



UNIVERSITY OF
TECHNOLOGY SYDNEY



Response to Discussion Paper

Leading practice agreements:

maximising outcomes from native title benefits

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1. Thank you for the opportunity to comment on the discussion paper: *Leading practice agreements: maximising outcomes from native title benefits* ('Discussion Paper') jointly released by the Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin and the Commonwealth Attorney-General, Robert McClelland in July 2010.
2. Jumbunna Indigenous House of Learning at the University of Technology, Sydney undertakes research relating to matters of importance to Indigenous people, their families and their communities. Jumbunna aims to produce the highest quality research on Indigenous legal and policy issues.

Background

3. The Discussion Paper is the most recent document in a series of papers and speeches that articulate the Australian Government's ('Government') vision for native title and associated agreement making. In a speech delivered by the Minister for Indigenous Affairs in 2008, that vision was unambiguously pronounced. A lengthy extract is cited here to provide the necessary background and context for analysis of the Discussion Paper.

The challenge here is to ensure that financial flows to native title holders - and indeed landholders under other land rights legislation - contribute positively to improving Indigenous economic status. To do this, these financial transfers must be structured to increase wealth and capital assets within Indigenous communities. We - the policy makers, resource developers, and Indigenous leaders - must collectively create a mindset which structures the governance of these arrangements to ensure financial benefits create employment and educational opportunities for individuals and are invested for the long term benefit of communities. The benefits of the payments made over the coming decades must be made to last for generations.¹

... It is not tenable for people to continue to live in overcrowded housing in dysfunctional, despairing communities while substantial funds, nominally allocated for their benefit, are either locked up in trusts or distributed as irregular windfalls to be frittered away with no long term good. The policy challenge is to both respect the rights of native title holders and claimants to make such agreements in relation to their land, and to make sure that the funds which flow are used to make a difference

¹ Jenny Macklin, 'Beyond Mabo: Native title and closing the gap' (2008 Mabo Lecture, James Cook University, Townsville, 21 May 2008
<http://www.jennymacklin.fahcsia.gov.au/speeches/2008/Pages/beyond_mabo_21may08.aspx>
at 29 November 2010. ('Beyond Mabo')

to their lives and to the lives of their children and grandchildren. We would all have cause for shame if the huge proceeds expected to flow to Indigenous people from the mining boom, are not harnessed to help close the gap between Indigenous and non-Indigenous Australians.²

4. The Discussion Paper further articulates the 'Government's vision for native title'.³ It was said to be prompted by the 'growing number and increasing financial value and importance of native title payments to Aboriginal and Torres Strait Islander groups'.⁴ It is designed to consider 'how best to ensure that native title agreements deliver practical and sustainable outcomes for native title groups and their communities, both existing and future'.⁵
5. The Government has determined the outcomes that these commercial agreements should properly achieve, namely 'agreements should be sustainable, both in terms of workability and providing for native title holders into the future'.⁶ Sustainability is described as having a number of attributes including, among others, that 'benefits are deployed for the benefit of current and future generations'.⁷
6. The Government proposes to establish a statutory body regulate these commercial agreements against the criteria for proper use or appropriate outcome that it will determine. In summary, the Government's vision is based on the following assumptions:
 - a. Huge proceeds of increasing importance are flowing to Indigenous peoples from the mining boom;
 - b. There is a danger that these substantial funds will be frittered away with no long term benefit;
 - c. It is essential that this windfall must be benefit current and future generations;
 - d. Financial benefits packages must be utilised for wealth and capital asset creation;
 - e. These negotiated agreements must also be utilised to close the gap between Indigenous and non-Indigenous people – to create employment and educational opportunities, and overcome overcrowding and socioeconomic disadvantage;
 - f. The Government has a role in regulating commercial agreements to achieve the outcomes that it has determined and to ensure that benefits are utilised for the purposes that it has described.

² Ibid

³ The Hon Jenny Macklin MP & The Hon Robert McClelland MP, *Discussion Paper. Leading practice agreements: maximising outcomes from native title benefits* (July 2010), 4. ('Leading practice agreements')

⁴ Ibid.

⁵ Ibid, 5.

⁶ Ibid, 4.

⁷ Ibid, 4.

General response to the Discussion Paper

7. Before proceeding, it is important to note that Indigenous peoples enter into a wide variety of commercial agreements, particularly within the resources sector. While some agreements arise from the exercise of procedural rights under the native title system, others are a product of broader commercial considerations. It appears, although not explicitly stated, that the proposals referred to in the Discussion Paper are intended to apply to the full range of these agreements. Therefore, this submission will not use the term 'native title agreements' used in the Discussion Paper. Instead, it will refer to 'negotiated financial benefits packages' as a more accurate reflection of the multiplicity of the agreements concerned.⁸
8. The Discussion Paper is complex and raises important public policy issues, in particular, by what authority and to what public purpose does the Government seek to monitor and regulate the benefits of commercial agreements made between private citizens and corporations.
9. Unfortunately, the Discussion Paper conflates a range of diverse issues that may be but are not necessarily interrelated but may have a secondary connection in some circumstances. For example, the Discussion Paper interweaves financial benefits packages, Indigenous economic development and the Government's Indigenous policy program – 'Closing the Gap' - but does not reveal the basis for any alleged correlation, other than that each issue relates to Indigenous people.
10. The Discussion Paper poses a series of practical questions aimed at realising the Government's vision in relation to these commercial agreements. Jumbunna IHL acknowledges that the native title system is in need of fundamental reform and that important reform has been proposed but has been slow to eventuate. However, we consider that before the Government's specific proposals can be considered or specific questions addressed, fundamental flaws underpinning the Discussion Paper must be highlighted. In summary, the proposals advanced in the Discussion Paper are objectionable on a number of grounds:
 - a. The principles underpinning proposals contained in the Discussion Paper are fundamentally flawed, rendering them inconsistent with Australia's human rights obligations. In particular, the proposals are racially discriminatory and seemingly would require suspension of the *Racial Discrimination Act 1975*. Differential treatment is permissible in very limited circumstances, where the criteria for such differentiation (judged against the objectives and the purposes of the relevant international convention) are proportionate, reasonable, objective, and are designed to achieve a legitimate purpose;
 - b. Despite the Government's rhetoric, the native title process has resulted in very few agreements providing 'huge proceeds'.

⁸ Simon Nish 'Whose money is it anyway?' (Paper presented at the National Indigenous Policy and Dialogue Conference, UNSW, 19 November 2010).

Further, the Discussion Paper provides no evidence as to the extent to which these agreements are resulting in 'poor outcomes' as defined. Thus, the review proposals are seemingly unnecessary, focussing unjustifiably on a small number of agreements and cannot reasonably be classified as special measures;

- c. While it is acknowledged that the vision of intergenerational economic prosperity that the Government professes is one that is shared by many Indigenous people, the imposition of externally determined outcomes to be enforced by a statutory body is misconceived. Notwithstanding, the Government's commitment to evidence based policy, the proposals do not accord with Australian and international evidence of the principles that underpin economic and community development in Indigenous communities. Such evidence emphasises the importance of Indigenous autonomy effected through capable, culturally legitimate governance institutions, yet the proposals undermine Indigenous decision making and self-determination;
- d. Native title rights and interests are a unique manifestation of Indigenous sovereignty and thus require specific protection. In fact, proof of the existence of native title requires evidence of an Indigenous society exercising traditional laws and customs from the time of the acquisition of Crown sovereignty to the present. Thus, the undermining of Indigenous decision making and failure to engender Indigenous institution building is especially problematic in relation to Indigenous peoples who have demonstrated attributes of nationhood.
- e. Further, the proposals outlined in the Discussion Paper are paternalistic and invoke the same rationale underpinning *terra nullius* – that resources not used for proper purpose (determined by non-Indigenous colonisers) were available for regulation and control by the Crown. Again, they treat Indigenous peoples as 'underdeveloped' and unwilling or unable to develop a vision for their communities;
- f. Finally, the proposals outlined in the Discussion Paper concern benefits arising from negotiated agreements attained through the current system, without any attempt to address the systemic failures of the native title system. It is not contentious that the system requires overhaul, which should be approached in light of the evidence of how sustained economic and community development is to be achieved – the stated aim of the Government's proposals.

The proposals are racially discriminatory and cannot be justified as special measures.

11. Non-discrimination and equality are fundamental to human rights law,⁹ such that non-discrimination is a peremptory norm of international law.¹⁰ It is one of the guiding principles of the United Nations Charter, which mandates ‘respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion’.¹¹ It is embodied in numerous international instruments, including the *Universal Declaration of Human Rights*, the *International Covenant on Civil and Political Rights* (ICCPR), the *International Covenant on Economic, Social and Cultural Rights* (‘ICESCR’), the *Convention on the Elimination of All Forms of Racial Discrimination* and the *Declaration on the Rights of Indigenous Peoples* (‘the Declaration’).
12. Nonetheless, substantive equality does not necessarily entail uniform treatment, and differential treatment will not constitute discrimination if the criteria for such differentiation (judged against the objectives and the purposes of the relevant convention) are proportionate, reasonable, objective, and are designed to achieve a legitimate purpose.¹²
13. As the Government acknowledges, the agreements to be regulated by the Discussion Paper’s proposals are ‘commercial agreements’.¹³ The wide array of agreements the subject of the proposals are negotiated on commercial terms between Aboriginal peoples/private citizens and corporations. In particular, the agreements of interest are those negotiated by the resources sector, taking advantage of the ‘mining boom’.¹⁴
14. It is inconceivable that the benefits arising from commercial agreements entered into by non-Indigenous people would be subject to scrutiny on the basis of how those benefits were to be utilised.
15. On its face, the proposal to review agreements is racially discriminatory and would require suspension of the *Racial Discrimination Act* unless it could be shown to be justified as ‘special measures’. Again, this is not an issue addressed by the Discussion Paper but requires explanation.

⁹ UN Human Rights Committee, *General Comment No 18: Non-discrimination*, 37th sess, U.N. Doc. HRI/GEN/1/Rev.6 (1989) [1]; CERD, *General Recommendation No 14: Definition of discrimination*, 42nd sess, UN Doc A/48/18 (1994) [1]; UN Committee on Economic, Social and Cultural Rights, *General Comment No 20: Non-Discrimination in Economic, Social and Cultural Rights*, UN Doc E/C.12/GC/20 (10 June 2009) [2] (‘CESCR’).

¹⁰ S James Anaya, *Indigenous Peoples in International Law* (Oxford University Press, 2nd ed, 2004) 130; Theodor Meron, ‘The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination’ (1985) 79 *American Journal of International Law* 283, 283; Aboriginal and Torres Islander Social Justice Commissioner, *Social Justice Report 2007* (2008), 239.

¹¹ *Charter of the United Nations* art 1(3).

¹² CERD, *General Recommendation 14*, [2]; HRC, UN Human Rights Committee, *General Recommendation 18*, [13]; CESCR, *General Recommendation 20*, [13].

¹³ Macklin & McClelland, *Leading practice agreements*, above, note 3, 5.

¹⁴ Macklin, *Beyond Mabo*, above, note 1.

16. Special measures are forms of permissible differential treatment, constituting favourable or preferential treatment, necessary to advance substantive equality for particular groups or individuals facing persistent disparities. They reflect an acknowledgment that formal equality before the law will not suffice to eliminate discrimination and will not achieve effective equality. Special measures have defined characteristics including that they are temporary, goal-directed and carefully tailored initiatives, which are based on assessed need, and encompass an appropriate system of monitoring. They are also legitimate, proportionate and necessary.
17. An assessment of the Government's proposals indicates that the proposals are unnecessary and do not support a legitimate objective.

Proposals do not support a legitimate objective

18. The Government justifies its intervention in this commercial process, noting that it 'play[s] a role in markets to prohibit unscrupulous behaviour, to protect consumers and to ensure appropriate standards of behaviour and transparency by the directors of companies and other commercial entities.'¹⁵ That is, in other circumstances, the Government plays a role in scrutinising process to protect the vulnerable.
19. By contrast, while there are genuine concerns as to the potential legitimacy of these agreements in light of inequality of bargaining power, this is not an issue addressed by the Discussion Paper. Rather, the Discussion Paper proposes a new statutory function to, among other things, 'review the sustainability of the benefits packages' but 'not their quantum'.¹⁶ That is, it proposes to regulate the enjoyment of benefits arising from these agreements but there will be no scrutiny of the negotiation process itself.
20. The proposals do not protect vulnerable negotiators but target post agreement implementation that must accord with non-Indigenous notions of proper exploitation of resources.

Proposals are unnecessary

21. As noted above, the explicit rationale for the Government's approach is that 'huge proceeds' emerging from the mining boom are being 'frittered away'. The Government alleges that 'Industry groups and Industry regularly bring concerns about particular negotiations or agreements' to its attention.¹⁷ These concerns include 'poor outcomes' arising from the manner in which benefits are dispersed and risk associated with poor governance of Indigenous institutions.¹⁸ The underlying and flawed premise of the Discussion Paper is that Indigenous native title claimants and holders are incapable or unwilling to engage in long term planning for

¹⁵ Macklin & McClelland, Leading practice agreements, above, note 3, 5.

¹⁶ Ibid, 8.

¹⁷ Ibid, 5.

¹⁸ Ibid.

- their community's development, requiring external regulation to generate approved outcomes.
22. Notwithstanding the gravity of the allegation, the Discussion Paper provides no evidence as to the extent to which negotiated financial benefits packages are resulting in 'poor outcomes' but it is evident that there can be very few.
 23. The Discussion Paper is directed at agreements of significant financial value and importance.¹⁹ However, very few agreements have resulted in huge proceeds. Of the small number that do exist, the Government provides no evidence of the extent to which they have resulted in 'poor outcomes.'
 24. Even if it were true that this was a widespread phenomenon – and anecdotally, the contrary appears to be true – how the benefit of agreement is to be distributed is ultimately a matter for the recipients of any benefit and not a matter for governmental regulation.

Australian and international evidence of necessary factors underpinning economic development

25. Intergenerational economic development is the legitimate ambition of Aboriginal and Torres Strait Islander Peoples across Australia and the Government rightly professes to support the objective.
26. Jumbunna commends the Government's repeated commitment to evidence based policy. Unfortunately, in this instance, the approach adopted by the Government outlined in the Discussion Paper does not accord with the available evidence as to fundamental principles that are necessary pre-requisites for economic prosperity and community development in Indigenous communities.
27. Indigenous people are the most disadvantaged group in Australia with significant disparity in almost all indicators of Indigenous disadvantage, ranging from life expectancy, educational outcomes, over representation in the criminal justice system, including imprisonment for men and women and juvenile detention, levels of disability and chronic disease, income, unemployment to rates of suicide and self-harm.²⁰ The very existence of such disparity, which is widening in relation to some indicators, is a matter of national concern. Increasingly, it is also a matter of international concern, as Indigenous Australians rank lower than their counterparts in the other three major Crown colony settlements (compared to Indigenous peoples in Canada, NZ, and the US) according to measures intended to simulate the UN Human Development Index.²¹

¹⁹ Ibid, 4.

²⁰ (Productivity Commission, 2009).

²¹ Martin Cooke, Francis, Mitrou, David Lawrence, Eric Guimond, and Dan Beavon, "Indigenous well-being in four countries: An application of the UNDP's Human Development Index to Indigenous Peoples in Australia, Canada, New Zealand, and the United States" (2007) *BMC International Health and Human Rights*, 9, Table 7).

28. Research findings in Australia and North America are remarkably consistent in identifying the fundamental characteristics of Indigenous communities that accomplish their own economic, political, social and cultural goals. Strikingly, economic prosperity is not engendered by concentrating on economic factors but by building governance capacity. Stable political governance has been demonstrated to be a more crucial factor than availability of natural resources, market proximity or educational attainment of the community, although these factors contribute to the ability to harness opportunity.²²
29. Essential characteristics of Indigenous peoples able to achieve their economic, social and cultural goals are that such communities exercise genuine decision making control over their internal affairs and utilisation of resources (described in Australia as exercising 'political jurisdiction');²³ have capable institutions of self-governance that get things done predictably and reliably, are accountable to internal and external stakeholders and have cultural legitimacy with the community they serve; and where their actions are based on long term systemic strategies with leadership focussed on creating stable political institutions.²⁴
30. Research conducted by the Indigenous Community Governance Project ('ICGP') at the Centre for Aboriginal Economic Policy Research ('CAEPR') found that governance capacity is a fundamental factor in generating sustained economic development and social outcomes.²⁵ 'Important factors in the link between governance and socioeconomic development outcomes include strong visionary leadership; strong culturally based institutions of governance, sound stable management, strategic networking into the wider regional and national economy; having prerequisite social infrastructure in place; and relevant training and mentoring opportunities.'²⁶
31. Simply, North American and Australian research has identified that Indigenous skills, abilities, knowledge and leadership are most effectively

²² Manley A Begay Jr, Stephen Cornell, Miriam Jorgensen & Joseph P Kalt, "Development, Governance, Culture. What are they and what do they have to do with rebuilding Native nations?" in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson: University of Arizona Press, 2007), 41.

²³ Michael Dodson & Diane Smith, "Governance for sustainable development: Strategic issues and principles for Indigenous Australian communities" *Discussion paper No 250/2003*, (CAEPR, ANU, 2003), 8.

²⁴ Stephen Cornell and Joseph P Kalt, "Two Approaches to the Development of Native Nations: One Works, the Other Doesn't" in Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (Tucson, University of Arizona Press: 2007), 5-30.

²⁵ Janet Hunt & Diane Smith, "Indigenous Community Governance Project: Year Two Research Findings" *CAEPR Working Paper No 36/2007* (CAEPR, Australian National University: April 2007), 52 <http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf> (accessed 25 July 2008). ('Year Two Findings')

²⁶ Janet Hunt & Diane Smith, "Building Indigenous community governance in Australia: Preliminary research findings" *Working Paper No 31/2006* (CAEPR, Australian National University: May 2006). ('Preliminary Findings')

- mobilised and exercised when initiatives are Indigenous-driven, towards Indigenous goals.²⁷
32. Thus, the evidence suggests that federal government support would be best focussed on institutional capacity building. Arising from its research findings, the ICGP made a series of recommendations for the development of culturally relevant, practically capable and effective community governance as the necessary precursor of sustained socioeconomic development.²⁸
 33. Vitally, the ICGP highlighted the failures of the governments' governance that inhibit capacity and good governance of Indigenous organisations and institutions. The research concluded that the 'delivery and funding of governance capacity development remains ad hoc, poorly coordinated, poorly funded and poorly monitored.'²⁹ Conversely, 'where a facilitated, community development approach is taken to Indigenous governance development, greater progress is made in creating sustained capacity and legitimacy'. The ICGP identified an 'urgent need for a nationally coordinated approach to the provision of governance capacity development and training.'³⁰
 34. Unfortunately, the approach outlined in the Discussion Paper is the antithesis of that supported by the evidence. Rather than engage in community capacity building and enhancement of Indigenous autonomy, the proposals instead embody a paternalistic framework whereby the Government determines what should be achieved from negotiations and imposes restrictive – and potentially unnecessary – regulation. Where the Discussion Paper does deal with governance, it fails to confront the complexity of Indigenous governance but instead restricts attention to issues relatively uncontroversial matters such as incorporation of organisations.
 35. As is the right of all Australians, Indigenous peoples should be at liberty to use the benefits arising from any agreements as they choose. While for some communities that may be conventional economic prosperity, it is important to note that the ICGP found that 'in some locations Indigenous aspirations for economic development differ considerably from those of non-Indigenous people.'³¹ Thus, there may be 'different views about the extent to which people should engage with various industries or relocate to take on full-time employment.'³²
 36. The recommendations emerging from the evidence as to how governments can facilitate capacity building is unambiguous. The role of Government should be to facilitate the necessary conditions to attain

²⁷ Hunt & Smith, Year Two Findings, above note 25, 34.

²⁸ Ibid, 50-54.

²⁹ Ibid, 34.

³⁰ Ibid.

³¹ Hunt & Smith, Preliminary Findings, above, note 26, 37.

³² Ibid.

Indigenous economic and community aspirations. Unfortunately, the proposals seek to do the opposite.

Native title is no mere property right and is not suitable for government regulation

37. In addition to being in contravention of the available evidence of what underpins 'success' in Indigenous communities, the proposals in the Discussion Paper undermine Indigenous autonomy in contravention of Australia's obligations to facilitate the right of Indigenous peoples to self-determination, the recognition of which is developing under international law, including by CERD.³³ This is especially problematic when native title is understood as a manifestation of pre-existing Indigenous sovereignty requiring specific protection.
38. Although, fragile, subordinate to other property interests and capable of extinguishment by Crown act, native title is no mere property right. Native title is *sui generis*,³⁴ situated within a 'recognition space' at the intersection of Indigenous and non-Indigenous normative systems.³⁵ Thus, no positive act is required by the Crown for native title to exist.³⁶ Native title rights and interests have their origin in pre-existing Indigenous normative systems and are not analogous with other common law property rights.³⁷ The Native Title Act provides the means by which native title rights and interests can be recognised by the Australian legal system.³⁸
39. Native title jurisprudence has struggled with, as Justice Callinan describes, 'finding any conceptual common ground between the common and statutory law of real property and Aboriginal law with respect to land.'³⁹ This lack of conceptual resonance is illustrated in the narrow and

³³ See CERD, *General Recommendation 21*,; *Charter of the United Nations*; ICESCR; ICCPR; *ILO No 169*; DRIP; Anaya, above note 10, 97.

³⁴ *Mabo & Ors v The State of Queensland [No 2]* (1992) 175 CLR 1 per Deane & Gaudron JJ at 89, per Dawson J at 133; *The Wik Peoples v State of Queensland* (1996) 187 CLR 1 per Kirby J at 215

³⁵ Benjamin Smith & Frances Morphy (eds), *The social effects of native title: recognition, translation, coexistence*, (Research monograph No 27, Australian National University, 2007).

³⁶ *Mabo [No 2]*, above, note 34, per Brennan J at 54-57; *Western Australia v Commonwealth* per Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh at 433

³⁷ *Fejo v Northern Territory of Australia* [1998] HCA 58 (10 September 1998) per Kirby J at [107-108], per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne & Callinan JJ at [53].

³⁸ The High Court has repeatedly stated that applications for recognition of native title in Australia are applications for rights under the NTA. See *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [7]; *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [16]; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [32]. Further it is to invite fundamental error to speak of native title as a common law right. See *Commonwealth v Yarmirr* (2001) 208 CLR 1 at [75]; *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [32]. This is a perplexing criticism because native title has never been a common law right but is recognised by the common law. Reference may be made to *Mabo [No 2]* but only to assist in assessing the meaning and effect of the legislation. See *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 at [16], [25]

³⁹ *Western Australia v Ward* [2002] HCA 28; (2002) 213 CLR 1 per Callinan J at [969]

- legalistic nature of native title jurisprudence as judges schooled in mainstream law and legal culture attempt to articulate rights and interests arising from an alien legal framework. The exercise is all the more elusive when described as occurring at the intersection of traditional law and custom and the common law,⁴⁰ but is to be found by reference to statute.
40. The approach articulated in *Yorta Yorta*⁴¹ and the cases which follow it, has mandated the centrality of ‘continuity’ from the time of the acquisition of Crown sovereignty to the present as fundamental to recognition of native title: continuity of the normative system of the society that existed before colonisation;⁴² continuity of the acknowledgment and observance of traditional laws and customs;⁴³ and continuity of the society.⁴⁴ Continuity of the exercise of native title rights and interests, and connection are also relevant.⁴⁵
41. Put simply, native title is proven by demonstrating the existence of a contemporary Indigenous society that has existed since before colonisation, which continues to acknowledge and observe traditional laws and customs relating to land and resources that constituted part of the normative system that existed before colonisation. In other words, despite the High Court’s repeated assertion that there cannot be two law making systems in Australia, the elements of proof for a native title determination, point to a society continuing to exercise vestiges of sovereignty that predate the acquisition of Crown sovereignty. Further, it is acknowledged that regulation of the native title rights and interests is a matter for native title holders. For example, the Federal Court has held that membership of the native title group is a matter to be determined by the holders of native title according to their traditional laws and customs.⁴⁶
42. It must be emphasised that such proof is required for the recognition and protection by the mainstream normative system but that native title rights and interests continue to be exercised notwithstanding external recognition. Thus, failure of the Yorta Yorta People’s claim for recognition did not diminish their status as traditional owners with responsibilities for

⁴⁰ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422 at [31]. (‘*Yorta Yorta*’)

⁴¹ *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58; 214 CLR 422

⁴² The normative system must have had a ‘continuous existence and vitality’ since the acquisition of European sovereignty: See *Yorta Yorta* at [47]

⁴³ Observance and acknowledgment of traditional laws and customs must have continued ‘substantially uninterrupted’: See *Yorta Yorta* at [87]

⁴⁴ The ‘society’ under whose laws and customs the native title rights and interests are said to be possessed must have continued to exist from sovereignty to the present ‘as a body united by its acknowledgment and observance of the laws and customs: See *Yorta Yorta* at [89]

⁴⁵ Account must no doubt be taken of the fact that both pars (a) and (b) of the definition of native title are cast in the present tense. The questions thus presented are about *present* possession of rights or interests and *present* connection of claimants with the land or waters. That is not to say, however, that the continuity of the chain of possession and the continuity of the connection is irrelevant See *Yorta Yorta* at [85].

⁴⁶ *Moses v State of Western Australia* [2007] FCAFC 78 (7 June 2007) at [374].

- country, which they continued to assert.⁴⁷ Similarly, while ‘extinguishment’ prevents recognition by the mainstream normative system, ‘native title does not cease to exist as an operative force among Aboriginal people. It does not cease to exist for all purposes, only for the purposes of the common law. The term ‘extinguishment’ is apt to suggest that native title suffers a greater destruction than is the fact.’⁴⁸
43. Indeed, it is arguable that the very existence of an agreement making process accompanying formal native title recognition is itself an acknowledgment of the unique status of Indigenous peoples/societies as sovereign peoples.
 44. Relations between governments and native title holders should properly be conceived as those between sovereign entities. Post *Mabo*, it is no longer appropriate for one sovereign to overtly subordinate to itself control over the enjoyment of any benefit arising from Indigenous territory and resources, notwithstanding that it may have the authority to do so. The Government’s proposals inappropriately fetter Indigenous jurisdiction and undermine self-determination and autonomy.
 45. It is in fact not clear under what jurisdiction the Government seeks to regulate *all* agreements negotiated between Indigenous peoples and corporations. As noted above, negotiated financial benefits packages include a range of agreements, some achieved through the exercise of procedural rights under the Native Title Act, others are not. It is apparent that the Government seeks to bring all agreements under the umbrella of the Native Title Act by referring to them as native title agreements, seeking to assert legitimate regulatory control.

Return to the ideology of *terra nullius*

46. In contravention of the available evidence and international legal obligations to empower Indigenous self determination, the proposals instead exhibit overt paternalism. Indeed, the Discussion Paper exhibits the same rationale as that which underpinned the discredited legal fiction that Australia was *terra nullius*, namely that control of resources is determined by use in a particular fashion determined by non-Indigenous people.

⁴⁷ The failure of the Yorta Yorta to have their authority recognised through the native title system has not prevented that community from being instrumental in forming the Murray Lower Darling Rivers Indigenous Nations (MILDRIN), an alliance of Indigenous nations focused on increasing the involvement of traditional owners in natural resource management and planning; being recognised as the heritage holders under the Aboriginal Heritage Act and gaining formal recognition by the Victorian government in entering into agreements such as the Yorta Yorta Cooperative Land Management Agreement for the Barmah-Millewah Forest: see Jessica Weir & Steven Ross “Beyond native title: the Murray Lower Darling Rivers Indigenous Nations in Benjamin R Smith and Frances Morphy (eds) *The Social Effects of Native Title: Recognition, Translation, Coexistence*, (Canberra, ANU E Press: 2007), 185-201.

⁴⁸ *Western Australia v Ward* [2000] FCA 191 (3 March 2000) per North J at [688].

47. Until so decisively overturned in the decision of *Mabo [No 2]* as ‘unjust and discriminatory’,⁴⁹ Australia was a rare example of inhabited territory held to be *terra nullius* and, thus, available for ‘discovery’ and ‘settlement’. The fiction that Australia was ‘desert and uninhabited’ was asserted politically⁵⁰ and later confirmed at law, first in the NSW Supreme Court judgment in *R v Murrell*⁵¹ and later by the Privy Council in *Cooper v Stuart*.⁵² The Privy Council held that the Colony of New South Wales was ‘territory practically unoccupied, without settled inhabitants or settled law’⁵³, holding that there was ‘no system of land law or tenure existing in the Colony at the time of its annexation to the Crown’.⁵⁴
48. ‘Settling’ unoccupied territory was one of the three means recognised at international law by which European nations reconciled competing claims over territory,⁵⁵ so that the ‘discoverer’ could enjoy territorial sovereignty over such land as against subsequent arrivals.⁵⁶ The ‘doctrine of discovery’ gave the British Crown, and its successors an exclusive right to acquire Indigenous land and has been relied upon by European and European-derived settler states to regulate and legitimise their colonial activities in Indigenous peoples’ territories.⁵⁷ Essentially, the only territorial titles recognised by international law were those held by ‘civilised’ Western nations.⁵⁸
49. Internationally recognised modes of acquisition of territory depended on whether the territory was occupied. Where occupied by a sovereign power, acquisition could occur by conquest, cession or prescription.⁵⁹ Vacant territory, *terra nullius*, was acquired through occupation.⁶⁰

⁴⁹ *Mabo [No 2]*, above, note 34 per Brennan J at 42

⁵⁰ The Crown’s legal advisers in 1819 advised that New South Wales had not been acquired by conquest or cession but had been taken possession “as desert and uninhabited”, and repeated in 1822 by the Colonial Office’s legal adviser. See Reynolds, H, “New Frontiers” in Havemann, P, *Indigenous Peoples’ Rights in Australia Canada and New Zealand* (Auckland: Oxford University Press, 1999), 131.

⁵¹ *R v Murrell*, Supreme Court of NSW, (Forbes CJ, Dowling & Burton JJ) 11 April 1836, Sydney reproduced in “Ballard, Murrell & Bonjon” (1998) 3 *Australian Indigenous Law Reporter* 410.

⁵² *Cooper v Stuart* (1889) 14 App Cas 286.

⁵³ *Ibid* per Lord Watson at 291

⁵⁴ *Ibid*, 292

⁵⁵ Patrick Macklem, ‘First Nations Self-Government and the Borders of the Canadian Legal Imagination’ (1991) 36 *McGill Law Journal* 383, 399. (First Nations Self-Government)

⁵⁶ *Ibid*.

⁵⁷ Robert A Williams, ‘Frontier of Legal Thought III: Encounters on the Frontiers of International Human Rights Law: Redefining the Terms of Indigenous Peoples’ Survival in the World’ (1990) *Duke Law Journal* 660, 672. (‘Frontier of Legal Thought’)

⁵⁸ *Id* at 673-674

⁵⁹ Brian Slattery, ‘Aboriginal Sovereignty and Imperial Claims’ (1991) 29(4) *Osgoode Hall Law Journal* 681, 685-686. (‘Imperial Claims’); Andrews, J A, ‘The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century’ (1978) 94 *The Law Quarterly Review* 408, 409; Asch, M, “Aboriginal Self-government and the Construction of Canadian Constitutional Identity”(1992) 30(2) *Alberta Law Review* 465, 482-483 [*Aboriginal Self-Government*]

⁶⁰ Slattery, *Imperial Claims*, above, note 59, 685-686; Andrews, above, note 59, 409; Asch, *Aboriginal Self-Government*, above, note 59, 482-483.

- Application of the common law was also enabled by conquest, cession and, ultimately, settlement of “desert uninhabited” territory.⁶¹
50. The problem for colonising nations seeking to cover their actions with a veneer of legality was that the three legal means of attaining sovereignty rarely neatly applied, including in the Australian colonies. Justice Willis acknowledged in 1841 that the colony of NSW was ‘neither an unoccupied place, nor was it obtained by right of conquest and driving out of natives, nor by treaties.’⁶²
 51. Colonising expansion and pressure for land led to an evolving definition of ‘terra nullius’ that ultimately defined occupation based on the level of political organisation of the inhabitants and use of territory. Benefits accruing to ‘backward peoples’ included Christianity and European civilisation.⁶³
 52. Vattel, cited at length in *R v Bonjon*, advanced the justification that uncultivated territories could be acquired by occupation, as Europeans had the right – indeed the obligation – to bring lands into production.⁶⁴ Vattel claimed that ‘those who pursue an erratic life, and live by hunting rather than cultivate their lands, usurp more extensive territories than with a reasonable store of labour they would have occasion for, and have, therefore, no reason to complain if other nations, more industrious, and too closely confined come to take possession of a part of those lands.’⁶⁵ In ‘establishing the obligation to cultivate the earth, those nations cannot exclusively *appropriate to themselves more land than they have occasion for, or more than they are able to settle and cultivate.*’⁶⁶[original emphasis] Moving through these immense regions was not ‘true and legal possession’, so that Europeans ‘finding land of which savages stood in no particular need, and of which they made no actual and constant use, were lawfully entitled to take possession of it, and settle it with colonies.’⁶⁷ ‘The earth ... belongs to mankind in general, and was designed to furnish them with sustenance’.⁶⁸
 53. The same sentiment is demonstrated in the justifications for the scrutiny and regulation of Indigenous societies’ private commercial arrangements provided in the Discussion Paper. The implication is that Indigenous peoples are ‘underdeveloped’ and that intervention is required to ensure

⁶¹ Blackstone, *Commentaries on the Laws of England*, 17th ed (1830) Bk II, 7 cited in *Mabo [No 2]*, above, note 34 per Brennan J at 33. According to Blackstone, English law would become the law of a country outside England either upon first settlement by English colonists of a “desert uninhabited” country or by the exercise of the Sovereign’s legislative power over a conquered or ceded country. See *Mabo [No 2]*, above, note 34 per Brennan J at 35.

⁶² *R v Bonjon*, Supreme Court of NSW, 16 September 1841, Melbourne reproduced in “Ballard, Murrell & Bonjon” (1998) 3 *Australian Indigenous Law Reporter* 410 per Willis J at 422.

⁶³ *Mabo [No 2]*, above, note 34 per Brennan J at 33.

⁶⁴ *Mabo [No 2]*, above, note 34 per Brennan J at 33.

⁶⁵ Vattel cited in *R v Bonjon*, above, note 62 per Willis J at 422

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

- that agreements reach their full 'potential'⁶⁹ and deliver prescribed outcomes determined by the Government. They must be 'sustainable' and have a role in realising the Government's policy objectives in closing the gap between Indigenous and non-Indigenous Australians.⁷⁰ They should 'deliver financial security and independence now and into the future'⁷¹ and provide wealth creation.⁷²
54. Agreements are to be reviewed against their 'capacity to 'contribute to the intergenerational, social and economic development of native title holders and claimants, whether the agreements incorporate leading practice.'⁷³
 55. The Discussion Paper is a contemporary manifestation of the justifications underpinning terra nullius, namely that land and resources should be used for industrious purposes, defined by non-Indigenous people. While for Vattel, land and resources were designed to furnish mankind with sustenance culminating in an obligation to cultivate the land, the Discussion Paper similarly imposes an obligation to use financial benefits to achieve economic development, wealth creation and to overcome socioeconomic disadvantage.
 56. By contrast, the role of Government is not to prescribe appropriate purposes for agreements but to facilitate the necessary conditions through which Indigenous peoples can achieve their economic and community development aspirations. Unfortunately, as described above, the paternalistic approach underpinning the Discussion Paper is the antithesis to that which available evidence directs governmental action.

An alternative approach

57. It is well settled that the native title system is in need of dramatic reform. For example, the Aboriginal & Torres Strait Islander Social Justice Commissioner's 2007 *Native Title Report* makes recommendations in relation to every aspect of the native title process, from the claims resolution process to the challenges faced by prescribed bodies corporate upon a determination of native title. The report raises concerns relating to almost insurmountable hurdles to gaining recognition of native title; casual disposal of protections afforded to native title to suit government policy; inadequate compensation for loss of native title; inadequate funding of representative Aboriginal and Torres Strait Islander bodies; inadequate funding of resources and infrastructure of prescribed bodies corporate; and anomalies in the funding of respondents.⁷⁴

⁶⁹ Macklin & McClelland, Leading practice agreements, above, note 3, 8.

⁷⁰ Ibid, 4.

⁷¹ Ibid, 8.

⁷² Ibid.

⁷³ Ibid, 9.

⁷⁴ Aboriginal & Torres Strait Islander Social Justice Commissioner, *Native Title Report 2007* (Sydney, Human Rights and Equal Opportunity Commission: 2008).

58. Vitally, the Social Justice Commissioner in the 2009 Native Title Report, emphasised the importance of the Government implementing its promised social justice package to address broader issues in the relationship between Indigenous and non-Indigenous Australians. In his view, a social justice package is integral to the effective operation of the native title system. If the Government is truly committed to improving the lives of Aboriginal and Torres Strait peoples, this is a priority that must be actioned rather than ignored.
59. The disparity in bargaining power is frequently raised as a serious concern in relation to negotiations involving Indigenous people. ICGP research findings 'seriously question whether conditions currently exist in Australia to enable Indigenous community leadership and decision-making authority to be adequately exercised.'⁷⁵ 'When power inequalities are as great as they currently are, Indigenous groups often feel they have little choice about how they do things.'⁷⁶ Hence, Professor Mick Dodson describes native title mediation as being characterised by cultural difference and power imbalance.⁷⁷
60. Similarly, the Native Title Payments Working Group ('Working Group') identifies a lack of capacity in the native title system to support traditional owners particularly at the negotiation stage, citing insufficient resources and expertise including in negotiation strategies, and the need for representation of the same quality as mining companies or other negotiators.⁷⁸ The Working Group observed that traditional owners' interests are often compromised in negotiations and interests not adequately represented.⁷⁹
61. The Working Group explicitly rejected the kind of initiative proposed by the Discussion Paper, observing that it would be 'inappropriate to mandate legislatively how benefits under agreements should be provided and applied.'⁸⁰
62. Instead, the Working Group, the Social Justice Commissioner and a range of other commentators have called for large scale, structural reform that would empower Indigenous peoples to assert their rights on a level playing field without having to rely on courts to protect their interests.
63. The native title system would indeed benefit from native title claimants having access to expert advice, support and representation during the course of negotiations; access to models of best practice and strategy; sufficient legal and research expertise; and guidance from previous native

⁷⁵ Hunt & Smith, Year Two Findings, above, note 25, 27.

⁷⁶ Ibid.

⁷⁷ Mick Dodson, "Power and Cultural Difference in Native Title Mediation", (1996) 3(84) *Aboriginal Law Bulletin* 8

⁷⁸ Native Title Payments Working Group, *Report* <http://www.fahcsia.gov.au/sa/indigenous/progserv/land/Documents/native_title_wg_report/default.htm> at 17 November 2010.

⁷⁹ Ibid.

⁸⁰ Ibid, 1.

title agreements. Post agreement implementation through appropriate institutional frameworks is also essential.

Conclusion

64. The Minister for Indigenous Affairs has previously stated that ‘we run the risk of becoming sidetracked by the tired old debate of ideology versus pragmatism. For the sake of a generation of Aboriginal and Torres Strait Islander children, this is quite simply an indulgence we cannot afford. We cannot allow the big issues of Indigenous policy to be hijacked by ideology. If we do that we risk being trapped in an intellectual straightjacket, limiting our ability to draw on the full diversity of ideas and options. Passionate but ultimately unproductive argument about rights versus the practical agenda simply fails to recognise that we can have both. They are not mutually exclusive.’⁸¹
65. Jumbunna IHL notes that the question of how financial benefits packages may be utilised to fulfil the aspirations of Indigenous communities is one where the rights and practical agenda are distinctly attuned. Both Australia’s human rights obligations and the evidence of what conditions promote Indigenous socioeconomic success promote autonomy and effective governance as a key factor. Crucially, the evidence demonstrates that ‘capacity development should be a process that strengthens Indigenous decision-making and control over their core institutions, goals and identity and that enhances cultural match and legitimacy.’⁸²
66. Ultimately, Indigenous peoples should be able to make their own decisions about how to use the benefits arising from their agreements. If the Government has concerns that some Indigenous peoples may not be making ‘good’ choices, then its role is best served by promoting self-determination exercised by effective governance institutions.

ⁱ See CERD, *General Recommendation 21*, above n 117; *Charter of the United Nations*; ICESCR; ICCPR; *ILO No 169*; DRIP; Anaya, above n 39, 97.

⁸¹ Macklin, *Beyond Mabo*, above, note 1.

⁸² Hunt & Smith, *Preliminary research findings*, above, note 26, 76.