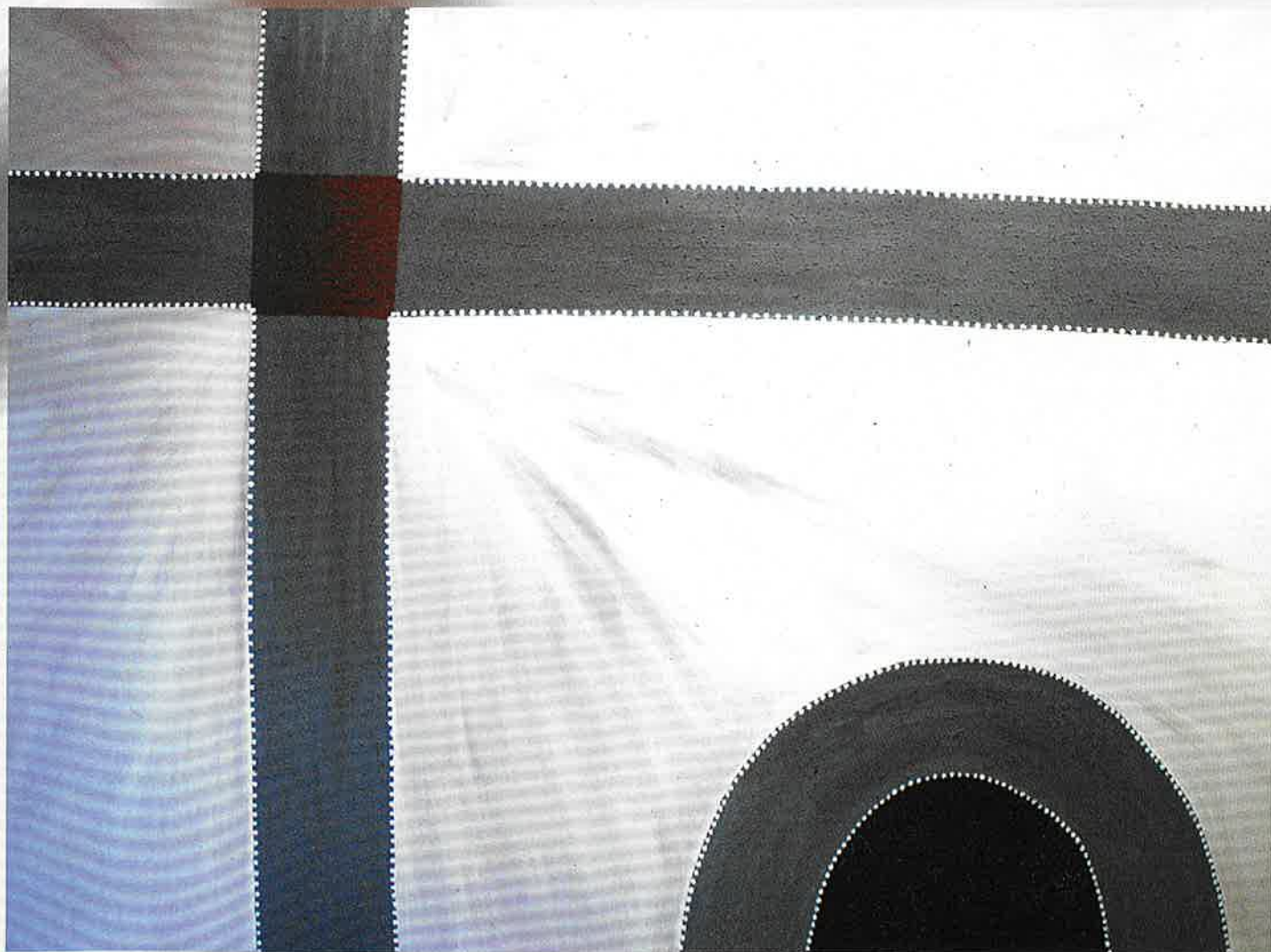


INDIGENOUS LAW BULLETIN

MAY / JUNE 2010, Volume 7 / Issue 18



LAUNCHING THE NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES
REVISITING VICTORIA'S INDIGENOUS FAMILY VIOLENCE PLAN
INTELLECTUAL DISABILITY, YOUTH, ABORIGINALITY AND REOFFENDING IN NSW

Complete archives of the **Indigenous Law Bulletin** from Volume 1, Issue 1 (1981) to Volume 7, Issue 9 (2008) are now available online at www.austlii.edu.au/au/journals/ILB

EDITORIAL

Earlier this year, we saw the announcement of an important and long awaited development in Indigenous-state relations. With the demise of the Aboriginal and Torres Strait Islander Commission ('ATSIC') in 2005, Indigenous Australians have had no national representative body to advance community interests, agitate for reform or implement much-needed services. On 2 May 2010, after a long consultation and development process, the National Congress of Australia's First Peoples ('Congress') was formally incorporated and announced its inaugural Executive Council. It is hoped that this new body will provide an Indigenous voice to better inform the development of laws and policies that affect Aboriginal and Torres Strait Islander people around Australia. In this edition of the *Indigenous Law Bulletin* ('ILB'), the Australian Human Rights Commission and Dr Thalia Anthony reflect on the progress that has been made to date, what is hoped and expected of this new body, and what Congress means to Indigenous self-determination.

In the third installment of their annual reporting series for the ILB, Dr Kylie Cripps and Leanne Miller revisit Victoria's Indigenous Family Violence Plan. While noble in its aims, the authors raise serious concerns about the transparency of the plan which, two years in, has released no public details explaining how responsibilities have been divided between participating bodies, how and when concrete measures will be implemented, or what progress has been made to date.

The devastating number of Indigenous young people who come into contact with the criminal justice system has been widely documented and lamented. Dianna Kenny and Matthew Frize take a new approach to this trend and examine the link between intellectual disability, youth and reoffending, and how these factors relate to Aboriginal offenders in NSW.

Last year, Tom Calma handed down his final *Native Title Report* as Aboriginal and Torres Strait Islander Social Justice Commissioner. In it, he reflected on progress and disappointments over his six year term. Dr Simon Young takes a look at the 2009 report and breaks down the most pressing criticisms of the existing system and highlights the Commissioner's recommendations for reform.

Elaine Johnson closes this edition with an examination of Neville 'Chappie' Williams' battle to protect Wiradjuri land from the expansion of the Cowal Gold Mine. Elaine looks at the way in which the *Environmental Planning and Assessment Act 1979* (NSW) can be used both to circumvent environmental safeguards and to erode Indigenous rights.

Zrinka Lemezina

Editor

CONTENTS

NEW CONGRESS TO REPRESENT ABORIGINAL AND TORRES STRAIT ISLANDERS <i>by the Australian Human Rights Commission</i>	3
A NEW NATIONAL INDIGENOUS REPRESENTATIVE BODY ... AGAIN <i>by Thalia Anthony</i>	5
MUTANT MESSAGES 3: VICTORIA'S INDIGENOUS FAMILY VIOLENCE PLAN <i>by Kylie Cripps & Leanne Miller</i>	10
INTELLECTUAL DISABILITY, ABORIGINAL STATUS AND RISK OF RE-OFFENDING IN YOUNG OFFENDERS ON COMMUNITY ORDERS <i>by Dianna T Kenny & Matthew Frize</i>	14
A CLIMATE FOR CHANGE? THE 2009 NATIVE TITLE REPORT <i>by Simon Young</i>	20
<i>BARRICK AUSTRALIA LTD V WILLIAMS</i> [2009] NSWCA 275 REQUESTS TO MODIFY PART 3A PROJECTS UNDER S75W OF THE <i>ENVIRONMENTAL PLANNING AND ASSESSMENT ACT</i> 1979 (NSW) <i>by Elaine Johnson</i>	26
REGULAR MONTHS IN REVIEW – May / June <i>compiled by Sonia Goldie & Zrinka Lemezina</i>	28
<i>Special thanks to Garth Neutheim</i>	

SEEKING CONTRIBUTORS

Would you like to submit an article to
the *Indigenous Law Bulletin* ?

If you are a student, practitioner, part of a community organisation, or are simply concerned about issues affecting Aboriginal and Torres Strait Islander people, the ILB wants to hear from you! We welcome contributions from Indigenous and non-Indigenous authors, on a wide range of topics. For more information, please visit our website at www.ilc.unsw.edu.au, or contact the Editor at ilb@unsw.edu.au.

A CLIMATE FOR CHANGE?

THE 2009 NATIVE TITLE REPORT

by Simon Young

The *Native Title Report* ('the Report') for the period July 2008 - June 2009¹ marks the end of Tom Calma's term as Aboriginal and Torres Strait Islander Social Justice Commissioner. The Report contains a broad and independent review of this important period in Indigenous law and policy development. In general terms, the Report is a guardedly positive assessment of current initiatives and directions.

The Commissioner reflects broadly on his six years in the office,² emphasising particularly the difficulties encountered in the wake of the dismantling of the Aboriginal and Torres Strait Islander Commission ('ATSIC'), the slow retreat from pre-*Mabo* injustice and the challenges of ongoing native title reform, as well as the significance of the National Apology. Looking at contemporary developments, he makes special mention of the 'impressive' settlement framework developed in Victoria, the Australian Government's growing responsiveness to suggestions for native title improvements,³ support for the new National Congress of Australia's First Peoples, and the concerted efforts of participants in the native title process to formulate reform options.

The Report also contains a range of carefully articulated recommendations.⁴ Some of these are unlikely to be considered within reach at present, but many are valuable contributions to the evolving debates in this field.

THE STATE OF LAW AND POLICY

THE LEGACY OF EARLIER POLICIES

In assessing the current law and policy landscape, the Commissioner first revisits the 'lingering effects' of earlier federal actions. He discusses the 1998 amendments to the *Native Title Act*⁵ - which so seriously 'undermined the protection and recognition' of native title rights⁶ - and notes the lack of any commitment by the current Federal Government to review these amendments.

As regards the much debated 2006 Northern Territory land rights amendments,⁷ the Commissioner reiterates

his earlier position that the community 'normalisation' policy reflected in the lease and individual sublease arrangements could lead to significant loss of Indigenous control, create succession problems and undue subdivision, and cause tension between communal and individual interests. He notes the unlikelihood of free Aboriginal 'consent' to such arrangements and expresses concerns about the funding mechanisms employed to pay for the head leases. The Commissioner laments the current Government's apparent support for and perpetuation of the leasing scheme and the spread of the underpinning policy to other parts of the country. He expresses particular unease over how Indigenous people are being involved in the relevant decision-making process and the possible long term impacts on cultural, economic, political and social rights.⁸

The Commissioner similarly repeats his concerns over the 2007 compulsory acquisitions (and related Emergency Response initiatives), noting the lack of consultation, significant community interruption, the scale of external control, the displacement of traditional rights, and the uncertain relationship between these new regimes and native title laws. He also notes the lack of practical progress to date, and his fear that, upon expiry of these arrangements in 2012, the Government will seek to draw these lands in under the long term lease policy.⁹

THE PERFORMANCE OF THE FEDERAL GOVERNMENT

The Federal Government's performance is directly assessed in the Report by reference to determination and budgetary statistics, as well as law and policy reform initiatives¹⁰ and relevant discussion papers.¹¹ The Commissioner notes his support for the Government's expressed dedication to negotiation over litigation, albeit with concerns over the political variability of such an attitude, state and territory claims that this has in fact long been their focus, and the reality that support for mediated outcomes does not necessarily produce quick or appropriate outcomes. For these reasons, the Commissioner considers that the Government's

'attitude' towards negotiated outcomes must be backed by unambiguous and enforceable measures.¹²

Statistically speaking, while some large claims were finalised during the 12 month reporting period (in South Australia, Western Australia and Queensland), it is noted that processing times are not reducing; only 12 determinations were made while 473 remain outstanding. Additional funding for native title provided in the 2009 budget (an additional \$50.1 million over four years) is welcomed – particularly the accompanying commitment to look at matters of evidence, respondent participation, access to tenure information and expert evidence, settlement breadth and flexibility, and partnerships with states and territories. However, the Commissioner expresses detailed concerns over the adequacy of the funding allocated to native title representative bodies and prescribed bodies corporate ('PBCs').¹³

Actual legislative initiatives, including specific reforms to the native title, evidence and federal justice regimes,¹⁴ are broadly supported by the Commissioner.¹⁵ The federal discussion paper on optimising benefits from native title agreements¹⁶ similarly meets with broad support, however the Commissioner repeats his encouragement for more attention to creating 'an even playing field', that is, the need to provide proper resourcing for Indigenous parties and to strengthen their negotiation rights.¹⁷

The Commissioner also identifies areas where momentum had been lost, specifically mentioning initiatives regarding financial assistance to states and territories for compensation purposes, the Joint Working Group on Indigenous Land Settlements, the Indigenous Economic Development Strategy and, most particularly, the regulation and funding of PBCs. In the latter context, the Commissioner emphasises the expanding responsibilities of such bodies (including via state initiatives) and how their day-to-day difficulties undermine their capacity to carry out vital functions.¹⁸

SIGNIFICANT CASES AND INTERNATIONAL DEVELOPMENTS

The Report examines in detail three important decisions from the period:

- *Wurridjal v Commonwealth*¹⁹ ('*Wurridjal*') on the constitutionality of the Northern Territory compulsory acquisitions
- *FMG Pilbara Pty Ltd v Cox*²⁰ ('*FMG Pilbara*') on the requirement of 'negotiation in good faith' and
- *Western Desert Lands Aboriginal Corporation (Jamukurnu-Yapalikunu) / Western Australia / Holocene Pty Ltd*,²¹

('*Holocene*') - the first decision that a mining lease could not be granted for native title reasons.

On the *Wurridjal* case, the Commissioner praises the High Court's extension of constitutional 'just terms' acquisition guarantees to laws made under the Territories power – noting the importance of this for the large Aboriginal population in the Northern Territory. He also notes the decision's implicit reaffirmation of the strength of property rights under the *Land Rights Act*.²² He is less enthusiastic about the Commonwealth's conduct of the case, the costs order made against the Aboriginal plaintiffs (no want of 'just terms' was found), and the questions left unanswered regarding valuation and the permit system changes.²³

The Commissioner also discusses the Federal Court's decision in *FMG Pilbara*, which condones Fortescue Metal's retreat from broad preliminary future act negotiations in favor of arbitration immediately upon the expiry of the prescribed time period. He considers that the result highlights both the insufficient protection afforded to Aboriginal interests and the courts' lack of vigour in policing the requirement of negotiation in good faith.²⁴

The *Holocene* case, of considerable symbolic importance, is also considered in detail. It is suggested that this factually specific result only 'slightly' shifts the balance of power as regards the 'glaringly deficient' provisions governing the right to negotiate, and that its rarity underlines the need to revisit the statutory balancing of interests here.²⁵

The Report also discusses relevant international developments, with particular reference to the Government's endorsement of the *United Nations Declaration on the Rights of Indigenous Peoples* ('the Declaration').²⁶ The Commissioner notes that improving native title legislation is essential to give effect to the rights encapsulated in the Declaration, and that the Government must now incorporate its principles into policy.²⁷ He also notes the critical comments of UN treaty monitoring committees²⁸ regarding the cost, complexity and evidential strictness of native title processes, as well as the interest of the Committee on the Elimination of Racial Discrimination in the 're-design' of the Northern Territory Intervention.²⁹

DEVELOPMENTS AT STATE AND TERRITORY LEVEL

The Report pays particular attention to the new Victorian Native Title Settlement Framework, which the Commissioner considers to be a very significant step for Aboriginal Victorians. The new Framework is focused upon streamlining negotiation, meeting traditional owners'

aspirations, building partnerships and strengthening communities. Importantly, this new initiative sets core principles on agreement content (as regards recognition, access, cultural support and improved claims resolution). The Commissioner particularly praises the consultative design of the Framework and its potential to largely resolve native title matters in Victoria by 2020.³⁰

The Commissioner is less enthusiastic about developments in other states and territories, singling out particularly the Western Australian Government's approach to the LNG processing plant negotiations and Wild Rivers declarations and amendments to land rights legislation in Queensland.³¹

CHANGING THE CULTURE AND IMPROVING THE SYSTEM

GENERAL IMPROVEMENTS

Overall, the Commissioner considers that some 'important first steps' were taken in the period towards the creation of a 'just and equitable native title system'. He urges all parties not to 'lose the momentum for change', but also cautions that Indigenous people must be fully and effectively engaged in reform processes.³²

Commissioner Calma clearly states his own priorities, with emphasis upon capacity, participation, the need to 'level the playing field', and the importance of minimum standards of human rights protection. He considers that governments must improve in their understanding, recognition and respect; in their policy development (which must be evidence-based and holistic); in their engagement with Indigenous people; and in their cross-cultural competence.³³ The Report also emphasises the importance of building Government-Indigenous relationships, which necessarily depend upon participation, accountability, respect for human rights, recognition of Indigenous aspirations for independence, and recognition and strengthening of culture and identity. The central importance of state and territory governments is noted, as is the need for them to consider native title holistically and with close reference to community capacity.³⁴

According to the Commissioner, improvement is also needed in the varying approaches of the corporate sector. He expresses support for the 2009 recommendations of the International Expert Working Group Meeting on Extractive Industries³⁵ – which concern such matters as the corporate integration of human rights and environmental standards, ensuring Indigenous control of shared benefits, risk management and accountability, and proper respect for the principle of free, prior and informed consent.³⁶

The importance of negotiation over litigation is a strong theme of the Report, and the Commissioner particularly emphasises the utility of interest-based approaches to negotiation in the native title context – entailing early discussion, broad coverage beyond strict issues of native title, and careful attention to non-tangible interests.³⁷

A further theme of the Report is the intersection of native title with broader rights protection and the interconnections of land and water entitlements with Indigenous well-being. With a view to encouraging more holistic policy advances, the Commissioner repeats his emphasis in earlier reports on the need for attention to relevant governance structures and methodologies (for example, via constitutional reform, human rights initiatives, national Indigenous representation, and reconciliation negotiation frameworks). Reference is also made in this context to the need for concerted progress in relation to the Social Justice Package and the Indigenous Economic Development Strategy, which would complement native title advances.³⁸

SPECIFIC REFORM RECOMMENDATIONS

Turning to actual native title provisions and procedures, the Commissioner's view is that a comprehensive reform process is required – one which respects anti-discrimination and human rights standards and in which Indigenous people are fully involved. The current climate, it is suggested, provides a 'historic opportunity' to transform the system.³⁹ The Commissioner focuses on several key issues.

RECOGNITION OF TRADITIONAL OWNERSHIP

The Commissioner tentatively approves of suggestions that, where claimants fall short of proving native title, courts might be empowered to recognise 'traditional ownership' without undue attention to continuity of tradition and particular uses of land. However he stresses that the primary focus must be to make native title itself more achievable.⁴⁰

THE BURDEN OF PROOF

The Commissioner agrees with the mooted idea that, upon the establishment of certain basic facts, there could be a presumption activated that shifts the burden to the respondents. However, he emphasises that the success of this in encouraging more positive outcomes will depend upon the attitude and approach of state and territory governments. He adds that associated reform might also be needed – suggesting that 'traditional' should encompass laws, customs and practices that remain identifiable through time; that it should be clarified that there is no

requirement of continuing physical connection; and that courts could be empowered to disregard interruption or change in traditional law and custom where justice so requires.⁴¹

APPROACHES TO CONNECTION EVIDENCE

The Commissioner refers to the variability and onerous nature of 'connection' evidence required by state and territory governments as a prerequisite to negotiations, and the resulting delays and strains upon representative body resources. He considers that possible solutions might include removing the legislative uncertainty⁴² that encourages such restrictive governmental approaches.⁴³ And once again he notes the need for attitudinal change in the state and territory governments, which should be encouraged by the Commonwealth through, for example, the formulation of national standards.⁴⁴

ACCESS TO LAND TENURE INFORMATION

The Commissioner emphasises that claimants should be able to access state and territory land tenure information at the earliest possible opportunity – which could be encouraged by federal statutory amendment or financial leverage. He also expresses support for the establishment of a national database that coordinates land tenure information.⁴⁵

THE PARTICIPATION OF NON-GOVERNMENT RESPONDENTS

The Commissioner notes the need to better manage the participation of respondents in native title proceedings particularly, for reasons of cost, timeliness and ease of negotiation. He urges that consideration be given to clarifying the role of state and territory governments in representing other interests; amending the provisions on party status to impose stricter criteria and/or more limited participation; amending provisions on removal of parties to ensure currency of interests; exploring the greater use of representative parties; and clarifying approaches to funding for respondent parties.⁴⁶

THE SCOPE OF SETTLEMENT PACKAGES

The Commissioner makes various suggestions to encourage broader and more flexible native title settlement packages. The successes of the existing Indigenous Land Use Agreements framework are noted, however also emphasised are the concerns that agreements are not adequately addressing economic and social disadvantage, nor delivering real gains in cultural heritage protection or environmental management. The recent amendments allowing the Federal Court to make determinations covering matters beyond native title are praised, however

it is suggested that further process improvements are required to:

- strengthen procedural rights and address concerns with the future acts regime⁴⁷
- confirm the possible existence⁴⁸ and protection of commercial native title rights⁴⁹
- extend the circumstances in which past extinguishment may be disregarded
- allow the use of adjournments to support agreement-making;
- develop community decision-making and agreement-making capacity
- promote a regional approach to agreement-making and
- improve evaluation and monitoring of agreement outcomes.⁵⁰

THE QUALITY AND QUANTITY OF EXPERTS IN THE SYSTEM

The Commissioner notes that accessibility of experts is important to the pursuit of a 'level playing field'. Funding of NTRBs and PBCs is considered important in this regard, as is the establishment of a register of experts, better use of independent experts, and improved training and development opportunities for anthropologists.⁵¹

The Report proceeds to examine the processes of Indigenous land tenure reform more generally. The main points made are referred to above and further detail is beyond the constraints of this article. Yet it is important to note that the Commissioner maintains his position that tenure reform (now largely directed by the Australian Government) is not the key to removing impediments to Indigenous economic development. He argues that issues of remoteness, health, job readiness, poor infrastructure and lack of respect for Indigenous forms of ownership are substantially more important. He considers reform programs across Australia to be focused upon enabling governments to secure tenure over Indigenous land and control of decision-making. He suggests that reform need not take this shape; clarity of ownership and improved development opportunities could be achieved through quickening the return of land to Indigenous people and providing flexible support for their right to development.⁵²

CONCLUSION

This Report clearly poses some exacting challenges for Australian law and policy makers. Importantly, it is for the most part positive about the future of Indigenous affairs (and particularly native title) in Australia. This is a timely infusion of optimism: as the Commissioner's own

unflinching emphasis on negotiation and compromise suggests, progress in this most important of fields can only come with goodwill and determined cooperation. This report is a valuable resource that contains a wealth of carefully-considered and well-articulated opinions and proposals. Hopefully Commissioner Calma's experience and insight will continue to be a feature of native title debates in Australia upon his departure from office.

Dr Simon Young is a Professor of Law at the University of Western Australia.

- 1 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009* (2009) ('*Native Title Report*').
- 2 *Ibid*, see particularly 'Report Overview', xi-xiv.
- 3 *Ibid*, 11.
- 4 *Ibid*, see the summary in the 'Report Overview', *ibid*, xv-xvii.
- 5 *Native Title Amendment Act 1998* (Cth).
- 6 *Native Title Report*, above n 1, 6-7.
- 7 See particularly the *Aboriginal Land Rights (Northern Territory) Amendment Act 2006* (Cth); *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Act 2007* (Cth).
- 8 *Native Title Report*, above n 1, 7-9.
- 9 *Ibid*, 9-10.
- 10 See the *Native Title Amendment Act 2009* (Cth); the *Evidence Amendment Act 2008* (Cth); *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth).
- 11 See particularly Commonwealth Attorney-General's Department, *Optimising Benefits from Native Title Agreements* (2008), available at <http://www.ag.gov.au/www/agd/agd.nsf/Page/IndigenousLawandNativeTitle_NativeTitle_DiscussionPaper_OptimisingBenefitsfromNativeTitleAgreements>.
- 12 *Native Title Report*, above n 1, 15-17.
- 13 *Ibid*, 12-15.
- 14 See the *Native Title Amendment Act 2009* (Cth), enhancing Federal Court powers in respect of control over claims, consent orders beyond matters of native title and the use of agreed statements of facts; *Evidence Amendment Act 2008* (Cth), allowing for traditional law and custom evidence to be exempted from certain rules of evidence; *Federal Justice System Amendment (Efficiency Measures) Act (No 1) 2009* (Cth) allowing referrals to expert referees.
- 15 *Native Title Report*, above n 1, 17-19. Note that the evidential reforms were considered not to go far enough to address the difficulties faced in native title proceedings.
- 16 See Attorney-General's Department, above n 11.
- 17 *Native Title Report*, above n 1, 19.
- 18 *Ibid*, 20-26. The Commissioner supports moves by PCBs themselves to establish a national peak body to provide a direct line of communication with governments.
- 19 [2009] 237 CLR 309.
- 20 [2009] FCAFC 49.
- 21 [2009] NNTTA 49.
- 22 *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth).
- 23 *Native Title Report*, above n 1, 26-31.
- 24 *Ibid*, 34-35.
- 25 *Ibid*, 35-40.
- 26 GA Resolution 61/295 (Annex), UN Doc A/61/L67 (2007).
- 27 *Native Title Report*, above n 1, 42-43.
- 28 Particularly the Human Rights Committee and the Committee on Economic, Social and Cultural Rights.
- 29 *Native Title Report*, above n 1, 44-45.
- 30 *Ibid*, 47-51.
- 31 *Ibid*, 51-52. The Commissioner does note the progress in Queensland in relation to national park joint management arrangements.
- 32 *Native Title Report*, above n 1, 53.
- 33 *Ibid*, 58-61; see also Appendix 3, where the Commissioner annexes some suggested guidelines for effective engagement and consultation, particularly promoting the principle of free, prior and informed consent.
- 34 *Ibid*, 61-63.
- 35 United Nations Permanent Forum on Indigenous Issues, *Report of the International Expert Group Meeting on Extractive Industries, Indigenous Peoples' Rights and Corporate Social Responsibility*, UN Doc E/C 19/2009/CRP 8(2009), available at <http://www.un.org/esa/socdev/unpfii/documents/E_C19_2009_CRP_8.doc>.
- 36 *Native Title Report*, above n 1, 63-65.
- 37 *Ibid*, 65.
- 38 *Ibid*, 66-74. The Commissioner notes that the latter strategy should not involve acquisition of control over Indigenous communities (as opposed to building community capacity) and that the facilitation of economic development would require further native title reforms in the form of recognition of commercial native title rights.
- 39 *Ibid*, 78.
- 40 *Ibid*, 79-80.
- 41 *Ibid*, 80-88. There has been much analysis of the interpretation of the continuity requirements in Australian law – for further discussion of judicial approaches and commentators' views see Simon Young, *The Trouble with Tradition: Native Title and Cultural Change* (2008).
- 42 See *Native Title Act 1993* (Cth), ss 87 and 87A.
- 43 For example, by replacing the ambiguous reference to the 'appropriateness' of the proposed consent determination with a reference to the need for genuine, free and informed agreement.
- 44 *Native Title Report*, above n 1, 88-93.
- 45 *Ibid*, 94-95.
- 46 *Ibid*, 96-101.
- 47 Especially as regards offshore areas, compulsory acquisitions and the good faith negotiation requirement (see discussion above of the *FMG Pilbara*, above n 20). Note also specific further comment on the brevity and uniformity of time prescriptions, the onus of proof regarding the issue of 'good faith', and the possibility of allowing the imposition of royalty conditions at the arbitration stage, *Native Title Report*, above n 1, 106-107.
- 48 For discussion of varying views on native title content, see Simon Young, above n 41.
- 49 See Lisa Strelein, 'A Comfortable Existence': Commercial Fishing and the Concept of Tradition in Native Title' (2002) 5 *Balayi: Culture, Law and Colonialism* 94.
- 50 *Native Title Report*, above n 1, 101-118.
- 51 *Ibid*, 118-122.
- 52 The Commissioner is also critical of the lack of clarity and transparency in the Federal Government's tenure reform policies, *ibid*, 125ff.