Looking in a mirror dimly:
Native title and broader Indigenous policy issues

Graeme Neate
President, National Native Title Tribunal

Address to National Indigenous Council

Canberra
28 February 2006
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Introduction

I acknowledge Ngunawal people on whose traditional country we meet.

I am honoured and pleased to have been invited to address this meeting of the National Indigenous Council (NIC).

It comes at a significant time in the history of native title in Australia almost 14 years after the historic High Court judgment in *Mabo v Queensland (No 2)* and 12 years after the *Native Title Act 1993* commenced to operate. Substantial progress has been made in clarifying the law and developing practice. Significant outcomes have been negotiated in numerous parts of Australia.

But much remains to be done and, with the Australian Government looking closely at various aspects of the native title scheme, now is an excellent time to draw on more than a decade of knowledge and experience to find practical ways to deal with outstanding issues in timely and cost effective ways.

My presentation to you puts native title in a broader context, relevant to your role in providing expert advice to the Australian Government on:

- how to improve outcomes for Indigenous Australians in the development of policy affecting them; and
- how to improve program and service delivery outcomes for Indigenous Australians.

Accordingly, my presentation will provide an overview of current native title outcomes and issues and will suggest ways in which native title processes and outcomes should be factored into the whole-of-government development and implementation of policy and service delivery.

I do not purport to be able to provide confident long-term predictions about where native title will fit within Indigenous policy and service delivery. Indeed it is difficult enough to predict long-term trends in native title law and practice. At best, to quote
out of context a famous passage from the Apostle Paul, ‘now we see in a mirror dimly, but then face to face. Now I know in part; then I shall understand fully …’.\(^5\)

With that qualification in mind, my main messages are simply these:

- significant outcomes have been achieved for many groups of Indigenous Australians under the native title scheme
- much remains to be done, and all parties need to think creatively about the options for resolving native title issues
- the National Native Title Tribunal can assist parties to reach just and enduring outcomes
- even with positive negotiations, not all Indigenous peoples will benefit directly from native title, and native title should not be seen as a panacea for a range of economic and social issues
- native title should be considered in developing whole-of-government approaches to Indigenous policy and service delivery – indeed in much of Australia native title underpins or impacts on a range of Indigenous policies.

**Significant outcomes have been achieved under the native title system**

It is now 12 years since the *Native Title Act 1993* commenced operation. In that time almost 1,700 native title applications have been filed, and thousands of proceedings have been commenced in relation to exploration, mining and various other proposed acts on land where native title might exist.

The main statistics reflecting the formal outcomes as at 18 February 2006 are as follows:

- 81 determinations of native title have been made covering nearly 9% of Australian land and waters - 56 determinations that native title exists and 25 that native does not exist
- 232 Indigenous land use agreements (ILUAs) have been registered, dealing with a range of issues including exploration and mining, the management of national parks, community living areas, marina development and defence facilities. Many have been negotiated in areas where native title has not yet been proved to exist, while others have formed part of a ‘package’ to settle native title claims by agreement
- numerous other types of agreements have been negotiated. Minerals companies, for example, have made more than 350 agreements with Indigenous groups.\(^6\)

More detailed statistics and relevant maps are annexed to this paper in **Attachments A to D**.

Of course, figures maps and graphs only tell part of the story. People are involved at every stage – native title parties, individual land holders, government officers, company representatives, recreational land users, Tribunal members and employees, judges and many others. Each will have a range of experiences of, and responses to, the native title regime.
One object of the Native Title Act is to provide for the recognition and protection of native title. Recognition of a group’s native title can bring profound social and psychological benefits to members of the group. These benefits are evident in a sense of pride and worth as a people who can ‘walk tall’ because they have been recognised by the broader community as the people for that area. For some people, that is the chief value of the native title process.

The stories of negotiations and their outcomes in human terms provide evidence of what native title delivers to particular groups and the broader community.

It is clear that the operation of the native title system over the past decade has influenced thinking and attitudes at a community and sectoral level.

- Indigenous Australians are seeking recognition as the people for their traditional country and a say in what happens on that country, and they will use whatever legal regime is available to obtain that recognition (be it native title laws, cultural heritage laws, land rights laws and so on).
- There is a willingness by industry sectors (especially the mining industry) and governments (especially some local governments) to engage local Aboriginal communities or groups in discussions about what happens on their traditional country, whether or not those communities or groups have statutory procedural rights to negotiate. In other words, such groups now have a seat at the negotiating table. This is evidence of a dramatic change in the attitude of many people to native title and to involving Indigenous Australians in decision-making.
- There is a general desire to expedite the resolution of claimant applications.
- There is a general desire to reduce the costs of reaching outcomes.
- There is a general willingness to consider outcomes that do not necessarily involve a determination of native title.

The relevance of that shift in thinking for the future resolution of native title issues is discussed later in this paper.

**What remains to be done**

Let me give a snapshot of the current situation:

- **Volume:** At 18 February 2006 there were 630 active native title applications, most of them (580) claimant applications. Most claimant applications are in the Northern Territory (206), Queensland (180) and Western Australia (129), but there are others in each state (other than Tasmania) and in the Australian Capital Territory. More claims are likely to be made in the future. Many of them are likely to be lodged in order to secure immediately certain procedural rights under the Native Title Act, as well as recognition in the longer term. When it is acknowledged that to date there have been 81 determinations of native title, one can appreciate something of the likely volume of work if each application is to be dealt with using the practices of the past.
- **Variety:** Although much emphasis is placed on claimant applications, native title activity involves other types of matters including non-claimant applications, compensation applications, proceedings involving the grant of exploration and mining tenements, the negotiation and registration of ILUAs, and the negotiation
of numerous other types of agreements. It is often the case that various types of
native title activity are carried out concurrently in relation to an area or group.

- **Age of matters:** Many claimant applications have been in the system for some
years. Approximately one third of current claimant applications were lodged
between 1994 and 1998, and almost 60 per cent are at least five years old.

- **State of readiness:** Although most claimant applications have been in the system
for many years and are categorised as ‘active’, few are ready for substantive
mediation. There are various reasons for that. In some cases there has been
insufficient research to support the application or there are technical defects in the
form of the application. In other cases, insufficient resources are available to the
applicants or their representatives to engage with a range of respondent parties. In
some cases a native title claim has been made with the prime objective of securing
certain procedural rights, not to pursue a determination that native title exists.

Most of my comments relate to native title claimant applications. They draw on the
experience and observations of the National Native Title Tribunal, which has been
involved in native title issues from the outset and brings to these issues a national
view informed by a range of local perspectives.

In light of experience of negotiations and litigation under the Native Title Act,
including the landmark judgments of the High Court, there is an increased acceptance
of the following four propositions as the context in which native title claims are
resolved:

- First, some groups of Aboriginal people will find it difficult, if not impossible, to
prove their ongoing connection to their traditional country to meet the criteria in s
223(1) of the Native Title Act as interpreted in the *Yorta Yorta* case.\(^10\)

- Second, some groups of Aboriginal people who *can* prove their connection to that
standard will find that, because of past extinguishment, there are few areas of land
or waters in their traditional country where native title could be recognised.

- Third, in areas where non-exclusive native title rights could be recognised, the
extent of those rights and their exercise will be limited as a result of past dealings
with land or current tenures and land use.

- Fourth, in many areas, the resources spent on intensive connection research and
tenure research will be inversely proportional to the native title outcome that
might be achieved (whether by agreement or after trial). In other words, the more
that is spent, the smaller the native title outcome. It should also be acknowledged
that the costs of the process are not only monetary. There are significant
emotional, cultural, social and other costs in the native title process.

**Parties need to think creatively about options for resolving native title issues**

It is apparent that most, if not all, parties (including all governments) want agreed
outcomes rather than be engaged in native title litigation. Governments play an
important part in achieving those outcomes. Governments can do much to meet the
desire to expedite the resolution of native title claims, reduce the overall costs of
reaching outcomes, and facilitate outcomes which may or may not include a
determination of native title.
Let me offer some broad suggestions in relation to reaching determinations of native title and in relation to possible related or non-native title outcomes.

In either case, governments need to be transparent as to:

- the criteria by which they assess claimant applications for possible settlement
- the options that they are (or are not) willing to put on the table for possible settlements, and
- the processes they follow to make decisions about settling claims.

In doing so, governments not only assist other parties to the negotiations but also create a context in which governments can take positive (rather than reactive) steps to deal with the real issues.

**Determinations of native title:** Governments have a critical role in the resolution of native title claims. Without the support of governments, consent determinations of native title cannot be made. Governments can set the tone and influence the pace of mediation. Some parties take a lead from a government’s approach.

I have urged governments to consider, or continue, as appropriate the following four actions.

- First, ensure that their requirements for settling determinations of native title (such as connection guidelines) are no more stringent than the law requires and that those requirements are available to the parties.
- Second, adopt a cooperative or consultative approach to the preparation of connection material, for example by providing relevant information from government records or by indicating to claim groups which matters have been covered by the government’s own research to avoid unnecessary duplication of research effort.
- Third, be willing to express a preliminary view, based on its own researches or the connection material provided by claim groups, about the prospects of a determination of native title.
- Fourth, be willing to commence substantive negotiations toward an appropriate outcome before being ultimately satisfied that the native title claim group can establish connection to a level that might succeed in securing a litigated determination from a court.

If all parties understand the government’s requirements, much might be done in concurrent processes rather than a more protracted series of sequential actions.

Governments seem to be moving in that direction. The communiqué issued after the first meeting of Commonwealth, state and territory ministers responsible for native title on 16 September 2005 acknowledged that ‘transparent procedures can contribute to achieving successful and timely native title outcomes’ and that ‘early information exchange between governments, and other parties, can assist with more efficient resolution of native title issues’.

**Related outcomes, including non-native title outcomes:** Although compliance with the current state of the law is critical to achieving native title outcomes (particularly
determinations of native title), many substantive related outcomes can be negotiated unfettered by the requirements of the Native Title Act. Government policies that provide a framework for dealing with issues can expand the scope of what is being discussed by parties to native title proceedings.

Respondent parties, especially state governments, have the capacity to negotiate about a range of possible outcomes for claimant applications that:

- satisfy the interests of the parties
- bring finality to the native title proceedings
- are in addition to or in place of determinations that native title exists, and
- can be delivered at lower cost than full blown native title proceedings.

Such options might include:

- grants of title or other interests in land
- roles in managing what happens on land (such as joint management of conservation areas or reserves)
- symbolic recognition of traditional affiliations with the land (such as signage indicating that an area is the traditional country of a named group of people, such as the signs around Canberra acknowledging the Ngunawal people)
- employment and other economic opportunities in relation to land
- financial payments or grants to a group (such as assistance for capital works or the administration of a tribal council or to establish an effective decision-making framework).

Results along these lines have already been achieved or are being negotiated.\textsuperscript{12}

They illustrate some of the lateral or innovative thinking that might be used to deal with the issues that prompted the lodgement of some native title claims, and to satisfy the interests of all the parties without necessarily having a determination that native title does or does not exist as a central component of the settlement.

We live in a federal system, with different laws in each state and territory relating to land tenure, exploration and mining. Governments have different policies on native title agreement-making. Those and other factors will influence the form and content of agreements, including those involving matters other than native title.

At the meeting of Commonwealth, state and territory ministers responsible for native title last year, it was acknowledged, among other things, that:

- a range of approaches may be adopted to resolving native title depending on the particular circumstances
- native title-related outcomes can deliver flexible and practical benefits to claimants, which may address the broader aspirations of native title claimants, in addition to resolving native title issues.\textsuperscript{13}

The time may also be right to look beyond claim or group specific options to broader structural and policy initiatives at a state or territory level. One aspect of alternative land schemes might be the extent to which, in areas where the resident community
includes Indigenous people other than native title holders or traditional owners, those other people would have entitlements. There may also be ways of involving traditional owners of land in decision-making without the need to invoke the native title claims process with the attendant costs for the parties and their representatives, the Federal Court, the Tribunal and, ultimately, the Commonwealth.

The result might involve some new legislation, or a revision of current legislation (such as cultural heritage or land rights schemes), to provide harmony between the various regimes and allow each to inform the options available under others.

**The National Native Title Tribunal can help parties to achieve outcomes**

The Tribunal is keen to help parties to negotiate just and enduring outcomes that satisfy their interests. Such outcomes could include:

- determinations that native title exists
- determinations that native title exists together with other agreements (e.g. ILUAs)
- non-native title outcomes that result in the discontinuance of the native title proceedings.

The options can be explored in mediations convened by the Tribunal under the supervision of the Federal Court. The Tribunal’s mediation service can have various facets. In addition to helping parties negotiate towards a determination of native title, the Tribunal can:

- help parties make strategic assessment of individual claims
- assist in the development of regional strategies and priorities in relation to clusters of claims (including overlapping claims)
- help parties by building their capacity to participate in mediation
- assist parties to negotiate agreements in relation to specific applications that may involve matters other than native title (under s 86F of the Native Title Act)
- assist in the drafting of agreements reached between the parties and provide compliance checking of ILUAs before they are lodged for registration.

Other services which the Tribunal can provide to parties include:

- preparing educational materials and delivering presentations about mediation, the Native Title Act, Tribunal and Federal Court processes and other aspects of the native title systems tailored to the particular audience
- producing background research reports and tenure searches
- producing maps showing the current status of land within a claim area and other geospatial analysis
- analysing the current legal framework within which claimant applications are negotiated or judged.

In addition, the Tribunal provides important services in relation to exploration and mining proposals on areas where native title might exist. Our mediation, case management and arbitration services have assisted parties to get on with business. The Tribunal’s management of the expedited procedure process has helped clear
substantial backlogs in the Northern Territory and Queensland in short periods of time.

The effect of recent developments in relation to the expedited procedure and regional agreements for native title and heritage protection approvals is such that the relevant sub-committee of the Ministerial Council on Mineral and Petroleum Resources considers that these matters, respectively, require no action or are second priority issues.\textsuperscript{14}

The Tribunal’s resources are limited, but we want to allocate them to projects that will produce positive outcomes with optimal use of all the participants’ resources. We want to work with parties to produce more such outcomes in shorter timeframes with lower transaction costs.

The Tribunal works cooperatively with the Federal Court, and we look to the Court to support us as we perform our functions. The current review of the claims resolution process provides an opportunity for us to explore ways in which the Tribunal and the Court can work together more effectively to achieve tangible and durable outcomes for the parties.

\textbf{The resolution of native title issues will not, of itself, resolve other economic social issues}

In recent years some people have criticised native title for not delivering, or being able to deliver, economic and other outcomes for Indigenous Australians.

Let me respond briefly to that criticism and put native title in a broader context.

\textbf{By-products of native title:} Although native title itself may not be an economically valuable commodity, significant economic benefits as well as heritage protection and other benefits are being secured by groups as a by-product of native title processes. People are using their procedural rights under the Native Title Act and other legislation to negotiate agreements before, after, and independently of a determination of native title.

In a broader sense Aboriginal people and Torres Strait Islanders are involved in negotiations about matters, in ways and with people that could not have been imagined a decade ago. There has been a change in the mindset of many Australians, particularly in key industries, so that it is increasingly part of day-to-day business to engage in discussions or negotiations with Indigenous people about a range of land use matters. Many of those negotiations proceed irrespective of whether the group has proved or can prove that it has native title. Indeed, many agreements (including ILUAs) are made long before native title is shown to exist and, potentially at least, with groups who could not prove that they have native title.

For those groups who have received native title recognition, the social and psychological benefits to them are profound, irrespective of any economic benefits. Indeed, for such people the benefits of native title recognition are priceless.
Paradoxically, the native title system, which has been understandably criticised because it can only deliver limited formal native title outcomes to some groups of people, has helped create an environment in which even groups who might fail to prove that they have native title can derive tangible benefits. Some people have characterised the hopes generated following the *Mabo (No 2)* decision as a ‘false dawn’. Undoubtedly some of the expectations raised at that time would never be reached. Yet 12 years on from the commencement of the Native Title Act, native title proceedings are being used as a platform on which serious negotiations can take place about a range of matters, and some sectors (such as major resources companies) have moved beyond strict compliance with the law to try to establish sustainable partnerships with local indigenous communities.

**Additional policies and services to supplement native title:** In my view, however, far too great a weight of expectation has been put on native title to deliver what it was not capable of delivering. Native title was never going to provide extensive outcomes for all Indigenous Australians. There are areas of Australia where native title will not be recognised. That much was clear from the High Court’s judgments in *Mabo (No 2)* and is apparent from the Preamble to the Act which states, among other things:

> It is important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests …

It was on that basis, the Preamble continues:

> that a special fund needs to be established to assist them to acquire land.

Subsequently, the Aboriginal and Torres Strait Islander Land Fund and the Indigenous Land Corporation were established to do, in part at least, what native title laws would not and could not achieve.

The third, and to date unrealised, element of the scheme that includes the Native Title Act was the ‘social justice package’. The Preamble alludes to it when it recites:

> The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended … to be a special measure for the advancement and protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

The full text of the Preamble, which sets out ‘considerations taken into account by the Parliament of Australia, in enacting the Native Title Act, is Attachment F to this paper.

**Native title and whole-of-government approaches to Indigenous policy and service delivery**

At a national level, the Australian Government’s vision for the administration of Indigenous affairs following the abolition of ATSIC is a ‘whole of government approach which can inspire innovative national approaches to the delivery of services to indigenous Australians, but which are responsive to the distinctive needs of particular communities’. The whole-of-government approach involves public service
agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues. The principles underlying the new arrangements are collaboration, regional need, flexibility, accountability and leadership.

How is native title relevant to the development of policy in respect of a range of Indigenous issues and the delivery of services to Indigenous communities?

Incorporating native title into policy development, program management and service delivery is consistent with those principles. Native title needs to be taken into account to explore opportunities for native title to provide a basis for economic and other returns to Indigenous communities. Indeed, as the Aboriginal and Torres Strait Islander Social Justice Commissioner has argued, any failure to coordinate the goals of the native title system with the Australian Government’s strategies to address the economic and social development of Indigenous people not only isolates the native title process from these broader policy objectives; it limits the capacity of the broader policy to achieve those objectives.17

There needs to be a collaborative approach to such issues by Australian government departments and agencies such as the Indigenous Land Corporation, Indigenous Business Australia and the National Native Title Tribunal.

The collaborative approach to these issues should not be confined to Australian Government departments and agencies. The national framework of principles agreed to by the Council of Australian Governments (COAG) in June 2004 includes ‘sharing responsibility’. An aspect of that principle is ‘committing to cooperation between jurisdictions on native title, consistent with Commonwealth native title legislation’. There is much room for such a cooperative approach to be adopted when negotiating native title and related outcomes.

At their meeting in June 2005, members of COAG ‘reaffirmed their commitment to work together in an ongoing partnership to improve outcomes for Aboriginal and Torres Strait Islander Australians’. In particular, COAG noted ‘the importance of governments working together with local indigenous communities on the basis of shared responsibility’.

At the first meeting of Commonwealth, state and territory ministers with responsibility for native title last year, the ministers agreed:

- to build on the agreement reached by COAG in June 2004 for all jurisdictions to cooperate on native title, consistent with the Native Title Act 1993; and
- to a renewed commitment to work together to make the native title system more effective to achieve improved outcomes for all parties.18

Native title claims and outcomes (particularly determinations that native title exists and ILUAs) are either directly or indirectly relevant to a range of matters of concern to Indigenous communities including:

- land ownership and use
- protection of cultural heritage
employment and training
• community governance
• service delivery and the provision of infrastructure.

Land ownership and use: Native title is not ‘title’ to land in the common law real property sense. Rather, it has been described as *sui generis* or unique. The Native Title Act, adapting passages from Justice Brennan’s judgment in the *Mabo (No 2)* case, defines ‘native title’ and ‘native title rights and interests’ to mean:  

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

(a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and

(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and

(c) the rights and interests are recognised by the common law of Australia.

Because native title can exist (albeit in a restricted form) over some areas where other legal interests in land exist (e.g. some forms of leases), a determination that native title exists can have a bearing on land use and management beyond areas of vacant Crown land or Aboriginal reserves.

It can, for example, have implications for areas that are Aboriginal land under local land rights legislation. The land rights legislation in New South Wales provides that as a general rule an Aboriginal Land Council may not deal with land vested in it that is subject to native title rights and interests unless the land is subject of an approved determination. Once the Federal Court makes a determination that native title does not exist, the land can be mortgaged, sold, leased or dealt with in other ways. Consequently, many of the determinations that native title does not exist are made unopposed in New South Wales in response to non-claimant applications by Aboriginal land councils.

In some areas, different regimes operate concurrently over the same land. For example, the land in and around various communities in north Queensland is the subject of a freehold deed of grant in trust (DOGIT) under state lands legislation, a determination of native title under the Native Title Act, various dealings in parts of the land under state legislation and an obligation to replace the current DOGIT freehold with a grant of freehold title under the state *Aboriginal Land Act 1991* or *Torres Strait Islander Land Act 1991*. Additionally, Community Shire Councils commonly hold DOGITs while also carrying the responsibility for delivering local government services and infrastructure.

Not surprisingly, it has become necessary to review state land rights legislation to ensure some degree of compatibility with the national native title regime.

The range of land laws operating in a particular region will influence what dealings are permissible in relation to areas of land and what processes must be followed in order to deal with or make use of that land. These are considerations that must inform any proposals for individual private ownership of areas of native title land.
**Protection of cultural heritage:** Although they are treated separately by Commonwealth, state and territory laws, cultural heritage issues are inextricably linked to native title. For example, in order to establish their native title to an area, members of an Indigenous community or group may provide information about sites of significance and other aspects of their cultural heritage to show the continuing existence and operation of traditional laws and customs that provide a connection between the people and their traditional lands.

The link between native title and the protection of Indigenous cultural heritage has been expressly recognised in recently enacted cultural heritage legislation in Queensland, and some similar recognition may be conferred by other Commonwealth, state and territory legislation in the future. In some areas, this may involve a reappraisal and even reallocation of the procedural rights held by some Indigenous groups under current laws.

**Employment and training:** One of the three reform priorities identified by the Ministerial Task Force on Indigenous Affairs is ‘building Indigenous wealth, employment and entrepreneurial culture’.

Native title is relevant to achieving that objective in some Indigenous communities. Along with registered native title claims and determinations that native title exists come procedural rights under the Native Title Act for registered claimants and native title holders. One benefit from those rights can be the capacity to negotiate training, employment and business opportunities in relation to enterprises on particular areas of land. Such opportunities can include employment and business ventures in mineral exploration and mining ventures, engagement in cultural heritage programs, and employment in national parks and other conservation areas.

For some industries, particularly the resources sector, a resident community with strong traditional ties to an area may provide a stable source of employees or business contractors. That in turn depends on such factors as the size of the community, the age range of members of the community and whether the people have sufficient education and relevant skills for the purpose. In other words, there may be real opportunities for economic development in a community of native title holders so long as people have or can acquire the relevant knowledge and skills.

The potential for such economic advancement was highlighted at the Inaugural Aboriginal Enterprises in Mining and Exploration Conference in Alice Springs on 4 November 2005. Among the points made at that conference were:

- Aboriginal communities need to be involved in decision-making about their traditional land
- native title processes have given Aboriginal people more power to negotiate, but there are still power imbalances
- communities need to be pro-active and develop a community-minerals industry strategy
- Aboriginal people can use their cultural knowledge to develop business enterprises such as tourism
- communities need to think and plan long-term with a mix of investments to ensure that the value of their money is retained
• Aboriginal communities who derive income from their lands may consider investing in Indigenous enterprises.

Some speakers highlighted the need for Indigenous businesses to deal with native title holding communities or traditional owners of land appropriately. In other words, Indigenous entrepreneurs have legal and social obligations to the traditional owners while generating wealth. That gave rise to questions such as whether the business plans of Aboriginal companies should deal with issues about working on other people’s country, and whether such companies would want to share the wealth of an Aboriginal business with traditional owners and people with historical links to the land.

Community governance: Community governance is clearly a significant issue in many Indigenous communities. One of the three reform priorities for the Ministerial Taskforce on Indigenous Affairs is ‘safer communities’. That priority ‘includes issues of authority, law and order, but necessarily also focuses on dealing with issues of governance to ensure that communities are functional and effective’.

The recent Annual Report of the Secretaries’ Group on Indigenous Affairs refers to measures being developed to support communities and improve their capacity to engage effectively with governments. They note that:

In some communities, the degree of disorder is so great as to constitute a crisis. Difficult decisions must be reached on the balance between dealing with the immediate risks and building the underlying capacity of the community.

On 1 December 2005 the NIC provided advice to the Ministerial Task Force on Indigenous Affairs, recommending ‘a number of strategies which could be used as a practical guide to looking at governance in Indigenous communities and organisations’ and that the NIC noted its intention to return to this issue.

Good governance is relevant to the conduct and resolution of native title claims. Native title claim groups need to organise themselves internally in order to negotiate an outcome with respondent parties (sometimes including neighbouring groups with disputed overlapping claims) or to argue the case in court. Where there is a determination that they have native title, the Native Title Act requires that a body corporate be established to hold the native title rights and interests in trust for the common law holders or to act as their agent or representative. The legal options need to be considered carefully. Importantly for the group and for those who may wish to negotiate with them, clear governance structures need to be in place so that the procedural and other benefits conferred on native title holders can be enjoyed. Groups who leave internal governance issues to be resolved after they have achieved a determination of native title risk not achieving appropriate governance structures and hence delaying or not gaining benefits for their communities.

Even when such corporations are established, there are real practical issues about how they will be resourced to function. This issue has arisen in the context of claim resolution and future act negotiations. The Australian Government is well aware of the situation, which has been the subject of comment by the Attorney-General.
and will presumably be addressed in the current examination of the structures and processes of prescribed bodies corporate.

Other governance issues arise once native title has been determined to exist over an area of land. The native title holders assume specified procedural rights under the Native Title Act in relation to certain types of future acts that might occur in relation to that land, such as the right to negotiate about the proposed acquisition of land by the government for the benefit of third parties or the grant of mining interests. One governance issue for some communities is how to define the role of people who, although native title holders, live far away from their traditional land. What part should they have in decision-making about the land and how can they exercise their rights in a timely and effective way?

In most (perhaps all) communities, people with historical links to the land (sometimes for long periods of residence) live alongside the native title holders. One challenge facing governments, resources sector and Indigenous communities in the current minerals boom is how to deliver sustainable economic special benefits to Indigenous communities in a region, including native title holders, particularly where native title claims are unresolved and communities include people who are not native title holders.

There can be tension about the governance of land, where the balance of decision-making power has shifted to the native title holders, or may have shifted within the native title holding group. Arrangements may need to be negotiated within the community to reflect the new legal reality while accommodating the interests of others with longstanding links to the community and the area. People from outside the community may need to adjust how they deal with the community.

A recent submission to a parliamentary committee by the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS) stated:

> Regional representative structures must draw their legitimacy from the local communities or interests they represent. Within any region, even in the delivery of services, traditional owners play a primary role in defining the priorities and negotiating outcomes in their traditional country. Native title has increased the say that traditional owners have over government and private sector activities on their country, regardless of a successful native title claim. This legitimacy is not limited to matters of land or natural resource management. Traditional ownership of land, and the assertions of prior and continuing identity and authority implies a role in the governance of the region. In addition, the new arrangements provide opportunities for native title holders and claimants to seek the realisation of their aspirations for land and community development through diverse programs and initiatives.

The governance arrangements for native title may also be relevant to some negotiations for Shared Responsibility Agreements. According to AIATSIS:

> The current disjunction between native title (including ‘alternative settlement options’) and the new whole of government initiatives, including shared responsibility and regional partnership agreements, appears incongruous.
Service delivery and infrastructure: In areas where native title exists or may exist, native title holders have various procedural rights in relation to certain types of public works and the acquisition of native title for the purpose of providing infrastructure. The effect of certain public works on native title will depend on when they were undertaken. The situation may be complicated where concurrently operating state laws are not necessarily consistent with the native title regime, or where the proposed infrastructure facility, which will benefit an entire community, is to be located on the traditional land of a family or clan within that community. Thus the timing and process for delivery of some community services will need to be designed having regard to the scheme of the Native Title Act as well as other laws.

General observations: The advent of native title legislation and the preceding land rights legislation of some jurisdictions has focused attention (and conferred legal rights) on people who might be broadly described as traditional owners. That concept, however defined in legislation, applies primarily in relation to land and cultural heritage. But traditional ownership is relevant more generally.

It will be clear, I hope, that while native title is not directly relevant to every priority policy and social delivery matter of concern to the NIC and the Ministerial Task Force on Indigenous Affairs, it should be recognised as a relevant and sometimes important factor to be taken into account when developing policies and devising some types of service delivery.

The NIC, the Ministerial Task Force on Indigenous Affairs, the Secretaries’ Group on Indigenous Affairs and, presumably, governments at all levels are looking to the longer term, not just confining their attention to immediate issues and short-term solutions. Indeed, the Ministerial Task Force’s Charter refers to determining the Australian Government’s 20-30 year vision for Indigenous Australians.

The recently published Annual Report 2004-05 of the Secretaries’ Group on Indigenous Affairs notes that ‘boosting the social and economic circumstances of Indigenous Australians cannot be achieved overnight. It requires concerted effort over a long period from all governments, Indigenous people themselves and the wider Australian community’. Appropriate structural arrangements need to be made to implement the whole-of-government approach in the longer-term. Accordingly, public servants, among others, ‘will need to commit themselves to a long-term process’.

The Secretaries Group notes that, in discussing future priorities, the NIC and Ministerial Task Force have begun to focus on wider systems reforms including:

- the effective provision of essential services to remote communities and the treatment of homelands;
- support for Indigenous economic development including improved outcomes from Indigenous-owned land.

The Secretaries’ Group also acknowledges that:

the ‘one size fits all’ policy approach is not appropriate and we must take care to acknowledge different needs in our current effort to increase access to mainstream
services. Local, personal and demographic factors will affect the needs of individuals, families and communities, a fact which increases the challenge of meeting the needs of urban, rural and remote communities. Furthermore, the diversity of Indigenous circumstances means that care must be taken to develop local or regional arrangements that are accepted by the majority of Indigenous people.45

The National Native Title Tribunal and others involved in resolving native title issues share that longer term view and the desire to ensure that outcomes are appropriate to local circumstances. That is why the Tribunal urges parties to native title proceedings to look beyond the particular legal issues evident in native title proceedings to see whether just, enduring and agreed outcomes can be achieved by negotiation. That is why we have commissioned research into what makes some agreements more durable than others.46

Conclusion

As I have said:

- significant outcomes have been achieved for many groups of Indigenous Australians under the native title scheme
- much remains to be done, and all parties need to think creatively about the options for resolving native title issues
- the National Native Title Tribunal can assist parties reach just and enduring outcomes
- even with positive negotiations, not all Indigenous peoples will benefit directly from native title and native title should not be seen as a panacea
- native title should be considered in developing whole-of-government approaches to Indigenous policy and service delivery

In my introduction I quoted a statement from one of the Apostle Paul’s letters where he used the image of a person assessing their circumstances and seeing ‘in a mirror dimly’. He observed that at present we know things in part, but in the future we will understand fully. The Ministerial Task Force on Indigenous Affairs, the Secretaries Group and the NIC are testing Indigenous peoples’ aspirations for the future. Where do they want their communities to be in 20-30 years time? What do they want their communities to look like?

As you seek to answer those questions and give substance to the vision for Indigenous Australians, I urge you to take into account the reality of, and the opportunities offered by, native title.

I am happy to work with the NIC, either by providing information or discussing broader issues with you, so that you are well informed in performing your important policy advice role, and so that together we can develop an Australia where native title is recognised, respected and protected through just and agreed outcomes.
Native title statistics

Active native title applications at 18 February 2006

<table>
<thead>
<tr>
<th></th>
<th>ACT</th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>TAS</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
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<tbody>
<tr>
<td>Claimant</td>
<td>1</td>
<td>36</td>
<td>201</td>
<td>176</td>
<td>26</td>
<td>0</td>
<td>16</td>
<td>124</td>
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<td>0</td>
<td>1</td>
<td>5</td>
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<td>0</td>
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<td>Non-Claimant</td>
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<td>0</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>37</td>
</tr>
<tr>
<td>Sub-Total</td>
<td>1</td>
<td>71</td>
<td>206</td>
<td>180</td>
<td>26</td>
<td>0</td>
<td>17</td>
<td>129</td>
<td>630</td>
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Native title determinations at 18 February 2006

<p>| | |</p>
<table>
<thead>
<tr>
<th></th>
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<tbody>
<tr>
<td>Total number of native title determinations in Australia</td>
<td>81</td>
</tr>
<tr>
<td>Determinations that native title exists in the entire determination area or in parts of the area</td>
<td>56</td>
</tr>
<tr>
<td>Determinations that native title does not exist in the determination area</td>
<td>25</td>
</tr>
<tr>
<td>Consent determinations</td>
<td>48</td>
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<tr>
<td>Litigated determinations</td>
<td>17</td>
</tr>
<tr>
<td>Unopposed determinations</td>
<td>16</td>
</tr>
<tr>
<td>Determinations involving claimant applications</td>
<td>63</td>
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<tr>
<td>Determinations involving compensation applications</td>
<td>1</td>
</tr>
<tr>
<td>Determinations involving non-claimant applications</td>
<td>17</td>
</tr>
<tr>
<td>Determinations in the appeal process</td>
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Indigenous land use agreements on register at 18 February 2006

<table>
<thead>
<tr>
<th></th>
<th>NSW</th>
<th>NT</th>
<th>QLD</th>
<th>SA</th>
<th>VIC</th>
<th>WA</th>
<th>Total</th>
</tr>
</thead>
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<tr>
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<td>5</td>
<td>77</td>
<td>123</td>
<td>6</td>
<td>17</td>
<td>4</td>
<td>232</td>
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<tr>
<td>Jurisdiction</td>
<td>Jurisdiction Area (1000's sq km)</td>
<td>Total Area of Determinations (1000's sq km)</td>
<td>% of Jurisdiction Covered by Determinations</td>
<td>Total area where Native Title exists in all or part of the determination area (1000's sq km)</td>
<td>Total area where Native Title found not to exist in the determination area (1000's sq km)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>--------------</td>
<td>---------------------------------</td>
<td>--------------------------------------------</td>
<td>-------------------------------------------</td>
<td>------------------------------------------------------------------------------------------</td>
<td>---------------------------------------------------------------------------------------</td>
<td></td>
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</tr>
<tr>
<td>NSW</td>
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<td>0.1%</td>
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<tr>
<td>NT (Note 3)</td>
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<td>12.8</td>
<td>0.9%</td>
<td>12.7</td>
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<td>QLD (Note 4)</td>
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<td>35.3</td>
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<td>SA</td>
<td>983.5</td>
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<td>0.2%</td>
<td>1.9</td>
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<td>VIC</td>
<td>227.4</td>
<td>10.9</td>
<td>4.8%</td>
<td>0.4</td>
<td>10.5</td>
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<tr>
<td>WA (Note 5)</td>
<td>2529.9</td>
<td>607.1</td>
<td>24.0%</td>
<td>577.8</td>
<td>29.3</td>
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<td>TAS</td>
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<tr>
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<td>0.0%</td>
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<td>0.0</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Jervis Bay</td>
<td>0.0</td>
<td>0.0</td>
<td>0.0%</td>
<td>0.0</td>
<td>0.0</td>
<td></td>
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</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>7691.9</strong></td>
<td><strong>669.1</strong></td>
<td><strong>8.7%</strong></td>
<td><strong>628.1</strong></td>
<td><strong>41.0</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Note 1 Areas sourced from Geoscience Australia
Note 2 Source data as at 31 January 2006. Due to the difficulties in mapping some determination areas these figures should be seen as indicative only
Note 3 Includes Croker Island and Blue Mud Bay #2 determinations (portion seaward of the High Water Mark)
Note 4 Includes Wellesley Islands determination (portion seaward of the high Water Mark)
Note 5 Includes Karajarri (portion seaward of the High Water Mark)
Note 6 Where it has been possible to map outcomes within a determination these areas have been calculated.

Produced by Geospatial Services,
National Native Title Tribunal

P:\GEO_INFO\Statistics\National Area Statements\Determinations as at 31 January 2006\Determinations as at 31 January 2006.xls
15 February 2006
Indigenous Land Use Agreements
31 December 2005
Copyright © Commonwealth of Australia

Legend
- Green: Registered Area Agreements
- Blue: Registered Body Corporate Agreements
- Orange: Area Agreements in notification
- Pink: Body Corporate Agreements in notification

Note:
1. Areas shown represent the geographic extent of the agreements.
2. Surfaced areas symbolised
3. Please refer to attached page for ILUA names.
4. Only include agreements which have either been registered or notified since 30 Sept 2005; have a label on this map. To view a list of all ILUAs, refer to the ILUA table provided or the NNTT's website.

Data Statement
Spatial data sourced from and used with permission of:
- Dept of Land Information, WA
- Dept of Planning and Infrastructure, Qld
- Dept of Planning, Infrastructure, NT
- Dept for Environment and Heritage, SA
- Dept of Sustainability and Environment, Vic
- Geoscience Australia, Australian Government

© The State of Queensland (SNRM) for that portion where their data has been used.

The map PDF file available from the NNTT's web site “www.nttt.gov.au” and provides hyperlinks to additional information on registered agreements.

Summary Statistics

<table>
<thead>
<tr>
<th></th>
<th>Registered</th>
<th>Body Corp</th>
<th>Total</th>
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</thead>
<tbody>
<tr>
<td>In notification</td>
<td>210</td>
<td>19</td>
<td>229</td>
</tr>
<tr>
<td></td>
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NATIVE TITLE ACT 1993

An Act about native title in relation to land or waters, and for related purposes

PREAMBLE

This preamble sets out considerations taken into account by the Parliament of Australia in enacting the law that follows.

The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement.

They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands.

As a consequence, Aboriginal peoples and Torres Strait Islanders have become, as a group, the most disadvantaged in Australian society.

The people of Australia voted overwhelmingly to amend the Constitution so that the Parliament of Australia would be able to make special laws for peoples of the aboriginal race.

The Australian Government has acted to protect the rights of all of its citizens, and in particular its indigenous peoples, by recognising international standards for the protection of universal human rights and fundamental freedoms through:

(a) the ratification of the International Convention on the Elimination of All Forms of Racial Discrimination and other standard-setting instruments such as the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights; and
(b) the acceptance of the Universal Declaration of Human Rights; and
(c) the enactment of legislation such as the Racial Discrimination Act 1975 and the Human Rights and Equal Opportunity Commission Act 1986.

The High Court has:

(a) rejected the doctrine that Australia was terra nullius (land belonging to no-one) at the time of European settlement; and
(b) held that the common law of Australia recognises a form of native title that reflects the entitlement of the indigenous inhabitants of Australia, in accordance with their laws and customs, to their traditional lands; and
(c) held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests, such as the grant of freehold or leasehold estates.
The people of Australia intend:

(a) to rectify the consequences of past injustices by the special measures contained in this Act, announced at the time of introduction of this Act into the Parliament, or agreed on by the Parliament from time to time, for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and

(b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.

Justice requires that, if acts that extinguish native title are to be validated or to be allowed, compensation on just terms, and with a special right to negotiate its form, must be provided to the holders of the native title. However, where appropriate, the native title should not be extinguished but revive after a validated act ceases to have effect.

It is particularly important to ensure that native title holders are now able to enjoy fully their rights and interests. Their rights and interests under the common law of Australia need to be significantly supplemented. In future, acts that affect native title should only be able to be validly done if, typically, they can also be done to freehold land and if, whenever appropriate, every reasonable effort has been made to secure the agreement of the native title holders through a special right to negotiate. It is also important that the broader Australian community be provided with certainty that such acts may be validly done.

A special procedure needs to be available for the just and proper ascertainment of native title rights and interests which will ensure that, if possible, this is done by conciliation and, if not, in a manner that has due regard to their unique character.

Governments should, where appropriate, facilitate negotiation on a regional basis between the parties concerned in relation to:

(a) claims to land, or aspirations in relation to land, by Aboriginal peoples and Torres Strait Islanders; and

(b) proposals for the use of such land for economic purposes.

It is important that appropriate bodies be recognised and funded to represent Aboriginal peoples and Torres Strait Islanders and to assist them to pursue their claims to native title or compensation.

It is also important to recognise that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests and that a special fund needs to be established to assist them to acquire land.

The Parliament of Australia intends that the following law will take effect according to its terms and be a special law for the descendants of the original inhabitants of Australia.

The law, together with initiatives announced at the time of its introduction and others agreed on by the Parliament from time to time, is intended, for the purposes of paragraph 4 of Article 1 of the International Convention on the Elimination of All Forms of Racial Discrimination and the Racial Discrimination Act 1975, to be a special measure for the advancement and
protection of Aboriginal peoples and Torres Strait Islanders, and is intended to further advance the process of reconciliation among all Australians.

2 The six inter-connected aspects of the reforms announced by Attorney-General Ruddock on 7 September 2005 include:
   • measures to improve the effectiveness of native title representative bodies
   • amending the guidelines of the native title respondents financial assistance program to encourage agreement-making rather than litigation
   • preparation of exposure draft legislation for consultation on possible technical amendments to the Native Title Act 1993 to improve existing processes for native title litigation and negotiation
   • an independent review of the claims resolution process to consider how the National Native Title Tribunal and the Federal Court can work more effectively in managing and resolving native title claims
   • an examination of current structures and processes of prescribed bodies corporate including targeted consultation with relevant stakeholders
   • increased dialogue and consultation with the state and territory governments to promote and encourage more transparent practices in the resolution of native title issues. For more information on the Native title system reform see www.ag.gov.au.
4 See the ‘Future tends’ section of the President’s overview sections of the National Native Title Tribunal’s Annual Reports for 2000-2001 (pp 22-33), 2001-2002 (p 22), 2002-2003 (pp 20-26), 2003-2004 (pp 16-25) and 2004-2005 (pp 15-26).
5 1 Corinthians 13:12 (Revised Standard Version)
7 Native Title Act 1993 s 3(a) see also ss 4(1), 10.
8 For examples of these stories see Native Title Stories: Rights, recognition, relationships, Video/DVD produced for the NNTT in 2004.
9 See statistics in Attachment A and the map at Attachment E to this paper.
10 Members of the Yorta Yorta Aboriginal Community v Victoria (2002) 214 CLR 422.
11 Noting that the Federal Court will apply a civil standard of proof – balance of probabilities – if a matter goes to trial.
12 For example:
   • In Queensland various land tenure options and indigenous land use agreements (ILUAs) are considered as part of a package to settle some claimant applications.
   • In New South Wales a national park was created at Byron Bay under an ILUA and non-native title outcomes have been negotiated in the regional centres of Dubbo and Coonabarabran.
   • In Victoria a package of native title and other outcomes was negotiated for the Wimmera claim, and a co-operative management agreement has been reached with the Yorta Yorta people even though they were unsuccessful in their native title application.
   • In South Australia there is a program for negotiating various ILUAs that might resolve many native title issues.
   • In Western Australia there are negotiations about the management of a national park where native title has been held to be extinguished.
13 Native Title Ministers’ Meeting, 16 September 2005, Canberra, Communiqué.
16 See Aboriginal and Torres Strait Islander Act 2005 Part 4A, formerly Aboriginal and Torres Strait Islander Commission Act 1989.
18 Native Title Ministers’ Meeting, 16 September 2005, Canberra, Communiqué.
19 *Native Title Act 1993* s 223(1).
20 See *Aboriginal Land Rights Act 1983* s 40AA.
22 The responsibilities of these Indigenous Community Councils are often much wider than for other councils. Such councils are often required to build and maintain the residential and commercial building infrastructure of the town and conduct businesses that would ordinarily be private enterprises.
23 For example, reviews are currently underway in relation to the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991* of Queensland, and the *Aboriginal Land Rights Act 1983* of New South Wales.
24 See the *Aboriginal Cultural Heritage Act 2003* and the *Torres Strait Islander Cultural Heritage Act 2003* of Queensland.
29 *Native Title Act 1993* ss 55-60, 224 and 253 (‘registered native title body corporate’).
31 See the comments of Justice North in *Nangkiriny v Western Australia* (2004) FCA 1156 at [9]-[11].
32 See the detailed analysis of funding conditions in relation to prescribed bodies corporate by Deputy President Sumner in *Gulliver Productions Pty Ltd/Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu)/Darcy Hunter & Ors on behalf of the Nyangumarta People/Karajarri Traditional Lands Association (Aboriginal Corporation) Western Australia* [2005] NNTTA 88 at paragraphs [62]-[103], available at [www.nntt.gov.au/determination/1133325555_3576.html](http://www.nntt.gov.au/determination/1133325555_3576.html)
34 See *Native Title Act 1993* ss 25-44.
35 AIATSIS, (2005?) Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, ‘Native Title Representative Bodies’, pp 12-13.
36 See, for example, the Yorta Yorta Cooperative Management Agreement with the Victorian government.
37 AIATSIS, (2005?) Submission to the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, ‘Native Title Representative Bodies’, p 13.
38 See e.g. *Native Title Act 1993* ss 24MD, 26.
40 The following statement encapsulates the Taskforce’s long-term vision for Indigenous Australians: Indigenous Australians, wherever they live, have the same opportunities as other Australians to make informed choices about their lives, to realise their full potential in whatever they choose to do and to take responsibility for their own affairs. See [www.atsia.gov.au/taskforce/charter.aspx](http://www.atsia.gov.au/taskforce/charter.aspx).
42 Ibid p 20.
43 Ibid p vi, Foreword by Dr Peter Shergold.