

# Land, Rights, Laws: Issues of Native Title



Native Title Research Unit  
Australian Institute of Aboriginal and Torres Strait Islander Studies  
Contributing to the understanding of crucial issues of concern to native title

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## **Abstract**

*This paper considers how the native title system might operate more effectively to assist traditional owner groups in realising their goals for economic and social development. It relies on human rights principles to build a framework for economic and social development. This framework integrates ethical principles, such as equality and respect for Indigenous culture, with the economic and social factors that determine how well Indigenous people live in their communities. Applying this framework to native title negotiations and agreement-making, the paper proposes principles to redirect the focus of the parties towards the economic and social development goals of the traditional owner group. The paper is based on consultation, research and analysis contained in the Native Title Report 2003.*

A version of this paper was prepared by Dr Bill Jonas for the Native Title Conference in June 2004. Dr Jonas finished his term as the Aboriginal and Torres Strait Islander Social Justice Commissioner on 12 July 2004 and the new Commissioner is Tom Calma.

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## **Promoting Economic and Social Development through Native Title**

### **The Aboriginal and Torres Strait Islander Social Justice Commissioner**

The native title system has seen increased reliance by all parties on the negotiation of agreements to settle native title claims. This provides an invaluable opportunity for governments and traditional owner groups to tailor native title agreements to the real needs of the claimant group rather than the demands of the legal system. The negotiation of native title agreements also provides an opportunity

for governments to understand the social and cultural context for the development objectives of the group and to recognise the basis for their social and cultural values, that is, the group's traditional laws and customs.

However, as was argued in the *Native Title Report 2003*, native title policy at the state and federal level is not sufficiently targeted towards these opportunities. While native title policies across Australia are centred around negotiation rather than litigation, the objectives of the negotiation process have not been clearly defined at a policy level. Governments are not yet clear what they want native title agreements to achieve, either for the claimant group or other parties. The failure of many state governments and the federal government to fully develop a policy direction for the negotiation of native title agreements means that the process takes place largely within a legal framework rather than a policy framework. While many governments are willing to include non-native title outcomes in native title agreements, the scope and content of these agreements are predominantly directed to addressing the legal issues contained within the claim rather than the economic and social development of the traditional owner group.

The *Native Title Report 2003* emphasises the need to shift the focus of native title negotiations and agreements towards the economic and social development goals of the native title claim group. Such a shift requires a reappraisal of both the negotiation process and the agreements that result from these negotiations. The principles proposed in this paper seek to provide a direction for this important reappraisal.

### **Developing a policy focus**

While there has been little policy development around defining the objectives of native title agreements, this gap could be filled if States and Territories were willing to align the objectives of native title negotiations with the economic and social development objectives contained in their broader Indigenous policies.

Improving Indigenous social and economic wellbeing is a key focus of Indigenous policy within Australia. Indeed this goal is the focus of the Federal government's policy of practical reconciliation. State and Territory governments have also responded to the alarming levels of disadvantage in Indigenous communities with policies aimed at economic and social development for Indigenous people.

Emerging from these policies are strategies considered essential for achieving economic and social development within Indigenous communities. These include:

- Partnerships: Indigenous communities and governments must work in partnership and share responsibility for achieving outcomes and building the capacity of people in communities to manage their own affairs;
- Capacity development within Indigenous communities: Indigenous people need to develop the capacity to formulate, implement and achieve their own economic and social development goals;
- Good governance: There must be institutions and processes within Indigenous communities that facilitate decision-making to enable the community to work together to achieve their goals;

- Whole of government: The goals and programs of the various government agencies concerned with Indigenous issues must be coordinated and integrated within the overall system so as to more effectively and efficiently improve the well being of Indigenous people;
- Sustainability: Economic development in Indigenous communities needs to be integrated with the social, political and cultural values of the group.

While these policy approaches are broadly accepted by governments and policy makers as necessary to the success of Indigenous development programs, native title is positioned outside this framework.

The failure to co-ordinate the goals of native title negotiations with the State'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 its objectives. By disregarding native title the broader policy on Indigenous economic and social development fails to understand the importance of filtering development through the cultural values and structures of the community. It fails to see that native title is an important asset in the development process, providing community governance structures, property rights, social and cultural capital and a national network of representative bodies specialised in assisting the group to achieve its goals.

### **Human Rights framework for Economic and Social development**

Human rights principles build a framework for economic and social development to occur within the cultural and political boundaries established by Indigenous peoples' traditional laws and customs. They require that Indigenous people control the direction that their development takes.

#### ***The right to development***

The UN General Assembly adopted the Declaration on the Right to Development (DRD) in 1986. Article 1 of the DRD reflects a notion of development which goes beyond the economic growth of the State making it instead a right of every human person and all peoples.

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realised.

This Article contains the two elements which characterise the right to development. First, development is a process which belongs to people, not to States. Second, development must be carried out in a way which respects and seeks to realise people's human rights. Thus development is cast not only as a human right in itself, it is also defined by reference to its capacity as a process to realise all other human rights.

Accordingly, economic and social development within Indigenous communities must be carried out in a way which is consistent with the following human rights:

- *The right to equality:* A non-discriminatory approach to development requires that Indigenous people enjoy equal protection of their property interests before the law. On this basis the CERD Committee recommends that States recognise and protect ‘the rights of indigenous people to own, develop, control and use their communal lands and territories and resources...’<sup>1</sup>
- *Participation:* The right to development requires free and meaningful participation<sup>2</sup> by all people in the development process. Article 2(3) of the DRD provides:

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their *active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.* [Italics added]

The CERD Committee’s General Recommendation XXIII provides guidelines to a participatory approach to development for Indigenous people, including the provision by State parties of conditions ensuring ‘equal rights in respect of effective participation in public life and that no decision directly relating to their rights and interests are taken without their informed consent’.<sup>3</sup> Through the mechanism of consent, Indigenous people are brought into the decision-making processes which determine the use and development of their land. In this way they can ensure that they benefit from the developments that occur.

- *Economic, social and cultural rights:* The right to development as elaborated by the DRD is specifically directed towards the goal of realising the economic, social, and cultural rights of people.<sup>4</sup>

The International Covenant on Social and Cultural Rights (ICESCR) elaborates upon the economic, social and cultural rights that are the objectives of the development process. A fundamental right under ICESCR is the right to an adequate standard of living<sup>5</sup> which in turn requires, as a minimum, that all people enjoy subsistence rights, such as adequate food, nutrition, clothing, housing and the necessary conditions of care. Linked to an adequate standard of living are economic rights, including the right to own property<sup>6</sup>, the right to work<sup>7</sup> and the right to social security<sup>8</sup>.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR) also provides a basis for the protection of Indigenous peoples’ cultural identity when threatened by hostile development on their land. Article 27 provides:

Members in ethnic, religious or linguistic minorities shall not be denied the right, in community with the members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.

The Human Rights Committee, the body that oversees States’ performance under ICCPR, considers that Indigenous people have a unique and profound relationship to their land which extends beyond economic interests to cultural and spiritual identity. Consequently the impact of developments on Indigenous people’s land is considered also to be an impact on this cultural and spiritual identity.

- *The right to self-determination*: The DRD not only expressly recognises the right of peoples to self-determination and full sovereignty over their resources; it also recognises the relationship between these rights and the right to development. Article 1(2) provides:

The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.

The effect of aligning the right to development with the right to self-determination for Indigenous people is:

- to give Indigenous people control over the direction that their development takes. It allows each community to utilise its own decision-making processes to develop its own agenda for development. There may be as many outcomes possible as there are communities, ways of governing, exercising control and administering decisions.
- to facilitate Indigenous people's participation in the design and implementation of development policies to ensure that the form of development proposed on their land meets their own objectives and is appropriate to their cultural values.
- to recognise Indigenous people's sovereignty over land and resources.<sup>9</sup>

For Indigenous people in Australia a rights-based approach to development, as elaborated by the Declaration on the Right to Development and informed by various human rights treaties, provides a basis for their control over their development process. Such an approach has the potential to expand the native title process beyond giving recognition to the limited Indigenous rights that remain after many years of dispossession. Under a rights-based approach the native title process provides a vehicle for Indigenous development to occur within the cultural and political values established by traditional laws and customs.

### ***Sustainable development***<sup>10</sup>

The basic tenets of sustainable development are the integration of environmental protection with economic and social development; conservation of resources; equity; quality of life and participation. These principles weave environmental considerations, economic outcomes and social justice into a holistic development model.

Increasing attention is being given to the role of sustainable development in programs designed to address economic development within Indigenous communities. Linking economic development outcomes to social, ecological, political and cultural factors supports an approach which integrates the distinct identity of Indigenous people and their unique relationship to land into the development process.

### **Principles**

The policy concepts and human rights principles discussed in this paper provide important guidelines for realising the economic and social development goals of Indigenous peoples. Native title agreements provide a vehicle to apply these principles to traditional owner groups. Native title agreements aimed at economic and social development should:

- Respond to the group's goals for economic and social development;
- Provide for the development of the group's capacity to set, implement and achieve their development goals;
- Utilise to the fullest extent possible the existing assets and capacities of the group;
- Build relationships between stakeholders;
- Integrate activities at various levels to achieve the development goals of the group.

### **Agreements should respond to the group's goals for economic and social development**

Human rights principles require that Indigenous people take control of their own development process. This principle is consistent with the generally accepted practical consideration that unless Indigenous development policies are designed and implemented with the effective participation of the Indigenous people for whom they are intended to benefit they are unlikely to succeed.

Native title agreement-making provides an opportunity for the traditional owner group to bring to the negotiation table its agenda for economic and social development. Through this process governments come to understand and respond to the social and cultural context for the development objectives of the group. Native title agreements can then be tailored to the development needs of the claimant group.

### **Agreements should provide for the group's capacity to set, implement and achieve their development goals**

Relocating control of the development process to the traditional owner group assumes that there is already available within the group the capacity to set, implement and achieve development goals. For instance it assumes that there are stable and accountable decision making structures through which the development goals of the group can be formulated and achieved. Where this is not the case, native title agreements provide an opportunity for the parties to develop a framework to enable the traditional owner group to build the capacities and the institutions necessary to achieve their development goals. Such a framework should acknowledge that capacity development:

- is a long-term process requiring the investment of consistent and adequate resources. (The benefit of a financial commitment in capacity development is a community which is ultimately self-supporting and self-governing.);
- is an ongoing process during which communities can learn from their experiences and build on their changing abilities;
- is a staged process, determined by the growing capacity and skill base of the group.

Implementing capacity development through native title agreements requires a significant change of approach to native title agreement making, not just by government but also by traditional owner groups and their representatives. It requires that agreements not only produce outcomes for the group but that they define processes to enable the group to take control of their development agenda. These

processes are likely to be long term to enable learning and adaptation to occur. They are also likely to be staged to enable the group to monitor and evaluate the success of their strategies at significant stages of the development process and make decisions based on this evaluation. Consequently native title agreements should ensure time frames are appropriate for this purpose; they should not be an isolated event but rather staged in accordance with the critical phases of the development process.

This approach to agreement making is typified by the model of incremental treaty making advocated by the British Columbia Treaty Commission in Canada.<sup>11</sup> Incremental treaty making is a process for building treaties by negotiating over time a series of agreements that are linked to and can be implemented prior to the final treaty. The approach emphasises long term investment in the negotiation of agreements, ongoing learning and adaptation and the creation of partnerships and development of long term relationships. It seeks to deliver frequently on outcomes rather than trying to achieve one set of outcomes through a single agreement. This in turn allows for gradual capacity development within traditional owner groups.

### **Agreements should fully utilise the existing assets and capacities of the group**

The emphasis of development driven by the group is on building the skills of people within the group rather than using external skills to identify and drive the achievement of objectives. It also seeks to tailor development to the group's skills and values. There are two ways in which agreements can utilise the existing assets and capacities of traditional owner groups. These are:

#### *Utilising and building on existing capacities of the group*

Capacity and skills that could be utilised in native title agreements differ from group to group but may include the ability to sustainably use and manage their natural environment, their cohesive cultural and social relationships, a traditional decision-making structure, a unique relationship to the land of their ancestors, and values that are shared by the members of the group.

In some cases governance structures need to be developed to ensure effective decision-making necessary to manage the development process, overcome complex problems, engage with external groups and build a vision for the future.

#### *Utilising and building on the assets of the group*

Native title rights and interests in land can be an important foundation for Indigenous economic and social development. Economic returns can flow from Indigenous people developing the land and the resources contained on the land, from companies seeking access to the land and resources for development purposes, and from the cultural assets of the group and their unique relationship to the land. All of these sources can be utilised to provide a foundation for the group's ongoing development. Native title agreements directed to achieving the development goals of the group should seek to enhance the rights and interests of traditional owners, rather than focus on the extinguishment of native title rights.

### **Agreements should build relationships between stakeholders**

If native title negotiations are to contribute to the development goals of the group, key stakeholders within the native title system must build relationships based on this common objective.

The most important relationship for Indigenous people pursuing their development goals is their relationship with government. A partnership with government is essential to traditional owner groups realising their development goals. However, it is critical that this partnership is one where the group retains control of the development process with the government adopting a facilitative role to assist the group to achieve its development goals. This role should be carried out through processes and institutions which the community respects and which reflect the group's cultural values.

Native title agreements can clarify the nature of the partnership between the traditional owner group and government and define the way in which government carry out their role. In much the same way that *Shared Responsibility Agreements* are utilised in the Council of Australian Governments trials being conducted in several communities around Australia (the COAG trials), native title agreements, including memoranda of understanding and protocol agreements, can formalise the partnership approach to achieving the economic and social development goals of the traditional owner groups.

### **Agreements should integrate activities at various levels to achieve the development goals of the group**

The model of development advocated in this paper proposes a locally driven process that occurs within a system of interrelated levels and understandings, including the local, regional, state, national and international levels. Agencies within State and Commonwealth governments, Office of Indigenous Policy Co-ordination, NTRBs, the National Native Title Tribunal, the Federal Court and industry bodies are the key actors within the native title sector. Native title agreement-making provides a process to co-ordinate the goals of the various institutions operating at different levels within the overall native title system so as to support the native title claimant group achieving their development goals.

### **Where to now?**

Shifting the focus of native title negotiations and agreements towards the economic and social development goals of the native title claim group requires a reappraisal of the native title agreement-making process. The principles proposed in this paper are aimed at providing a direction for this reappraisal based on human rights principles. I welcome your feedback on these principles and any of the ideas discussed in this paper. In particular I invite interested parties to respond to the following questions based on their own experience of native title agreement-making:

- How can native title agreements better respond to the economic and social development goals of the traditional owner group?
- What changes are necessary for this to occur, both in terms of the process of agreement-making and the structure and content of the agreements themselves?



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- <sup>1</sup> Committee on the Elimination of Racial Discrimination (CERD), General Recommendation No. 23: Indigenous Peoples (1997), para 5, in Compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies, UN document HRI/GEN/1/Rev.6, 12 May 2003, p 212.
- <sup>2</sup> *Declaration on the Right to Development (DRD)*, 4 December 1986, UN document A/RES/41/128, preamble para 2.
- <sup>3</sup> *Committee on the Elimination of Racial Discrimination*, General Recommendation No. 23: Indigenous Peoples, para 4(d).
- <sup>4</sup> *Declaration on the Right to Development*, Preamble para 4.
- <sup>5</sup> Article 11(1) *International Covenant on Economic, Social and Cultural Rights (ICESCR)*; see also article 25 *Universal Declaration on Human Rights (UDHR)* and article 27(1) *Convention on the Rights of the Child (CROC)*.
- <sup>6</sup> *Universal Declaration on Human Rights*, article 17(1).
- <sup>7</sup> *Universal Declaration on Human Rights*, article 23(1), ICESCR article 6(1).
- <sup>8</sup> *Universal Declaration on Human Rights*, articles 22 & 25(1); ICESCR article 9; CROC article 26(1).
- <sup>9</sup> Erica-Irene Daes' report *Indigenous Peoples and their Relationship to Land* (11 June 2001, UN doc E/CN.4/Sub.2/2001/21), contains a list of objectives that 'may be useful for assessing the value and appropriateness of proposed principles and other measures or endeavours relating to the rights of indigenous peoples to lands and resources'. These are set out in the *Native Title Report 2003*, p 21.
- <sup>10</sup> The key principles on sustainability have been set out in a number of declarations and reports, including the *Declaration of the United Nations Conference on the Human Environment*, 1972; UN General Assembly *World Charter for Nature*, 1982; World Commission on Environment and Development's report, *Our Common Future*, 1987; *Rio Declaration on Environment and Development*, and *Agenda 21*, 1992; and the *Johannesburg Declaration on Sustainable Development*, 2002.
- <sup>11</sup> The incremental treaty making model is discussed in the *Native Title Report 2003*, p 178.

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