



Australian  
Human Rights  
Commission

# Indigenous Property Rights Project – Garma Roundtable Background Paper

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# 1 Background

The Indigenous Property Rights Project (the Project) is developing a reform agenda to remove obstacles to economic development on the Indigenous Estate. It provides a forum for Indigenous peoples to develop and lead policy and propose legislative reforms in the areas of native title, land and water rights, the environment and cultural rights.

This paper is intended to provide information for the Garma Roundtable, and outline some of the issues and reform options that have been considered by the Indigenous Strategy Group and the Indigenous Property Rights Network so far.

As the Project progresses it will continue to develop the reform agenda, and be included in the Aboriginal and Torres Strait Islander Social Justice and Native Title Report which is tabled in the Australian Parliament.

## 1.1 How the process started

In May 2015, the Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda and the then Human Rights Commissioner Tim Wilson convened the Broome roundtable on Indigenous property rights on Yawuru country in Broome, Western Australia.

Participants at the Broome roundtable called for dialogue about five sets of issues to better enable economic development within the Indigenous Estate:

- 1 **Fungibility and native title** – enabling communities to build on their underlying communal title to create opportunities for economic development.
- 2 **Business development support and succession planning** – ensuring that Aboriginal and Torres Strait Islander peoples have the governance and risk management skills and capacity to successfully engage in business and manage their estates.
- 3 **Financing economic development within the Indigenous estate** – developing financial products, such as bonds, to underwrite economic development through engaging the financial services sector and organisations including the Indigenous Land Corporation (ILC) and Indigenous Business Australia (IBA).
- 4 **Compensation** – rectifying the existing unfair processes for compensation for extinguishment of native title and considering how addressing unfinished business could leverage economic development opportunities.
- 5 **Promoting Indigenous peoples right to development** – promoting opportunities for development on Indigenous land including identifying options to provide greater access to resources on the Indigenous estate.

Participants at the Broome meeting tasked the Commission with facilitating a process for Aboriginal and Torres Strait Islander peoples to consider ways to reform law and policy, in order to increase opportunities to undertake economic development on their country.

## 1.2 Governance

The first meeting after Broome was held in Sydney in December 2015 with the support of KPMG. Participants at the Sydney meeting settled the project governance and design as follows:

*Indigenous Strategy Group* - an Indigenous Strategy Group directs priorities. This includes oversight of the process, setting the scope of the work, assisting with identifying technical expertise, developing a package of reforms and communicating with government, the media and the broader community.

*Indigenous Property Rights Network* - Indigenous and non-Indigenous technical and design experts in land, native title, resources, environmental protection and cultural heritage form a broader network group to provide leadership, guidance and expertise to an agreed program of work. Participation in the network is opt in, and includes community organisations, government, industry, statutory authorities, research institutions and others.

*Secretariat* - the Commission provides secretariat support to the Indigenous Strategy Group and the Indigenous Property Rights Network.

## 1.3 Guiding principles and the human rights framework

A set of Guiding Principles were approved by the Indigenous Property Rights Network at the Sydney Meeting and are set out in the Appendix on page 22. The following Principles were approved:

1. Application of international human rights and principles
2. Indigenous led
3. Inclusive process
4. Experience, advice, research and evidence based
5. Self-determination
6. Secure and protect the Indigenous Estate
7. Right to make decisions
8. Respect for and protection of culture

The international human rights and principles include those set out in the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) and the *United Nations Declaration on the Right to Development*.

## 1.4 Roundtables

The Commission has facilitated a series of meetings with the Indigenous Strategy Group to set the direction. It has also held roundtables in Canberra, North Stradbroke Island and Darwin addressing the commercial and social potential of rights and interests in lands, seas, waters and resources (the Indigenous Estate), Indigenous banking and finance, tenure, business and benefit sharing. Attendance at roundtables has been open to all Indigenous Property Rights Network members and communiques have been issued after each meeting to update the Network.

Further roundtables may take place in 2017.

## 1.5 Concurrent processes

A number of concurrent processes have informed the work of the Indigenous Property Rights Project and have implications for the rights of Aboriginal and Torres Strait Islander peoples in relation to their land, seas, waters and resources.

These include:

- the *Our North, Our Future: White Paper on Developing Northern Australia* (White Paper) released in June 2015, followed by the *Northern Australia Infrastructure Facility consultation paper* in November 2015
- the Council of Australian Government's (COAG) Investigation into Indigenous land administration and use (COAG Investigation Report) released in December 2015
- the 2015 Australian Law Reform Commission (ALRC) Native Title Inquiry resulting in the report *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC Report) released in June 2015
- current and recent native title cases including the Timber Creek compensation litigation and *Rrumburriya Borroloola v Northern Territory of Australia* [2016] FCA 776.

## Reform options

## 2 Mapping, recording and registering the Indigenous Estate

Properly mapping and recording the Indigenous Estate is essential both for Indigenous property rights holders and proponents of development on country for two key reasons.

### 2.1 Mapping the Indigenous Estate

One of the first issues raised by Indigenous members of the Network was the need to understand the extent and nature of the Indigenous Estate in order to exercise free, prior and informed consent in relation to development, and to generate economic opportunities.

Aboriginal and Torres Strait Islander peoples need a clear picture of their rights and interests in land and waters in order to facilitate effective planning and decision making. The rights and interests recognised by Australian law arise from over 18 different Commonwealth, state and territory statutes as well as case law. Maintenance of a current and accurate record requires targeted attention so the extent of these interests can be ascertained and made accessible.

The National Native Title Tribunal (NNTT) conducts geospatial mapping and has recently developed a tool which creates an aggregated national view of areas created through specified acts or grants and which supports generation of geospatial

statistics and future planning. This mapping project was initiated by the Department of Prime Minister and Cabinet (PM&C) and incorporates available data in relation to land held pursuant to the *Native Title Act 1993* (Cth) (NTA) as well as state and territory land rights legislation, Aboriginal Lands Trust schemes and other statutes.

A number of Indigenous groups have also requested the NNTT map their areas in order to allow members to make properly informed decisions about their land, including decisions about economic development. A successful example of this occurring is the Quandamooka Atlas (Atlas), developed as a joint effort between the NNTT and Quandamooka Yoolooburrabee Aboriginal Corporation (QYAC). The Atlas provides a visual representation of land, sea and waters subject to rights and interests under a variety of land tenures and regulations, including native title land, freehold land, pastoral leases and local government zonings.

The Atlas is an example of how geospatial mapping technology can be used by Indigenous peoples with interests across many types of tenure. It shows the benefits of mapping specific areas (retaining the ability to exclude sensitive information) as a starting point for discussions about development opportunities in an area, and as the basis for exercising free, prior and informed consent and self-determination over land, sea and waters.

**2.2 Accurate recording and accessible registration**

Domestic and international proponents of development on the Indigenous Estate need to be able to identify existing rights and interests in the early stages of projects by searching registers, either through an automatic link on state and territory land registers to the NNTT database, or other mechanisms. An effective system of registering, updating and integrating this information so that it is accessible through state and territory land registries is essential to ensure that proponents have the benefit of ‘notice’ of Indigenous rights and interests, and the holders of such rights and interests can be engaged.

<b>Reform options</b>	
<b>Mapping</b>	<ul style="list-style-type: none"> <li>• That the Commonwealth build the economic development capability of native title Prescribed Bodies Corporate (PBCs) and other Indigenous landowners by:               <ul style="list-style-type: none"> <li>○ supporting PBCs and other Indigenous landowners to more comprehensively map the extent of their Indigenous Estate;</li> <li>○ supporting the NNTT to create these maps on request of a PBC;</li> <li>○ financially supporting Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) to purchase and operate GIS software which can map PBC and other Indigenous landowner areas at no cost to the landowners;</li> <li>○ supporting NTRBs and NTSPs to train PBC members and staff and other Indigenous landowners in the operation of this software.</li> </ul> </li> </ul>
<b>Recording and registering</b>	<ul style="list-style-type: none"> <li>• That State and territory governments contribute to the economic development capability of PBCs and other Indigenous landowners by:               <ul style="list-style-type: none"> <li>○ working with relevant stakeholders, to ensure the integration of information about the Indigenous Estate on state and territory title information systems (see COAG recommendation 4(a));</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ in the interim, include mandatory links on state and territory registers to the NNTT's website requiring proponents to check for native title interests.</li> </ul>
<b>Recording and registering</b>	<ul style="list-style-type: none"> <li>• That the Commonwealth support the economic development capability of PBCs and other Indigenous landowners by: <ul style="list-style-type: none"> <li>○ supporting the NNTT to identify where on land and waters Indigenous interests arise under legislation and regulations other than the NTA (see AHRC Desktop Scan);</li> <li>○ assisting with making records of state and territory land registries available to NNTT for the purpose of mapping for Indigenous groups. This may include assistance to facilitate administrative arrangements between NNTT and state and territory registries, possibly through licensing agreements and contributions to license fees arising from access or licensing agreements.</li> </ul> </li> </ul>

### 3 Planning

In the post determination environment, statutory land use planning processes have been slow to recognise and integrate Indigenous rights and interests across jurisdictions.

The majority of state and territory planning regimes do not explicitly recognise native title holders and other Indigenous landowners under state and territory land rights and administration regimes as key stakeholders in land-use planning. There are no specific legislative obligations to involve native title holders and Indigenous landowners at the planning stage, though this does occur at times as a matter of policy, particularly in areas with high Indigenous populations. Indigenous Land Use Agreements (ILUAs) are utilised by some native title groups to have a greater involvement in planning decisions, but these are negotiated on an *ad hoc* basis.

Native title holders and registered claimants are generally only legally required to be specifically notified of projects on native title land at the development stage, for example when a project proponent applies for a licence or tenure in relation to a project. By this stage broad development plans for land areas have already been formulated - sometimes significantly in advance – often leaving Aboriginal and Torres Strait Islander peoples at a disadvantage in negotiations and lobbying and under pressure to make decisions within tight time frames.

Project proponents are commonly unaware of the existence or extent of native title and other Indigenous interests on land identified in planning documents for development and therefore can hold expectations of an unrealistically streamlined approach to development consent.

<b>Reform options</b>	
<b>Planning</b>	<ul style="list-style-type: none"> <li>• That State and territory governments contribute to the economic development capability of PBCs and other Indigenous landowners by: <ul style="list-style-type: none"> <li>○ following Queensland's lead by including 'the promotion and protection of Aboriginal and Torres Strait Islander knowledge, culture and tradition' in the objects/purpose provisions of all planning legislation; and</li> </ul> </li> </ul>

	<ul style="list-style-type: none"> <li>○ amending the definition of ‘owner’ in planning legislation to include Indigenous landowners under the Native Title Act and state and territory land rights regimes.</li> <li>• That the Commonwealth, states and territories cease designating land to be of heritage or environmental value without the free prior and informed consent of the relevant Indigenous peoples.</li> </ul>
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## 4 Heritage

At each Indigenous Property Rights roundtable, participants raised serious concerns about the effectiveness of laws for the protection and management of Indigenous heritage sites and knowledge.

The National Native Title Council (NNTC) is clear that the current heritage laws ‘tend to undermine the capacity of Traditional Owners to adequately protect their cultural heritage as they have been developed with the expediency of development assessments and approvals in mind’.<sup>1</sup>

Consistent with views expressed by roundtable participants, the NNTC recommends development of a nationally prescribed set of minimum standards for the protection of cultural heritage based on international best practice which should be introduced through either the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) or the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

Development of the uniform minimum standards should be based on extensive consultation with the Aboriginal and Torres Strait Islander peoples of Australia. The national standards should be based on rights articulated in the UNDRIP and International Covenant on Civil and Political Rights (Art 27).<sup>2</sup> Importantly, the rights of free, prior and informed consent and effective participation should be fundamental to both the development of the legislation as well as its procedures.

Reform options	
<b>Develop and implement national uniform best practice standards in heritage protection legislation</b>	<p>That the Commonwealth comply with international heritage protection conventions and the cultural and heritage responsibilities of Aboriginal and Torres Strait Islander peoples by:</p> <ul style="list-style-type: none"> <li>• introducing Commonwealth legislation implementing national uniform best practice standards for the protection of cultural heritage to operate across jurisdictions</li> <li>• supporting amendment of state and territory laws so they give real effect to the cultural heritage rights of Aboriginal and Torres Strait Islander peoples across jurisdictions.</li> </ul>

## 5 Sustainable land use

The Indigenous Property Rights Project has focused on identifying ways that native title land and other Indigenous interests in land might be used for economic development in accordance with the wishes of the relevant Aboriginal and Torres Strait Islander peoples.

Native title is a unique type of title in Australia, as it has its origins in the laws and customs of Aboriginal and Torres Strait Islander peoples. It is regarded differently to other forms of tenure, the origins of which reside in a grant from the Crown to the owner.

At the Broome roundtable, participants considered the main issues relating to sustainable use of land. In this sense, sustainability is more than an environmental concept. It includes:

- meeting obligations to pay for rates, pest control, fencing and other costs associated with land;
- considering land use that honours its history and meaning;
- considering land use that honours the struggles of family members who might have passed away still waiting for land claims to be resolved;
- considering ways in which land might contribute to meeting the urgent day to day needs of claimants; and
- planning for the future, including future generations.

Participants at the Broome roundtable identified fungibility as one of the key challenges to economic development on native title land. Fungibility refers to the notion that goods or property are interchangeable with other commodities of the same kind and amenable to being bought and sold on a market. Indigenous peoples' interests in land generally come from their connection to particular areas and so the land doesn't have the quality of fungibility.

Native title is inalienable so it cannot be sold or transferred in accordance with state and territory conveyancing legislation. Section 56 of the NTA also protects it from debt recovery processes so it cannot be used as security against a loan. Additionally, land rights legislation limits the extent to which Indigenous land can be used as security for borrowing.

The fact that native title and other Indigenous land is communally held and inalienable does not prevent it being used for economic gain. However, it does mean that decision making must follow particular rules. This approach is not completely dissimilar to the kinds of decision making processes for companies dealing with property where a board resolution would generally be required. It does require a more collective style of decision making which is commonly, but perhaps incorrectly, regarded as a constraint on business.

While Aboriginal and Torres Strait Islander peoples are committed to pursuing economic opportunities, they are also determined to ensure the hard won rights derived from their ancestors are used for the benefit of future generations and not surrendered. The Guiding Principles developed by the Indigenous Property Rights Network also state that reform options must not compromise underlying rights. Sustainability is a priority when considering any use of the Indigenous Estate.

The Indigenous Property Rights Project has therefore focused on exploring options which can increase prospects for economic development without permanent diminution of rights. The following options have been identified in respect of native title land:

Reform options	
<b>Options for creating registrable/commercial interests</b>	<p>Four potential options for creating registrable/commercial interests for native title holders in a manner that does not diminish native title:</p> <ul style="list-style-type: none"> <li>• leasing of exclusive possession NT land under state and territory legislation (L.Strelein model)</li> <li>• amending the NTA to allow for leasing of exclusive possession land without requiring Crown consent under an ILUA</li> <li>• grants of inalienable freehold as part of NT settlements</li> <li>• amending the NTA to provide for exclusive possession native title to be converted to freehold post settlement</li> </ul>

Each state and territory has legislative regimes creating Indigenous land rights, land trusts or other types of land holdings. In most cases the individuals, groups, organisations and corporations with interests in the land will vary across the legislative regimes in each state and territory, as will the nature of the interest. For example, in some cases the legislative regimes provide for commercial development of land and in other cases they are more limited.

The COAG Investigation Report briefly considered practical difficulties of exercising the right to development on these areas. Further consideration of the ways in which multiple purposes (commercial, non-commercial, heritage, residential for example) can be accommodated while maintaining the Indigenous Estate is required. In addition, innovative approaches to economic development which consider hybrid commercial models which can be adapted to the types of business, business partners, types of land holdings and different traditional owner groups needs further consideration.

Reform options	
<b>Further scoping of opportunities for economic development on trust land and other Indigenous land holdings</b>	<p>That the Commonwealth support:</p> <ul style="list-style-type: none"> <li>• further research and consideration of the practical difficulties associated with pursuing commercial options on land acquired through government land purchase schemes, land trusts and other non-native title types of Indigenous land;</li> <li>• innovative approaches to economic development (existing and potential) which consider hybrid commercial models which can be adapted to the types of business, business partners, types of land holdings and different Traditional Owner groups.</li> </ul>

## 6 Sustainable business

Aboriginal and Torres Strait Islander peoples are eager to initiate and participate in commercial ventures that provide ongoing economic benefits, ideally produce local employment, and/or financial returns to the local community and do not compromise hard-earned native title and land rights. This combination of factors contributes to sustainable economic development on country.

The fact that Indigenous people have specific goals for economic development should not be mistaken for a reluctance or lack of commitment to business on land, sea and waters. Too often there is an assumption that Indigenous people are either not interested in business opportunities, or not proficient in commercial enterprise.

There needs to be a shift away from this 'deficit' view of Indigenous people in business and towards an acknowledgement of people's capabilities, without ignoring the crucial benefits that governance training and business education provides to all people engaged in commercial enterprise.

Further, business ideas need to be based on realistic and sustainable propositions. Political debate and media attention have drawn tenuous links between economic problems and the lack of commercially tradeable land tenure as well as collective decision making. However, they have avoided discussions about the impact of slowing mining, drought and the relatively small labour force required for employers like pastoralists. In other words, the economic realities faced by farmers and small town economies and the extent to which the mainstream agricultural sector has always received government subsidies tends to get lost in a push for land reform to encourage economic development for Indigenous people.

Policy solutions have focused on a more interventionist approach by government, rather than supporting Aboriginal and Torres Strait Islander peoples to manage their own affairs in the locations they know well, in accordance with their values and aspirations. The tendency to blame collectivism for limited economic development, and insist on individual based solutions requires review as well. There is no doubt that business needs innovators and a resilient, entrepreneurial spirit to get going and ride the ups and downs, but sustainable business ideas must also be adapted to the many and varied conditions across the country.

For example, there has been much discussion about home ownership, but careful consideration is required to determine whether this is a realistic and desirable aspiration for the majority of people, particularly if it focuses on individual ownership in remote areas with fewer employment opportunities and little to no secondary market. Communal or family models of home ownership and other flexible models should not be discounted by financial institutions and policy makers, as these are likely to be more realistic in many circumstances.

Clearly, further economic modelling is required to build on previous work on effective economic development models by the Centre for Aboriginal Economic Policy Research (CAEPR) and others. The Productivity Commission and specialists in urban development, rural and remote land, water and sea use, industry specialists and others are required to undertake this work in different locations.

Our last roundtable focused on the building of closer relationships between Aboriginal and Torres Strait Islander land holders and their representatives with the banking sector and Indigenous Business Australia (IBA). This sector is already engaged with many Indigenous business people, and brings a wealth of experience and practical thinking to this Project.

## **6.1 Risk**

To a large extent, these are fundamentally conversations about risk rather than land tenure or the collective vs individuals. Both Indigenous peoples and financial

institutions are considering the way they assess risk and developing new frameworks for business propositions.

Financial institutions see value in exploring ways to lend for large and small projects without having to take a charge or mortgage on Indigenous interests such as freehold parcels of land, for a number of reasons. Not least among these reasons is the benefit of avoiding the potential embarrassment and reputational risk in selling the land of a PBC or land council that might have been used to secure loan arrangements. Financial institutions are also realistic about the economies in rural and remote areas where there is little or no 'secondary market' from which to realise any capital from a distressed loan.

Indigenous people are assessing their risk appetite, often for the first time, and considering a new risk framework which balances their cultural responsibilities to past and future generations with the risks inherent in business ventures and the potential economic and social benefits when ventures are successful.

## **6.2 Financial mechanisms to deal with risk**

In an ideal world, Aboriginal and Torres Strait Islander peoples would face the same hurdles to financing economic development as non-Indigenous people. Five key factors were identified by lenders at the North Stradbroke Island roundtable. The threshold question of loan serviceability must be answered in the affirmative to get across the line, but then banks will consider the following (in no particular order):

1. The question of serviceability of any loan – that is, is it viable?
2. Governance and financial acumen of the Indigenous community
3. Valuation in rural and remote Australia (the secondary market)
4. Reputational risk to lenders
5. Tenure of land used as collateral

Clearly we don't live in an ideal world, so the challenge remains to create a level playing field for Indigenous and non-Indigenous economic development.

Government support for business propositions that are innovative (for example bio-tech and clean energy projects) and nation-building (such as northern development) is not new.

Economic development on Indigenous owned land is a perfect candidate for government investment. In many ways it is new, nation-building and innovative.

We tend to agree however, that the financial services sector is best placed to assess borrowers and their business propositions. They will ask the threshold question, and may work with Indigenous businesses to improve the prospects of success where possible, or provide realistic feedback on the limits of the proposition.

In any case, there is no doubt that banks want to be engaged in Indigenous business. What is needed is innovative support to manage risk.

Indigenous people are also considering risk. There are few guarantees in business, and most Traditional Owners would be extremely reluctant to surrender rights to land in exchange for economic development alone. We know that people have surrendered native title for some very specific purposes, but not just to take a gamble

on a business idea. So, conversion and permanent surrender of title is generally thought to be an unacceptable price for economic development.

A variety of mechanisms are possible, for example:

- a development fund which underwrites loans and investment in projects that meet the serviceability threshold would satisfy this emerging risk framework. This would not be dissimilar to the government’s current Northern Australia Infrastructure Facility (NAIF), or the Clean Energy Finance Corporation which invests in new non-coal energy projects
- tax incentives, similar to those provided by government in the 1990’s for venture capitalists investing in bio-medical start-up companies, would assist Indigenous businesses to get across the serviceability threshold question.

Non-cash financial support by government to create innovative urban, rural and regional development by Australia’s Indigenous peoples provides long term economic and social benefits to the nation.

<b>Reform options</b>	
<b>Sustainable Business on Indigenous land, waters and seas</b>	<p>Task the Productivity Commission to:</p> <ul style="list-style-type: none"> <li>• undertake economic modelling across sectors in selected urban, rural and remote areas utilising the 5 key factors set out in 6.1 (among other criteria);</li> <li>• scope a Commonwealth loan underwriting and/or investment fund to support private sector investment in Indigenous economic development;</li> <li>• develop tax incentives to encourage investment.</li> </ul>
<b>Risk issues</b>	<p>That the Commonwealth:</p> <ul style="list-style-type: none"> <li>• support the analysis of risks for both Indigenous land holders and financial institutions with the objective of developing a new risk framework;</li> <li>• support the development of a loan underwriting and investment guarantee facility to support investment by financial institutions in Indigenous economic development projects as a risk mitigation strategy.</li> </ul>
<b>Finance issues</b>	<ul style="list-style-type: none"> <li>• That the finance sector and Indigenous land and business sectors continue developing relationships</li> <li>• That the above sectors jointly develop models of economic development which address the 5 key questions identified at 6.1 across the range of diverse locations (urban, rural and remote).</li> </ul>

## **7 Exercising the Right to Development – an effective and adequately resourced system**

At the Broome roundtable, participants identified as a high priority the promotion of Indigenous peoples’ right to development, including opportunities for development on

Indigenous land generally and specifically options to provide greater access to resources on the Indigenous Estate.

Traditional Owner groups are engaged in a diverse range of industries from pastoralism, mining and tourism to mention just a few.

For many Traditional Owners, cultural enterprises are a way of achieving economic development congruent with community values and the exercise of native title rights and ensuring financial sustainability of cultural practices such as natural resource management, healthcare, art and farming.

The 'Indigenous Rangers - Working on Country' and 'Indigenous Protected Areas' programs supported by the PM&C have been highly successful examples of Indigenous communities using traditional knowledge to provide economically valuable services, resulting in increased job opportunities on-country and positive environmental outcomes.

## **7.1 Commercial use of native title rights**

Enabling native title holders to exercise their native title rights for commercial purposes is a key factor in ensuring economic development. Native title holders currently face challenges in asserting and exercising these rights in a commercial context.

State and territory governments often require native title holders to acknowledge the non-commercial nature of their non-exclusive rights to hunt, fish and gather resources as part of consent determinations or negotiated settlements. The form of orders frequently made in relation to these non-exclusive rights are that they are for "personal, domestic, and non-commercial communal purposes" only.

The decisions in *Akiba v Commonwealth* [2013] HCA 33 (*Akiba*), *Western Australia v Brown* [2014] HCA 8 (*Brown*) and *Rrumburriya Borroloola v Northern Territory of Australia* [2016] FCA 776 (*Borroloola*) may require revision of these limitations. Even after the decisions in *Akiba* and *Brown*, state and territory governments continue to resist omission of this limitation prior to determination (often claiming it is on an evidentiary basis) and due to complex land administration regime requirements after determination.

The outcomes in *Akiba*, *Brown* and *Borroloola* show the courts are moving away from narrow interpretations. An absence of the limitations formerly imposed may lead to recognition of commercial rights by states which would give real meaning to their rhetoric about support for Indigenous economic development.

## **7.2 Options for incorporation**

For some time now, native title holders have raised their frustrations with the mandatory requirement that PBCs incorporate under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) rather than having the flexibility to choose to incorporate under the *Corporations Act 2001* (Cth) (Corporations Act). The CATSI Act has lower thresholds for 'small', 'medium' and 'large' corporations which has the effect of increasing the reporting requirements of

PBCs, and restricting the freedom to decide upon internal governance rules without the approval of the regulator.

PBCs should have the option of choosing the incorporation method that best suits their aims and needs, including incorporation under the Corporations Act and regulation by the Australian Securities & Investments Commission (ASIC).

### **7.3 Improving and resourcing the legal framework**

The legislative and judicial framework that has shaped native title and land rights requires some careful reform. Work has begun on this, including the recommendations of the ALRC Report and the COAG Investigation Report. Many of these are captured in Table 1 of the COAG Investigation Report.<sup>3</sup> We have also suggested some legislative reform options in relation to:

- some of our options for creating registrable/commercial interests in land;
- financial mechanisms to underwrite loans and investment;
- allowing PBCs more flexible incorporation options; and
- heritage and planning legislation.

In addition, support for legislative amendments set out in the NNTC's 2016 Federal Election platform and re-introduction of the *Native Title Amendment Bill 2012 (Cth)* should be considered. Amongst other things, the amendments in the Bill would have a positive impact on future act negotiations, which would in turn empower communities to exercise greater control with respect to economic development on native title land.

### **7.4 Comprehensive settlements**

Comprehensive settlement of native title and compensation claims is often more effective than adversarial processes of litigation. If conducted well, settlement processes can provide an opportunity for recognition and acknowledgement of colonisation and the ongoing connection between Indigenous peoples and their land, sea, waters and resources. It can also deliver additional rights and interests above what may be achieved in litigation, e.g. to areas that would not be successfully claimed, but that are nevertheless culturally significant.

A key factor in a successful comprehensive settlement is flexible timeframes that allow for sufficient community consultation where people are fully informed, have time to consider the issues, discuss them and come to a decision. Time frames may also need to accommodate cultural obligations such as law business and sorry business.

In addition to time frames, it is essential that negotiating teams approach discussions with the intention of coming to arrangements which are truly compensatory and acknowledge this one off opportunity for Indigenous groups to secure a strong foundation for pursuing their own economic development.

## 7.5 Post determination litigation funding

A successful determination is not always the end of the costs of pursuing legal entitlements. PBCs are rarely sufficiently resourced to meet the costs of:

- compensation claims over areas that have been excluded from native title determinations due to extinguishment (whether by consent determinations or other means);
- litigation to enforce the terms of an ILUA; or
- other negotiations or litigation, e.g. in relation to future acts and other matters.

## 7.6 Adequate resourcing

Land Councils, the NNTC, NTRBs, NTSPs and PBCs all provide different and essential parts of the work required to exercise the right to development. They require sufficient and sustained funding to maintain an effective role in this process and support Indigenous economic development.

Reform options	
<b>Activities on land</b>	<p>That the Commonwealth recognise the value of projects and local employment on country, including the capacity to participate in the economy through these projects and employment by:</p> <ul style="list-style-type: none"> <li>• continuing support for Indigenous land and sea programs through the 'Indigenous Rangers - Working on Country' and 'Indigenous Protected Areas' programs beyond the current 2018 contracts;</li> <li>• additional investment underpinning the expansion of these programs to capitalise on the economic and social benefits of Indigenous land and sea management and enable Traditional Owners to take control and determine their own future;</li> <li>• conducting in-depth consultation with current program providers and participants in relation to any proposed changes to the structure of the program, recognising that the community-run nature of the programs have been key to their success, the lack of other employment options in very remote areas, and the important social, cultural and economic benefits of enabling people to work on country.</li> </ul>
<b>Commercial native title rights</b>	<p>That the Commonwealth:</p> <ul style="list-style-type: none"> <li>• support the ALRC proposal to amend the NTA definition of native title rights and interests to specify that native title rights may be exercised for any purpose, commercial or non-commercial;</li> <li>• support measures to discourage States and territories from limiting recognition of the right to take resources in native title settlements.</li> </ul>
<b>Incorporation</b>	<p>That the Commonwealth:</p> <ul style="list-style-type: none"> <li>• support legislative and policy measures to allow PBCs to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters</li> </ul>

<b>Improving and resourcing the legal framework</b>	<p>That the Commonwealth:</p> <ul style="list-style-type: none"> <li>• support legislative amendments set out in Table 1 of the COAG Report (page 11);</li> <li>• support the legislative amendments set out in the NNTC’s 2016 Federal Election platform;</li> <li>• re-introduce the Native Title Amendment Bill 2012 (Cth);</li> <li>• engage in discussions about ways to implement appropriate time frames for negotiation of comprehensive settlements;</li> <li>• make litigation funding available where required by PBCs to assert rights post determination;</li> <li>• fund PBCs, Land Councils, NTRBs, NTSPs and others to support native title and land rights claimants to pursue their economic development aspirations and initiatives.</li> </ul>
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## 8 Compensation

Compensation for impairment or extinguishment of native title rights and interests remains one of the biggest pieces of unfinished business for Indigenous peoples that must be addressed as a matter of justice and reconciliation.

*De Rose v State of South Australia* [2013] FCA 988 (*De Rose*) was the first case in Australia in which a party (the South Australian government) was ordered to pay compensation to native title holders for the extinguishment of native title rights and interests. However, the amount of compensation to be paid was settled between the parties on a confidential basis.

Earlier this year the Federal Court heard evidence in proceedings commenced by the Ngaliwurru and Nungali peoples to determine the amount of compensation payable by the Northern Territory government for the extinguishment of native title rights and interests over what is now the Timber Creek town site. Judgement on this issue is expected to be handed down later this year and is expected to be an important legal precedent about how native title rights are valued in monetary terms.

Some PBCs are actively investigating options for pursuing native title compensation in relation to native title areas that have been extinguished or impaired. However, this is a costly and time consuming process, as addressed in the COAG Investigation Report.<sup>4</sup> Simplifying the process for applying for compensation, as well as funding PBCs and other groups to claim their rights to compensation should be an important priority for the Commonwealth government.

Reform options	
<b>Compensation</b>	<ul style="list-style-type: none"> <li>• That the Commonwealth adequately fund PBCs and other Indigenous groups entitled to compensation to pursue their legitimate claims, as is their legal right.</li> </ul>

# 9 Business development

Fundamental to assessment and management of business opportunities in the early years of this post determination and post land claim phase is sound governance and business planning.

At the Broome roundtable participants identified a number of skill sets that need to be developed in order for people to create and manage successful businesses. These include business, governance, risk management, investment and succession planning skills.

Such focused support could be in the form of litigation funding for NTRBs/NTSPs or PBCs to legally address serious matters of contention or dispute.

A significant proportion of all new business enterprises in Australia terminate within the first few years. Conducting a commercial enterprise requires a set of skills that most people require assistance with and Aboriginal and Torres Strait Islander peoples face a specific set of challenges when planning and conducting business enterprises, necessitating tailored training and investment.

Reform options	
<b>Business development</b>	<p>That the Commonwealth Government fund the following:</p> <ul style="list-style-type: none"> <li>• effective, applied governance training to build capacity of Indigenous directors and managers;</li> <li>• effective, applied financial literacy and financial training to build capacity of Indigenous directors and managers;</li> <li>• effective, applied business development training to build capacity of Indigenous directors and managers.</li> </ul>

# 10 Benefit sharing

Indigenous Australians have struggled for many years to achieve recognition of their rights to land, sea, waters and resources. It is vital that this long process result in real, tangible benefits for Aboriginal and Torres Strait Islander peoples, improving their standard of living and enabling them to live on and look after country.

The issue of sharing the benefit of any successful economic development opportunities within the Indigenous Estate is one of the least considered elements of the property rights discussion. That is, how do communities share in the wealth created from either acquisition of an interest in land, or any economic activity carried out on that land?

It is almost as if not much consideration goes into what will happen in the event of a particular claim or enterprise succeeding. The very purpose of pursuing claims or economic activity should be a successful outcome in which all those connected with the claim or activity tangibly improve their lives.

Again, the issue of good governance is central to ensuring that any benefit accrues to those with a right to benefit. In following the principles guiding the development of the

property rights agenda as outlined earlier in this paper, it is essential that those with the right to participate in decisions around benefit sharing are central to the development of any benefit sharing regime, that benefits are shared equally between those people, and finally all processes around benefit sharing be open and transparent.

**10.1 Indigenous Community Development Corporation (ICDC)**

A variety of models are used by Aboriginal and Torres Strait Islander communities to hold and manage financial benefits received as a result of future act agreements, native title settlements and other land related agreements. The proliferation of models reflects the fact that no one existing model provides a comprehensive range of features that are highly suited to the particular needs of Indigenous communities.

In 2013 the NNTC, in collaboration with the Minerals Council of Australia, proposed a new corporate vehicle designed to meet the task of holding benefits from native title agreements and supporting Indigenous business. Although the ICDC is envisaged as a not-for-profit mechanism which essentially holds, manages and distributes funds, it can provide a secure mechanism for funds received from agreements, which can be used to foster social enterprise and for-profit businesses.

Importantly, the ICDC envisages that decisions about the ways funds are used, invested and distributed are to be made in concurrence with the relevant Indigenous community.

**10.2 Indigenous Investment Principles (IIPs)**

The Indigenous Investment Principles (IIPs) provide excellent guidance to all organisations making decisions about monies they hold. The IIPs set out principles to guide governance, development of the mandate and spending rules for investment and a sound investment strategy. The Commission supports the adoption of the IIPs by Indigenous groups.

<b>Reform options</b>	
<b>Benefit sharing</b>	<ul style="list-style-type: none"> <li>• That the Commonwealth, state and territory governments recognise the importance of land, sea, waters and resources to Indigenous peoples, as well as their long struggle for rights</li> <li>• That the Commonwealth, state and territory governments support governance and business development work</li> <li>• That the Commonwealth support the development of structural vehicles such as the ICDC, future fund and other mechanisms for benefit sharing and management</li> <li>• That Indigenous groups with interests in land, sea, waters and resources support adoption of the Indigenous Investment Principles (IIPs)</li> </ul>

## 11 Advocacy

At the Canberra roundtable it was decided there were three elements to the successful implementation of the property rights agenda. First, in line with calls from other sectors there needs to be a meaningful relationship between those who are working on both property rights and economic development and the highest level of government.

Secondly, a property rights reform agenda such as that outlined earlier in this paper has to be developed.

Finally, there has to be a deliberate and well-organised advocacy campaign for the implementation of that reform agenda. There are many elements to the advocacy process and that includes the final property rights report being featured in this year's Native Title Report to Parliament submitted by the Aboriginal and Torres Strait Islander Social Justice Commissioner. The Commissioner has committed to continuing the advocacy of the reform agenda based on a human rights approach, including the UN Declaration on the Rights of Indigenous Peoples and the Declaration on the Right to Development.

However, it is imperative that any advocacy campaign be led by Aboriginal and Torres Strait Islander peoples in the first instance. There seems to be a natural alignment of this advocacy group emerging from the Indigenous Strategy Group supported by the Indigenous Property Rights Network.

It is therefore recommended that the development of an advocacy strategy be considered as a matter of importance to ensure the work outlined in this paper can produce positive outcomes for Aboriginal and Torres Strait Islander holders of the Indigenous Estate.

## 12 Appendix

### Indigenous Property Rights Network – Guiding Rights and Principles for Process and Outcomes

The following Principles were approved by the Indigenous Property Rights Network (Network).

- 1) Application of international human rights and principles
- 2) Indigenous led
- 3) Inclusive process
- 4) Experience, advice, research and evidence based
- 5) Self-determination
- 6) Secure and protect the Indigenous Estate
- 7) Right to make decisions
- 8) Respect for and protection of culture

#### ***Definition***

The following definition of the Indigenous Estate was approved by the Network.

The Indigenous Estate includes the lands, seas, waters and resources of Aboriginal and Torres Strait Islander Peoples.

#### ***Guiding Principles – foundational rights, process and outcomes***

##### **Foundational Rights**

##### **1) Application of international human rights**

The foundational rights which are applied by the Network in its deliberations and decision making are outlined in:

- *The United Nations Right to Development*
- *The United Nations Declaration on the Rights of Indigenous Peoples*, in particular:
  - a) self-determination<sup>1</sup>
  - b) participation in decision-making, free, prior and informed consent, and good faith<sup>2</sup>

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<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts , 4, 5, Preamble 16, 17. At

<http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 18, 19, 5, 10, 11(2), 27, 28, 29, 32(2), 41, 46. At

<http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

- c) respect for and protection of culture<sup>3</sup>
- d) equality and non-discrimination.<sup>4</sup>

## **Process**

### **2) Indigenous led**

The Indigenous Strategy Group has been established to guide the Network.

Decisions by the Indigenous Strategy Group and the Network are made by consensus.

### **3) Inclusive process**

The Network is open to all Aboriginal and Torres Strait Islander Peoples.

The Network will engage and build relationships with government, stakeholders and each other in ways that are:

- based on good faith, equality and non-discrimination
- collaborative
- cooperative
- inclusive
- participatory.

### **4) Experience, advice, research and evidence**

The work of the Network will be grounded in the experience and advice of Aboriginal and Torres Strait Islander Peoples as well as current research and information to ensure all decisions are made using the best available evidence.

## **Outcomes**

### **5) Self-Determination**

Self-determination is the fundamental right of Aboriginal and Torres Strait Islander Peoples to shape our own lives and be the key decision-makers in our lives.

An essential expression of self-determination is the application of free, prior and informed consent to questions of development on Indigenous lands.

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<sup>3</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts (1), 31, 11(1), 11(2), 12(1), 13(1), 15(1), Preamble 3, 7, 10, 11. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

<sup>4</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Resolution 61/295, UN Doc A/RES/61/295 (2007), arts 8(1)(e), 9, 15(2), 21(1), 22(2), 44, 46(3), Preamble 5, 9, 18, 22. At <http://www.ohchr.org/EN/Issues/IPeoples/Pages/Declaration.aspx> (viewed 3 February 2016).

This includes the right to engage in, oppose and negotiate development on Indigenous lands.

The Network will have regard to the interests of government and industry stakeholders, but the rights of Aboriginal and Torres Strait Islander Peoples to be self-determining in regard to their interests in land will be paramount for the Network.

## **6) Secure and Protect the Indigenous Estate**

Fundamental to the work of the Network is the strengthening of the inherent rights of Aboriginal and Torres Strait Islander Peoples to their land and waters and to exercise self-determination.

The Network recognises native title as a property right.

In the course of its Indigenous Property Rights work, the Network will not diminish, jeopardise or limit in any way the rights and interests of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners.

## **7) Right to make decisions**

The Network respects the right for Aboriginal and Torres Strait Islander Peoples to make their own decisions on matters that affect them. As such, local decision-making about the Indigenous Estate, including questions of development, are a matter for each group with rights and interests in the relevant land or water.

The Network values the right of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to pursue, reject or negotiate development.

The Network supports and advocates for application of the principle of free, prior and informed consent when decisions are made with respect to development on the Indigenous Estate.

## **8) Respect for and protection of culture**

The Network will:

- seek to strengthen state, territory and Commonwealth legislative and policy protections for the heritage of Aboriginal and Torres Strait Islander Peoples
- respect the cultural authority of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners
- recognise and respect the right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to be different
- work in ways that strengthens the inherent right of each group of Aboriginal and Torres Strait Islander landowners, holders of native title and Traditional Owners to exercise self-determination

- engage respectfully with each group of Aboriginal and Torres Strait Islander landowners, holders of native title, Traditional Owners and their representatives
- consider appropriate ways to provide education and transfer knowledge to future generations.

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<sup>1</sup> National Native Title Council, *Election Platform – 2016 Federal Election*, 4.

<sup>2</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>3</sup> Senior Officers Working Group, Commonwealth of Australia, *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments* (December 2015) 11.

<sup>4</sup> Senior Officers Working Group, Commonwealth of Australia, *Investigation into Indigenous Land Administration and Use: Report to the Council of Australian Governments* (December 2015) 14 -15, 17, 28-29.