Report overview:
The challenges ahead

This is my sixth and final *Native Title Report* as the Aboriginal and Torres Strait Islander Social Justice Commissioner. This Report covers the period 1 July 2008 – 30 June 2009.

In this Report, I:

- review developments in native title law and policy over the reporting period
- consider principles and standards that should underpin cultural change in the native title system
- highlight several aspects of the native title system in need of reform and provide options for further discussion
- provide an update on developments in Indigenous land tenure reform.

Looking back

It is with great pride, gratitude and a touch of sadness that I present my last *Native Title Report*. My time as the Aboriginal and Torres Strait Islander Social Justice Commissioner has been rewarding and challenging. I feel privileged to have served my people in this way.

My term has coincided with one of the most tumultuous periods in Indigenous affairs in recent years.

Just before I took up the position of Social Justice Commissioner, the Howard Government announced the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC). This led to a raft of 'new arrangements' and an absence of national representation for Aboriginal and Torres Strait Islander peoples.

The dismantling of ATSIC resulted in a major policy vacuum. ATSIC had played a role domestically and internationally as an advocate of the human rights of native title holders. After the abolition of ATSIC, the ability of Aboriginal and Torres Strait Islander peoples to be fully engaged in the development of native title policy and law was limited.

Much of my early work as Social Justice Commissioner focused on monitoring the impact of the post-ATSIC new arrangements. I have consistently argued for greater government accountability and for governments to listen to the voices of Aboriginal and Torres Strait Islander peoples.

I have also advocated for the active participation of Aboriginal and Torres Strait Islander peoples in decisions that affect us – especially decisions about our lands, resources and waters.

In addition, I have called for reforms to native title law and policy that promote the achievement of the social, economic and cultural development aspirations of Aboriginal and Torres Strait Islander peoples.

My reports have addressed a range of issues, including:

- promoting sustainable economic and social development through native title
- ensuring that economic development on Indigenous land respects and upholds Australia's human rights obligations
- Indigenous peoples and climate change
- Indigenous peoples and water
- the protection of Indigenous knowledge
- changes to Indigenous land tenure, for purposes including home ownership and leasing
- the Northern Territory intervention
- improving agreement-making processes
- reforms to the *Native Title Act 1993* (Cth) and related policies and legislation
- significant decisions in native title and land rights law.

Looking forward

The policy landscape seemed to shift with the election of the Rudd Government. On 13 February 2008, Prime Minister Rudd made a historic and long overdue National Apology to the Stolen Generations on behalf of the Australian Parliament.

I consider the National Apology to be a 'line in the sand that marks the beginning of a new relationship and era of respect'.[1]

To truly realise the promise of the Apology, governments across Australia need to respect the rights of traditional owners and their responsibilities to their country and their people.

Significant improvements must be made to the native title system if we are to close the gap between Indigenous and non-Indigenous Australians and to achieve reconciliation.

As the Victorian Attorney-General humbly stated to a room of traditional owners:

> Just as the dispossession of this land's first peoples is this nation's greatest tragedy; their survival its greatest act of heroism; reconciliation, in all its forms, is our greatest opportunity for redemption. *This* is the story that most defines our nation. This, then, is the story on which we must make good.
>
> Business will only be finished, however, when the legacies of dispossession and assimilation, of racism and disadvantage, are dismantled on every front. The possibility of genuine land justice is one such front, as is the capacity to participate as equal parties to a dispute, and as equal parties to its resolution. …
>
> There's business to be finished that speaks of hope and possibility, of deliverance and grace, of a time that is long overdue. Let's get to it, then – let's get back to basics and prove that Australia has come of age, that it *is* a place that values 'Spirit of country – land, water and life'.[2]

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1 T Calma (Aboriginal and Torres Strait Islander Social Justice Commissioner), *Essentials for Social Justice: The Future* (Speech delivered at the University of South Australia, Adelaide, 12 November 2008). At http://www.humanrights.gov.au/about/media/speeches/social_justice/2008/20081112_future.html (viewed 26 November 2009).

2 R Hulls (Attorney-General of Victoria), *AIATSIS Native Title Conference 2009* (Speech delivered at the 10th Annual Native Title Conference, Melbourne, 4 June 2009). At http://ntru.aiatsis.gov.au/conf2009/papers/TheHon.RobertHulls.pdf (viewed 26 November 2009).

These words echo those of Justices Deane and Gaudron in the High Court's decision in *Mabo v Queensland (No 2)* (*Mabo*)[3]:

> The acts and events by which … dispossession in legal theory was carried into practical effect constitute the darkest aspect of the history of this nation. The nation as a whole must remain diminished unless and until there is an acknowledgment of, and a retreat from, those past injustices.[4]

In the years since the *Mabo* decision, the retreat from injustice has been slow.

There have been some successes – mining companies are sitting at the table with traditional owners; state governments have made some 'concessions'; determinations of native title cover 11.9% of the land mass of Australia and Indigenous Land Use Agreements cover 14.4% of the land mass, as well as other areas of sea.[5]

But there remains a long way to go. The pace of a native title claim is slow – too slow for many of our elders. Changes to the system must be made to hasten Australia's retreat from injustice.

During this year, we have witnessed reforms that could prove to be the first steps in transforming the native title system.

For example, the Victorian Attorney-General announced an impressive settlement framework.[6] This framework has the potential to go a long way towards achieving land justice in Victoria.

Meanwhile, the Australian Government has begun a process of native title reform. The federal Attorney-General is receptive to suggestions for improving the native title system.

The Chief Justice of the High Court, Justices of the Federal Court, the National Native Title Council and Native Title Representative Bodies[7] are among those who have developed proposals for change. I warmly encourage them to continue these essential discussions.

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I am hopeful that this spirit of reform will translate into real and lasting benefits for Aboriginal and Torres Strait Islander peoples.

I have approached the writing of this year's Report with this new sense of hope. However, I am acutely aware that there is much unfinished business to attend to.

I begin this Report by 'setting the scene' and providing an overview of events that have occurred during the reporting period.

In Chapter 1, I summarise the former Australian Government's legacy of native title and land rights policy. I then review developments during the reporting period, including relevant changes to law and policy, significant court decisions and developments in international human rights law.

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3 *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

4 *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 109 (Deane and Gaudron JJ).

5 National Native Title Tribunal, *Annual Report 2008–2009* (2009), p 23. At http://www.nntt.gov.au/Publications-And-Research/Publications/Documents/Annual%20reports/Annual%20Report%202008-2009.pdf (viewed 26 November 2009).

6 See Chapter 1 of this Report for a review of developments in Victoria.

7 For ease of reference, I will use the term 'NTRB' throughout this Report to include both Native Title Representative Bodies and Native Title Service Providers where applicable. NTRBs are bodies recognised by the Minister to perform all the functions listed in the *Native Title Act 1993* (Cth), pt 11, div 3. Native Title Service Providers are bodies that are funded by government to perform some or all of the functions of a representative body: see *Native Title Act 1993* (Cth), s 203FE.

In the next two Chapters, I seek to build upon the new momentum for change.

In Chapter 2, I outline principles and standards that should guide a new approach to native title. I also consider that the native title system ought to be viewed in the context of broader reforms to promote and protect the rights of Aboriginal and Torres Strait Islander peoples.

In Chapter 3, I focus on several key areas for reform that have attracted attention during the reporting period. I propose legislative and policy options for improving the native title system, with the objective of promoting further discussion and debate.

The final Chapter of this Report serves as a reminder that, even though governments have come a long way since *Mabo*, we have a hard road to travel before the rights of Indigenous peoples can be fully respected in this country.

In Chapter 4, I provide an update on developments in Indigenous land tenure reform. I am concerned that these reforms have been focused on enabling governments to obtain secure tenure, rather than on assisting Indigenous people to make use of their land. I also set out principles that should be considered prior to the introduction of land tenure reforms.

A new beginning

As I observed above, my term as Social Justice Commissioner began just after the abolition of ATSIC. It ends with the Australian Government announcing its support for the new National Congress of Australia's First Peoples.[8]

To borrow from the United Nations General Assembly, I am firmly convinced that:

> control by indigenous peoples over developments affecting them and their lands, territories and resources will enable them to maintain and strengthen their institutions, cultures and traditions, and to promote their development in accordance with their aspirations and needs.[9]

In this, my final *Native Title Report*, I urge governments to listen to us. Work with us. Respect our voices, our rights, our lands, our resources and our waters. Only then will this country truly be able to retreat from injustice.

8 J Macklin (Minister for Families, Housing, Community Services and Indigenous Affairs), 'Australian Government response to "Our Future in Our Hands"' (Media Release, 22 November 2009). At http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/new_rep_body_22nov2009.htm (viewed 26 November 2009). See also Australian Human Rights Commission, 'New National Congress of Australia's First Peoples announced' (Media Release, 22 November 2009). At http://www.humanrights.gov.au/about/media/media_releases/2009/116_09.html (viewed 26 November 2009).

9 *United Nations Declaration on the Rights of Indigenous Peoples,* GA Resolution 61/295 (Annex), UN Doc A/61/L.67 (2007), preambular para 10. At http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 23 November 2009).

Recommendations

Recommendations: Chapter 2

2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.

2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries.

2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians.

Recommendations: Chapter 3

3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership.

3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements.

3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society.

3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time.

3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters.

3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance.

3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.

3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements.

3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information.

3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information.

3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings.

3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement.

3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's *Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993* to provide greater transparency in the respondent funding process.

3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by:

- repealing section 26(3) of the Native Title Act
- amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3)
- reviewing time limits under the right to negotiate
- amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination
- shifting the onus of proof onto the proponents of development to show their good faith
- allowing arbitral bodies to impose royalty conditions.

3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.

3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose.

3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances.

3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as:

- the prospect of a negotiated outcome being reached
- the resources of the parties
- the interests of the other parties to the proceeding.

3.20 That the Australian Government:

- consider options for increasing access to agreements (while respecting confidentiality, privacy obligations and the commercial in confidence content of agreements)
- support further research into 'best practice' or 'model' agreements
- support further research into best practice negotiating processes.

3.21 That, where appropriate and traditional owners agree, the Australian Government promote a regional approach to agreement-making.

3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.

3.23 That the Australian Government ensure that NTRBs are sufficiently resourced to access expert advice.

3.24 That the Australian Government provide further support to initiatives to provide training and development opportunities for experts involved in the native title system.

Recommendations: Chapter 4

4.1 That the Australian Government amend the *Northern Territory National Emergency Response Act 2007* (Cth) to end the compulsory five-year leases, and instead commit to obtaining the free, prior and informed consent of traditional owners to voluntary lease arrangements.

4.2 That the statutory rights provisions, set out in Part IIB of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), be removed.

4.3 That the Australian Government meet with the Aboriginal land councils to discuss other ways of introducing broad scale leasing to communities on Aboriginal land in the Northern Territory, which do not require communities to hand over decision-making to a government entity.