evidence Act 1995* (Cth) provides a rule that excludes what is known as 'hearsay' evidence from being submitted in a court as evidence. The rule states that 'evidence of a previous representation made by a person is not admissible to prove the existence of a fact that the person intended to assert by the representation'. The purpose of the rule is to exclude statements made out of court because the reliability of those representations cannot be tested. Section 76 of the Evidence Act 1995 (Cth) provides a rule that generally excludes evidence of an opinion from being submitted in a court as evidence (known as the 'opinion evidence rule'). The rule states that 'evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed'.

> witnesses, there is a Catch-22 cleavage: if you are articulate, you appear less traditional; if you are inarticulate, you may appear traditional, but it is difficult for the tribunal to assess your claim to traditional ownership of land.[28]

Neither will the amendments comprehensively address the evidence issues that Aboriginal and Torres Strait Islanders face in native title proceedings. Many significant issues which I have identified in previous native title reports will remain.[29]

For example the amendments only apply to evidence of traditional law and custom, not to every element of native title, to which the strict rules of evidence will continue to apply. For example, 'one of the problems about native title is that it requires proof of who you are, a genealogy which is just simply impossible for people who did not have written records'.[30]

In preparing this Report, I spoke to Justice Wilcox about his observations as a Federal Court judge who sat on native title cases. He stressed that oral traditions in themselves will only 'get you back so far', whereas native title claimants still have to prove traditional law and customs were observed by every generation back to the date of sovereignty which is nearly 200 years. The cruel result is that:

> [the white legal system] force [Aboriginals and Torres Strait Islanders] to prove things knowing that they just don't have the records. And of course the whitefellas didn't help, they didn't keep records of the Aboriginal people either. They didn't do it until long after they were doing it for white people.[31]

These compounding factors contribute to the near impossible evidence burden for proving native title, which were seen again in cases before the Federal Court this year (see chapter 3). I strongly recommend the Attorney-General consider further reform.

(b) Native title funding

The spending allocated for native title in the May 2008 Federal Budget was disappointing.

In February 2008, the Attorney-General stated that the government would ensure that Traditional Owners and their representatives were adequately resourced so that they are in a position to pursue beneficial outcomes.[32] This sentiment was supported by the Minister for Indigenous Affairs.[33] The National Native Title Tribunal,[34] other

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28 M Walsh, "Which Way?' Difficult options for vulnerable witnesses in Australian Aboriginal Land Claim and Native Title cases' (2008) 36(3) *Journal of English Linguistics* 239.

29 See T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007*, Australian Human Rights Commission (2008), pp 172-178; T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Australian Human Rights Commission (2005); W Jonas, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2002,* Australian Human Rights Commission (2003).

30 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008,* 23 July 2008.

31 M Wilcox, former Justice of the Federal Court of Australia, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008,* 23 July 2008.

32 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_ 29 February2008-NegotiatingNativeTitleForum (viewed March 2008).

33 Minister for Families, Housing, Community Services and Indigenous Affairs, *Beyond Mabo: Native title and closing the gap*, (2008 Mabo Lecture, Townsville, 21 May 2008). At: http://www.facs.gov.au/internet/jennymacklin.nsf/print/beyond_mabo_21may08.htm (viewed May 2008).

34 National Native Title Tribunal, *National Report: Native Title,* June 2008 (2008), p 3. At: http://www.nntt.gov.au/Applications-And-Determinations/Procedures-and-Guidelines/Documents/National%20Report%20Card%20-%20June%202008.pdf (viewed July 2008).

governments,[35] the National Native Title Council,[36] the Minerals Council of Australia[37] and myself, among others, have continued to call for additional funding so that the system can operate effectively.[38] Despite widespread recognition of the severe resource constraints under which Native Title Representative Bodies (NTRBs) operate, the 2008-09 Federal Budget, the first Budget of the new government, decreased the funding available to them.[39]

In total less that $59million was allocated to resource all 15 NTRBs across the country. This includes the funding allocated for Prescribed Bodies Corporate (PBCs) whose job it is to protect, promote and preserve native title rights and interests.[40] This amount is abysmal when compared to the over $7billion the government receives in taxes from the resource industry who use the lands, and is token when compared to the $21.7 billion budget surplus.

During the reporting period, the Attorney-General's department chaired the Native Title Coordination Committee which has made recommendations to government on funding the native title system. Those recommendations and the outcomes in the 2009-2010 Budget are not public but I look forward to seeing the government respond by addressing this serious failure in its next Budget.

4. The next 12 months?

While the new relationship between the Government and Indigenous Australians started with the landmark National Apology in February, the goodwill has not yet transpired into significant decisions or actions to improve the native title system.

In order for the Government to see 'more, and better, outcomes delivered through native title processes'[41] a lot more work will need to be done. The Attorney-General has recognised that 'tinkering at the edges is not enough',[42] but in this reporting period, the first year of the new government's term, that is all we have seen.

In my next native title report, I hope to report that the governments' new approach to native title has resulted in tangible, reportable changes that have had a real impact on native title agreements, and that these agreements are clearly beneficial to Aboriginals and Torres Strait Islanders, contributing to reconciliation between all people in this country, and self-determination and sustainable development for Indigenous communities.

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35 See chapter 2 of this Report for more information.

36 National Native Title Council, 'Four-point plan for making native title system work better' (media statement, 16 July 2008). At: http://www.glc.com.au/me_xx/20080716.htm (viewed July 2008).

37 Minerals Council of Australia, 2008-09 Pre-Budget Submission (2008), p vi. At: http://www.minerals.org.au/__data/assets/pdf_file/0015/26025/FINAL_08_Pre-Budget_Sub_rev.pdf (viewed October 2008).

38 See chapter 3 and recommendation 3.1 in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007,* Australian Human Rights Commission (2008) and T Calma, 'A system starved of funds', The Australian, 23 May 2008. At: http://www.theaustralian.news.com.au/story/0,25197,23743271-7583,00.html (viewed May 2008).

39 R Markwell, adviser, Office of Jenny Macklin, Minister for Families, Housing, Community Services and Indigenous Affairs, Correspondence to the National Native Title Council, 19 August 2008.

40 T Wooley, public officer, De Rose Hill – Ilpalka Aboriginal Corporation and Yankunytjatjara Native Title Aboriginal Corporation, *Telephone interview with the Native Title Unit of the Australian Human Rights Commission for the Native Title Report 2008,* 8 September 2008.

41 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).

42 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).