Australian Human Rights Commission

Options paper: reforms to the *Native Title Act 1993* (Cth)

AUSTRALIAN HUMAN RIGHTS COMMISSION SUBMISSION TO THE OPTIONS PAPER ON REFORMS TO THE *NATIVE TITLE ACT 1993* (CTH)

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1 INTRODUCTION

1. The Australian Human Rights Commission (the Commission)[1] makes this submission in response to the Options Paper on reforms to the *Native Title Act 1993* (Cth) (the Native Title Act).

2. The Native Title Act was introduced in response to the landmark High Court decision in *Mabo v Queensland [No 2]* (Mabo).[2] The Preamble to the Native Title Act states that in enacting the law, the people of Australia intend:

   - to rectify the consequences of past injustices for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders, and

   - to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.[3]

3. The Native Title Act has been in operation for almost 25 years. During this time, it has undergone numerous reviews. The Act was significantly amended in 1998[4] in ways that the Commission has stated 'seriously undermined the protection and recognition of the native title rights of Aboriginal and Torres Strait Islander peoples'.[5] Further amendments in 2010 created a new 'future act' process.[6]

4. Aside from the 1998 and 2010 amendments, reforms to the native title system have been relatively ad hoc and have not applied a holistic approach. This has resulted in a system that has created some opportunities for Aboriginal and Torres Strait Islander communities, but which remains slow and cumbersome in the delivery of outcomes. As noted by former Social Justice Commissioner, Mick Gooda:

   > The promise of the Mabo decision and the Native Title Act as drafted in 1993 has not been fully realised. Subsequent decisions made in the Federal and High Courts, and successive amendments made to the Native Title Act by governments have played a key role in the failure of the native title system to meet expectations.[7]

5. As a result, the Native Title Act in its current form does not provide for a just and equitable native title system, which is consistent with international human rights standards, in particular the United Nations Declaration on the Rights of Indigenous Peoples. Although the system goes some way to upholding the rights of Aboriginal and Torres Strait Islander peoples, it also creates significant obstacles to the full realisation of these rights, including, the onerous burden of proof, the injustices of extinguishment, and the weaknesses of the good faith requirements.

6. The relationship of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources is the foundation of their cultural, social and economic lives. Native title reforms must be viewed in a holistic way, to recognise that native title is intrinsically linked to social justice and the enjoyment and exercise of Aboriginal and Torres Strait Islander peoples' human rights. It is critical that the United Nations Declaration on the Rights of Indigenous Peoples serves as

the compass for the development and implementation of any legislative measures that may affect Aboriginal and Torres Strait Islander peoples.

7. Previous inquiries and reports have gone some way to recommending improvements to the operation of the overall native title system. For example, the Council of Australia Governments (COAG) *Investigation into Indigenous land use and administration* and the report by the Australian Law Reform Commission (ALRC), *Connection to Country: Review of the Native Title Act 1993 (Cth)*.

8. It is essential that the recommendations from the various working groups, inquiries and reviews work together to shape future reforms to the Native Title Act. In particular, it is important to recognise the level of research and consultation involved in the ALRC's report into the Native Title Act and to act on their recommendations. The ALRC's proposed reforms, if implemented, will go a long way in improving the current system.

9. A number of the proposals contained in the Options Paper are also sourced from Table 2 of the COAG *Investigation into Indigenous land use and administration*, which were not supported by the Expert Indigenous Working Group. The principles and recommendations formulated by the Expert Indigenous Working Group provide a guide to government on how reform that affects Indigenous peoples' rights should be pursued in the future.[8] This was recognised by the Senior Officers Working Group, which stated in recommendation 6 that 'All governments note the principles articulated by the Expert Indigenous Working Group in this report when taking forward reforms that affect Indigenous land owners and native title holders'.[9] The Commission is therefore concerned that proposals contained in Table 2 have been included in the Options Paper without any reflection on the reasons why the Expert Indigenous Working Group did not support these proposals.

10. The Commission welcomes the opportunity to provide feedback on the Options Paper in order to create a just and equitable native title system, which is consistent with international human rights standards. Any reform to the native title system must provide for a fair, independent, impartial, open and transparent process for Aboriginal and Torres Strait Island peoples, which delivers on the original intent outlined in the objects and Preamble of the Native Title Act. Crucially, reviews of the native title system must translate into beneficial outcomes for native title holders and native title claimants on the ground.

11. The Commission will provide a response to the specific questions and various options raised in the Options Paper. This submission will then provide specific comment on four key areas:

    - the operation of s223 of the Native Title Act,
    - commercial native title rights and interests,
    - what constitutes 'good faith' in the Native Title Act,
    - procedural rights over offshore areas, and
    - the Commission's Indigenous Property Rights Project.

2 RECOMMENDATIONS

12. In relation to the reforms contained in the Options Paper, the Australian Human Rights Commission recommends that the Australian Government:

    i. amend the *Native Title Act 1993* (Cth) to give effect to the proposals contained in question 1 to confirm the validity of section 31 agreements made prior to *McGlade v Native Title Registrar* [2017] FCAFC 10

    ii. amend the *Native Title Act 1993* (Cth) to give effect to the proposals contained in questions 3(a), 3(b) and 3(d) regarding 'Authorisation and the applicant'

    iii. ensure that, in relation to question 3(c), any amendment to s 66B of the *Native Title Act 1993* (Cth) reflect the proposed wording contained in Recommendation 10–7 of the report by the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*

    iv. make better use of existing provisions in the *Native Title Act 1993* (Cth) and the *Prescribed Body Corporate Regulations 1999* (Cth), in particular Regulation 8A, before introducing a new alternative agreement-making mechanism as proposed in question 4 regarding 'Agreement-making and future acts'

    v. amend the *Native Title Act 1993* (Cth) to give effect to proposal C1 in Attachment C to broaden the scope of body corporate ILUAs to cover areas where native title has been extinguished, and that this amendment is consistent with the wording contained in s 24BC(2) of the Native Title Amendment Bill 2012

    vi. amend the *Native Title Act 1993* (Cth) to give effect to proposal C2 in Attachment C to the extent that it is consistent with the wording used in s 24ED(1) of the Native Title Amendment Bill 2012

    vii. amend the *Native Title Act 1993* (Cth) to give effect to proposal D1 in Attachment D to enable native title claim groups and native title holders to be able to choose their decision-making processes, whether traditional or otherwise

    viii. amend the *Native Title Act 1993* (Cth) to give effect to proposals E3 and E6 in Attachment E to allow the historical extinguishment provision to be disregarded in national, state or territory parks, and over pastoral leases held by native title claim groups, irrespective of their corporate structure

    ix. expand the reforms contained in proposals E3 and E6 in Attachment E by:

        a. allowing historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants

b. ensuring that the reform is not restricted to 'onshore' areas of national, state or territory parks; historical extinguishment should also be disregarded in relation to marine parks and reserves

13. The Australian Human Rights Commission recommends that the Australian Government:

x. take into consideration the recommendations from previous native title working groups, reviews and inquiries to ensure an efficient and consistent approach is applied to reform processes to the native title system

xi. implement in their entirety the recommendations from the report of the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*.

xii. ensure that the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are consistent with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples, and address concerns raised by the Committee on the Elimination of Racial Discrimination and the Human Rights Committee in relation to the *Native Title Act 1993* (Cth) and the broader native title system

xiii. provide Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources

xiv. support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters

xv. incorporate the priorities delivered from the Australian Human Rights Commission's Indigenous Property Rights Project into the development of any future reforms to the *Native Title Act 1993* (Cth) and the broader native title system, in particular in relation to enhancing economic development opportunities for Aboriginal and Torres Strait Islander peoples through native title, and

xvi. that the Australian Government support and resource the continuation of the Indigenous Property Rights Project with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, in order for the agenda developed by the Indigenous Strategy Group to be further advance and achieved

14. The Australian Human Rights Commission recommends amendments to the *Native Title Act 1993* (Cth) to:

xvii. clarify that native title rights may be exercised for any purposes, including commercial and non-commercial, and provide a non-exhaustive list of native title rights and interests

xviii. ensure the Act is consistent with the Full Federal Court's decision in *De Rose v South Australia No 2* (2005) 145 FCR 290

xix. provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants

xx. address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so

xxi. provides a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded in relation to interruption or change in the acknowledgement and observance of traditional laws and customs, such as the forced removal of children and the forced relocation of communities onto missions

xxii. restore the original wording of s 24MD(2)(c)

xxiii. permit procedural rights in relation to offshore areas

xxiv. include explicit criteria as to what constitutes 'good faith' in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in the *Western Australia v Taylor* (1996) 134 FLR 211, and suggested legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith'

xxv. include the principle of free, prior and informed consent in a manner consistent with the United Nations Declaration on the Rights of Indigenous Peoples

3 GENERAL COMMENTS

15. The Commission notes the scope of the Options Paper, which is focused on unlocking the economic development opportunities that accompany the recognition of native title. The Options Paper states that this scope was determined based on the ongoing development of case law and the broader native title system, with a view to ensuring that any legislative change meets the current needs of the system. It is for this reason that the Options Paper does not propose significant changes to key concepts underpinning native title law, namely connection and the content of native title. The Commission is of the view

that connection and the content of native title continue to be fundamental needs of the system.

16. The Commission has previously stated that its key priorities for native title reform are to:

    - establish a presumption of continuous connection in relation to a native title claim once native title claimants have met the requirements of the registration test, and

    - enable native title holders to govern their lands, territories and resources through their Prescribed Bodies Corporate (PBCs).[10]

17. The Commission has also previously noted that economic development for Aboriginal and Torres Strait Islander peoples is hindered by obstacles in the native title system. Tom Calma, the former Social Justice Commissioner, identified the following six specific aspects of native title law and policy that can inhibit economic development for Aboriginal and Torres Strait Islander peoples:

        - the test for the recognition of native title

        - the test for the extinguishment of native title

        - the nature of native title as a bundle of rights

        - the rules that regulate future development affecting native title rights

        - inadequate resourcing for Aboriginal and Torres Strait Islander bodies in the native title system

        - the goals of governments' native title policies[11]

18. The Commission considers it appropriate that any suggested amendments that relate to benefits obtained from either determinations of native title or Indigenous Land Use Agreements (ILUAs), also take into consideration the need to build good governance capacity within the native title system. This is particularly important to enable PBCs to manage native title benefits into the future, and to ensure that they have the capacity to administer and evaluate their statutory responsibilities, particularly those included in ILUAs, and the capacity to respond appropriately where there is a breach of agreement. The benefits of native title will not be fully realised without investment in the governance of native title.

19. Similarly, any amendments to the role of PBCs in agreement-making should take into account the need for ongoing and adequate funding of PBCs, Native Title Representative Bodies and Native Title Service Providers. Funding of this nature is essential to ensuring a framework for economic development on the Indigenous Estates, which is consistent with the principle of self-determination.[12]

20. The Social Justice and Native Title reports, tabled in Parliament by previous Aboriginal and Torres Strait Islander Social Justice Commissioners, contain extensive analysis and recommendations regarding the Native Title Act and the operation of the native title system over many years. The recommendations and analysis contained in these reports should inform this reform process.[13]

21. The Commission also refers the Government to the submissions made by the Commission to the numerous inquiries into native title conducted over many years. These submissions provide relevant analysis and proposed reforms to law and policy with regard to:

    - the protection of the cultural, social and economic rights and interests of Aboriginal and Torres Strait Islander peoples concerned with and derived from their lands, territories and resources
    - the trends in native title over and how they are relevant to connection requirements, authorisation and joinder provisions
    - the variations in the operation of the native title system at the State and Territory level across Australia and how they interrelate with land rights, cultural heritage and other relevant legislation
    - the operation of s 223 of the Native Title Act, connection and continuity, and the meaning of 'traditional'
    - interruption to connection and the operation of the law regarding extinguishment
    - commercial native title rights and interests
    - good faith negotiations
    - agreement-making and economic development
    - the impacts of and options for addressing lateral violence in native title

4 OPTIONS AND QUESTIONS RAISED IN THE OPTIONS PAPER

4.1 Section 31 Agreements

22. The Commission supports question 1 in the Options Paper to amend the Native Title Act to confirm the validity of section 31 agreements made prior to *McGlade v Native Title Registrar* [2017] FCAFC 10 (McGlade decision). This amendment will ensure that there is certainty for all stakeholders in the native title system following the McGlade decision and the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth) (the 2017 Amendments).

23. Regarding the role of the applicant in future section 31 agreements, option 3 from question 2 in the Options Paper states that this reform proposal would align the process for section 31 agreements with that for making area ILUAs following the 2017 Amendments. However, the Options Paper is unclear whether this alignment would extend to applying the "default" position from the 2017 Amendments. These amendments provide that, if no persons are nominated or determined by the native title claim group to be a party to the agreement, a majority of the persons who comprise the applicant may be the native title party to an ILUA.

24. The Commission is of the view that this default position should not apply to section 31 agreements. The native title group should provide express authorisation to deviate from the current requirement that all persons comprising the applicant must be the native title party to a section 31 agreement. This ensures that appropriate safeguards are in place for the native title group. These safeguards are significant when one considers the range of issues that can be covered by section 31 agreements.

25. This default majority option also fails to account for the complexity of native title claims. It is based on the assumption that a minority of the applicant, which holds a different opinion to the majority, is a dissident voice and is not based on a valid concern about the impact of a section 31 agreement on the group's native title rights and interests.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to the proposals contained in question 1 to confirm the validity of section 31 agreements made prior to *McGlade v Native Title Registrar* [2017] FCAFC 10.

4.2 Authorisation and the applicant

26. The Commission welcomes questions 3(a) to 3(d) in the second section of the Options Paper — "Authorisation and the applicant" — that specifically respond to several recommendations from the report by the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)* (ALRC *Connection to Country* report).[14]

27. The Commission has previously welcomed these recommendations, particularly those that aim to offer claim groups greater flexibility in authorising applicants,[15] negotiating ILUAs[16] and consenting to native title decisions.[17] Mick Gooda, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, noted that he was pleased that these recommendations seek to:

    - strengthen the authority of the claim group in defining the role of the applicant,
    - ensure that any monetary benefits are directed to the claim group and not the applicant, and
    - where there is doubt, require an applicant to act by a majority of the claim group.[18]

28. These options have the potential to not only empower Aboriginal and Torres Strait Islander peoples in important decision-making processes, but also decrease the lateral violence and stress that can be caused by the native title process.[19]

29. In relation to question 3(c) in the Options Paper, the Commission is of the view that any amendment to s 66B of the Native Title Act should reflect the proposed wording contained in Recommendation 10–7 of the ALRC *Connection to Country* report, which states that:

> Section 66B of the Native Title Act 1993 (Cth) should provide that, where a member of the applicant is no longer willing or able to perform the functions of the applicant, the remaining members of the applicant may:
>
> (a) continue to act without reauthorisation, unless the terms of the authorisation provide otherwise; and
>
> (b) apply to the Federal Court for an order that the remaining members constitute the applicant.[20]

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to the proposals contained in questions 3(a), 3(b) and 3(d) regarding 'Authorisation and the applicant'.

Recommendation: that the Australian Government ensure that, in relation to question 3(c), any amendment to s 66B of the *Native Title Act 1993* (Cth) reflect the proposed wording contained in Recommendation 10–7 of the report by the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*.

4.3 Agreement-making and future acts

30. The Commission holds concerns about providing PBCs with greater autonomy and increased regulatory responsibilities, when this is not coupled with an increase in financial resources for and the governance capacity of PBCs.

31. The benefits of native title can only be fully harnessed by investing in the governance of native title and ensuring that PBCs have access to ongoing and adequate funding to meet their administrative, legal and financial functions. Improving the capacity of PBCs to respond to agreement-making and future acts is one of the most effective ways to improve efficiency and timeliness in agreement-making.

32. Although the Commission supports in principle reforms to make decision-making and approval processes more efficient, this should not come at the expense of the procedural rights of native title holders or native title claimants. As noted by the Expert Indigenous Working Group to the COAG *Investigation into Indigenous Land Administration and Use* (COAG Investigation), 'the principle of free, prior and informed consent should underpin any decision to delegate, streamline or pre-authorise decision-making'.[21]

33. A number of the options raised in this section of the Options Paper — 'Agreement Making and Future Acts' — are sourced from proposals contained in Table 2 of the COAG Investigation. The Commission notes that the Expert Indigenous Working Group did not support any of these proposals contained in Table 2.

(a) Alternative agreement-making processes

34. Question 4 in the Options Paper proposes the creation of an alternative agreement-making mechanism which would not require consultation with the broader group of native title holders and could be entered into directly by the PBC. The Commission is of the view that existing provisions in the Native Title

Act and the *Prescribed Body Corporate Regulations 1999* (Cth) (PBC Regulations), in particular Regulation 8A, should be further explored before introducing a new alternative agreement-making mechanism. These provisions allow PBC rules to be drafted so that PBC directors have a degree of flexibility in making operational decisions pursuant to alternative consultation processes. Furthermore, the requirement of PBCs to consult with and obtain the consent of native title holders before making a native title decision is a critical protection within the PBC Regulations. Caution should therefore be exercised before introducing a new agreement-making mechanism, which would not require consultation with the broader group of native title holders and could be entered into directly by the PBC. This approach is consistent with Article 32(2) of the United Nations Declaration on the Rights of Indigenous Peoples (Declaration):

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[22]

35. The Commission does not support proposal B2 in Attachment B — 'Alternative agreement-making' — which would allow native title holders to vary the effect of s 211 of the Native Title Act through an ILUA, including by allowing the PBC to contract out of this protection. Section 211 creates a protection for the exercise of traditional hunting, fishing, gathering cultural or spiritual activities from regulation by Commonwealth, state and territory laws. The rights contained under s211 for native title holders are fundamental rights that should not be compromised. The Commission notes that this option was also a recommendation from the COAG Investigation, which the Expert Indigenous Working Group did not support.[23]

Recommendation: that the Australian Government make better use of existing provisions in the *Native Title Act 1993* (Cth) and the *Prescribed Body Corporate Regulations 1999* (Cth), in particular Regulation 8A, before introducing a new alternative agreement-making mechanism as proposed in question 4 regarding 'Agreement-making and future acts'.

(b) Streamlining existing agreement-making

36. Several of the proposals contained in Attachment C are derived from the Native Title Amendment Bill 2012, Schedule 3. The Commission addressed these reforms in 2013 in its submissions to inquires by the Senate Legal and Constitutional Affairs Legislation Committee and the House Standing Committee on Aboriginal and Torres Strait Islander Affairs into the Native Title Amendment Bill 2012.

37. The Commission supports proposal C1 in Attachment C to broaden the scope of body corporate ILUAs to cover areas where native title has been extinguished, as this provides greater flexibility for the use of body corporate ILUAs. The Commission notes that the proposal qualifies that it will include areas where native title has been extinguished in "specific circumstances".[24] The Commission supports the wording that was contained in s 24BC(2) of the 2012 Bill to allow parties to make a body corporate ILUA over areas that are wholly determined but include areas where native title has been extinguished; and/or where an area has been

excluded from a determination, and native title would have been held by the relevant native title group had native title not been extinguished over that particular area.[25]

38. Similarly, the Commission has also previously voiced its support to simplifying the process for amending ILUAs, as this provides flexibility to enable parties to make administrative amendments to ILUAs without requiring a new registration process.[26] The Commission supports the proposal in C2 of Attachment C to the extent that it is consistent with the wording used in s 24ED(1) of the 2012 Bill, which states that certain amendments can be made to ILUAs (whether body corporate, area agreement or alternative procedure) where:

    - the amendments can mostly be categorised as administrative amendments, as set out in s 24ED(1)
    - the parties to the agreement have agreed to the amendment
    - the Register of the National Native Title Tribunal has been notified of the amendments in writing

39. While the Commission supports, in principle, improving the efficiency of doing business on land subject to native title, native title holders and claimants' rights should not be compromised or watered down when pursuing this objective. For this reason, the Commission does not support proposal C10 in Attachment C — "Streamlining agreement-making" — to provide that notices about proposed future acts can always be transmitted electronically. Many native title holders and native title claimants may not have regular or reliable access to electronic communications, including telecommunication services and computer access. The Commission is of the view that this reform may lead to native title holders and native title claimants not being aware of notices that could have a significant impact on their native title rights and interests.

40. The Commission also notes that several of the proposed options contained in Attachment C are derived from Table 2 of the COAG Investigation, which the Expert Indigenous Working Group did not support. For example, providing that notices for agreement and other processes under the Native Title Act can always be submitted electronically.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to proposal C1 in Attachment C to broaden the scope of body corporate ILUAs to cover areas where native title has been extinguished, and that this amendment is consistent with the wording contained in s 24BC(2) of the Native Title Amendment Bill 2012.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to proposal C2 in Attachment C to the extent that it is consistent with the wording used in s 24ED(1) of the Native Title Amendment Bill 2012.

4.4 Indigenous decision making

41. The Commission supports the proposed reform contained in proposal D1 of Attachment D — "Indigenous decision making" — to enable native title claim

groups and native title holders to be able to choose their decision-making processes, whether traditional or otherwise.

42. This reform is self-determination in action. It recognises the diverse decision-making processes used by Aboriginal and Torres Strait Islander peoples and provides greater flexibility to native title claim groups and native title holders to choose a decision-making process that is best suited to their particular circumstance.

43. The Commission has previously expressed support for a reform of this nature. It also notes that it is consistent with recommendations contained in the ALRC report and the COAG investigation.[27]

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to proposal D1 in Attachment D to enable native title claim groups and native title holders to be able to choose their decision-making processes, whether traditional or otherwise.

4.5 Claims resolution and process

44. A number of the reforms contained in Attachment E of the Options Paper — "Claims resolution and process" — are derived from recommendations in the ALRC *Connection to Country* report, which aim to improve the efficiency and effectiveness of claims resolution.[28]

45. As noted in the 2013 Social Justice and Native Title Report, Recommendations 12-1 to 12-5 of the ALRC report do not make significant headway in creating a faster, cheaper or more effective native title system. This is because the terms of reference did not allow the ALRC to 'undertake a comprehensive review of the claims resolution process'[29] or investigate reform possibilities for creating an alternate settlement system in accordance with initial plans for a statutory compensation fund.[30]

(i) The historical extinguishment provision

46. The Native Title Act in its current form does not allow parties to reach agreement about disregarding extinguishment of native title except in particular circumstances set out in s 47 (pastoral leases held by native title claimants), s 47A (reserves covered by claimant applications) and s 47B (vacant Crown land covered by claimant applications).

47. The Commission supports the reforms contained in Attachment E of the Options Paper to allow the historical extinguishment provision to be disregarded in national, state or territory parks, and over pastoral leases held by native title claim groups, irrespective of their corporate structure. The Commission has previously expressed support for reforms of this nature in relation to the Native Title Amendment Bill 2012, which proposed the insertion of a new s 47C.[31]

48. As stated in previous submissions, the Commission is of the view that the range of circumstances in which historical extinguishment can be disregarded should be expanded beyond those listed in Attachment E of the Options Paper.[32] In particular, the Commission recommends expanding the reforms to allow historical

extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.

49. The exact wording of the proposed amendment to the Native Title Act is not included in the Options Paper. However, based on the wording of s 47 of the Native Title Amendment Bill 2012, the operation of this reform should not be restricted to "onshore" areas of national, state or territory parks; historical extinguishment should also be disregarded in relation to marine parks and reserves.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to give effect to proposals E3 and E6 in Attachment E to allow the historical extinguishment provision to be disregarded in national, state or territory parks, and over pastoral leases held by native title claim groups, irrespective of their corporate structure. The Commission recommends expanding the reforms contained in proposals E3 and E6 in Attachment E by:

a. allowing historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants

b. ensuring that the reform is not restricted to 'onshore' areas of national, state or territory parks; historical extinguishment should also be disregarded in relation to marine parks and reserves

(ii) Compulsory acquisition

50. Following his visit to Australia in August 2009, the former Special Rapporteur on the Rights of Indigenous Peoples, James Anaya, observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the Declaration and other international instruments.[33]

51. Section 24MD(2)(c) of the Native Title Act currently states that 'compulsory acquisition extinguishes the whole or the part of the native title rights and interests'. As originally enacted, this section of the Native Title Act stated that 'acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition that led to extinguishment'.[34] The Commission therefore supports amending s 24MD(2)(c) of the Act to its original wording.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to restore the original wording of s 24MD(2)(c).

4.6 Post-determination dispute management

52. The Options Paper contains a proposal in Attachment F — "Post-determination dispute management" — to amend the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) to require PBCs to set up and maintain registers of native title decisions and trust money directions. While, in principle, the Commission supports enhanced transparency and accountability for PBCs, this reform would place an increased regulatory burden on PBCs, and may not be the most appropriate response to dealing with concerns around PBC administration and decision-making.

53. The capacity of PBCs to engage effectively in decision-making and consultative processes can be hindered by a lack of technical and financial resources, limited governance capacity, and a limited understanding by PBC directors of the regulatory and legislative obligations of PBCs. The Commission is of the view that the capacity of PBCs to engage effectively in decision-making and consultative processes may be enhanced through an increase in the Government provision of technical and financial resources to PBCs, as well as capacity-building training for PBC directors and native title holders more broadly. This assistance will help to facilitate effective consultation processes and capacity development of PBCs and ensure they are well-functioning, sustainable and self-governing.[35]

54. This approach is consistent with the Declaration, which states that:

> Indigenous peoples have the right to have access to financial and technical assistance from States and through international cooperation, for the enjoyment of the rights contained in this Declaration.[36]

55. This type of financial and technical assistance is essential to ensuring that Aboriginal and Torres Strait Islander peoples are able to enjoy their right to participate in decision-making in an effective manner. The United Nations Permanent Forum on Indigenous Issues has even suggested that the 'principle of free, prior and informed consent, combined with the notion of good faith, may therefore be construed as incorporating a duty for States to build Indigenous capacity'.[37]

56. The Commission notes that a number of the proposed options contained in Attachment F are sourced from the COAG Investigation. The Expert Indigenous Working Group did not support the majority of the reforms from this section of the COAG Investigation, including:

- ORIC to support and, where necessary, investigate PBC compliance with the PBC regulations
- remove the directors' discretion to refuse membership to a person who meets the PBCs membership criteria other than in exceptional circumstances, and limit the grounds for cancellation of PBC membership to ineligibility or misbehaviour
- require PBCs to address how disputes with common law holders will be resolved in their rulebook, keep a register of trust money directions, require PBCs to keep separate financial records and reports in relation to native title benefits and introduce a requirement that the common law holders be consulted on the investment and application of native title monies
- allow PBCs or individual native title holders to approach the NNTT for dispute resolution assistance directly
- create an arbitration function for the National Native Title Tribunal in relation to post-determination disputes

- make the Federal Court's jurisdiction exclusive in relation to CATSI Act matters that affect PBCs

5 THE NEED FOR BROADER REFORM

57. The scope of the Options Paper does not include several issues that the Commission and other stakeholders have consistently raised as priorities that should be included in any reforms to the native title system. These issues include:

    - the Native Title Act and its consistency with international human rights standards
    - the operation of s 233 of the Native Title Act
    - proof and evidence in native title claims
    - the content of native title rights and interests, in particular the use of native title rights and interests for a commercial purpose
    - procedural rights over offshore areas
    - what constitutes "good faith" in the Native Title Act

58. A number of these issues were also a key focus in the recommendations made in the ALRC *Connection to Country* report.[38]

Recommendation: that the Australian Government implement in their entirety the recommendations from the report of the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth)*.

Recommendation: that the Australian Government take into consideration the recommendations from previous native title working groups, reviews and inquiries to ensure an efficient and consistent approach is applied to reform processes to the native title system.

5.1 The Native Title Act and its consistency with international human rights standards

59. The High Court decision in *Mabo* was founded on human rights.[39] The intention of the Native Title Act was also to recognise the fundamental human rights of Aboriginal and Torres Strait Islander peoples to their traditional land, territories and resources. This relationship was observed by Professor Dodson, a former Social Justice Commissioner, who stated in 1994 that the 'recognition of native title is more than a recognition of Indigenous property interests, it is also about the recognition of our human rights'.[40] Professor Dodson further remarked that the international instruments of human rights ratified by Australia are 'relevant to native title in that they protect property against arbitrary and discriminatory interference and provide rights to the free exercise of culture'.[41]

60. The international human rights system therefore provides a framework through which the Australian government can develop and implement native title laws

and policies in ways that are consistent with international human rights standards.

61. Australia has ratified a number of international human rights treaties that recognise the rights of Indigenous peoples to the ownership, use and occupation of their lands, territories and resources, and the expression of their cultural identity. This includes the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), and the International Convention on the Elimination of all Forms of Racial Discrimination (ICERD). The standards recognised in these treaties are further articulated in the United Nations Declaration on the Rights of Indigenous Peoples.

62. In monitoring Australia's performance against its human rights obligations, human rights treaty bodies, including the United Nations Human Rights Committee (HRCttee) and the Committee on the Elimination of Racial Discrimination (CERD), have provided recommendations for reform that would bring the native title system in line with international human rights standards.[42] Similar recommendations have also been made to Australia through the Universal Periodic Review (UPR).

63. Relevant recommendations from the HRCttee, the UPR and CERD are provided at Appendix 1.

64. In particular, in 2017, CERD noted that the Native Title Act was a "cumbersome tool that requires indigenous claimants to bear a high standard of proof to demonstrate ongoing connection with the land". [43] CERD recommended that Australia "move urgently to effectively protect the land rights of indigenous peoples, including by amending the Native Title Act 1993, with a view to lowering the standard of proof required and simplifying the applicable procedures" and ensuring "that the principle of free, prior and informed consent is incorporated into the Native Title Act 1993…as appropriate, and fully implemented in practice".[44]

65. In 2017, the HRCttee also noted its concern about the high standard of proof required to demonstrate ongoing connection under the Native Title Act, and that many recommendations from the ALRC *Connection to Country* report and the COAG Investigation have not been implemented.[45] The HRCttee recommended that Australia remove the barriers to the full protection of indigenous land rights and consider amending the Native Title Act, taking into account the Covenant and relevant international standards.[46]

(a) The United Nations Declaration on the Rights of Indigenous Peoples

66. The United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) sets out the minimum standards for the survival, dignity, well-being and rights of the world's Indigenous peoples.[47] It has been hailed as the most comprehensive and advanced international instrument on indigenous peoples and is recognised as reflecting a global consensus on indigenous peoples' rights.

67. The Declaration elaborates on the rights and principles contained in international human rights law, including the treaties to which Australia is a party, to the

specific cultural, historical, social and economic circumstances of indigenous peoples. In many ways, the Declaration reflects customary international law.[48]

68. The Declaration is underpinned by the following four key principles:

    - self-determination,
    - participation in decision making,
    - respect for and protection of culture, and
    - equality and non-discrimination.

69. Articles 25–32 of the Declaration provide clear guidance on how States can facilitate the realisation of Indigenous peoples' rights to lands, territories and resources, including:

    - legal recognition and protection of these lands, territories and resources with due respect given to customs, traditions and land tenure systems of Indigenous peoples concerned,[49]
    - the establishment and implementation of a fair, independent, impartial, open and transparent process that is developed in conjunction with, and gives due recognition to, Indigenous peoples' laws, traditions, customs and land tenure systems, and adjudicates the rights of Indigenous peoples to their lands, territories and resources,[50] and
    - that the free, prior and informed consent of Indigenous peoples concerned is obtained prior to the approval of any project affecting their lands, territories and resources, particularly in connection with development, utilisation or exploitation of mineral, water or other resources; to provide effective mechanisms and take appropriate measures to provide just and fair redress; and to mitigate adverse environmental, economic, social, cultural or spiritual impact.[51]

70. While the Native Title Act provides a process to recognise native title rights and interests of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, a gap exists between these rights and interests and the standard set by the Declaration.

71. In order for the native title system to be consistent with international human rights standards, any reforms to the Native Title Act should be reflective of the normative standards set by international human rights law as it pertains to the rights of Indigenous peoples, in particular the Declaration. A significant omission in the Options Paper is that it does not make single reference to the consistency of the reforms with the Declaration or other international human rights standards.

72. In her report following her visit to Australia in 2017, the Special Rapporteur on the rights of Indigenous peoples, Victoria Tauli-Corpuz, recommended that the Government:

> Review the system with multiple and overlapping legal regimes applicable to native title claims at the federal, state and territory levels, with a view to aligning them with the United Nations Declaration on the Rights of

Indigenous Peoples, which does not contain norms requiring proof of continuous occupation of land.[52]

73. The Commission supports this recommendation of the Special Rapporteur on the rights of Indigenous peoples.

Recommendation: that the Australian Government ensure that the *Native Title Act 1993* (Cth), the *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) are consistent with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples, and address concerns raised by the Committee on the Elimination of Racial Discrimination and the Human Rights Committee in relation to the *Native Title Act 1993* (Cth) and the broader native title system.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to include the principle of free, prior and informed consent in a manner consistent with the United Nations Declaration on the Rights of Indigenous Peoples.

5.2 The operation of s 223 of the Native Title Act

74. If a just and equitable native title system is to be achieved for Aboriginal and Torres Strait Islander peoples, the definition of native title under s223 of the Native Title Act should take into account the impacts of colonisation and the original intent of the Native Title Act.

75. Previous Aboriginal and Torres Strait Islander Social Justice Commissioners have highlighted how the process of native title claimants having to describe their relationships to each other, as well as their connection to their lands, territories and resources, can cause considerable stress for Aboriginal and Torres Strait Islander peoples, and lead to lateral violence within and between their families and communities.[53]

76. The Commission considers that a key priority for native title reform is the need to address the onerous standards of proof required for Aboriginal and Torres Strait Islander peoples to prove their connection to their lands, territories and resources from sovereignty to the current day.

(a) Presumption of continuity

77. Many stakeholders, including the Commission, support the introduction of a presumption to ease the evidentiary burden placed on Aboriginal and Torres Strait Islander applicants in proving native title.[54] The time that has elapsed between the assertion of sovereignty in 1788, and the recognition of native title in 1992, means that establishing the survival of native title rights and interest over a period of more than 200 years presents significant challenges of evidence. This process is particularly unjust when one considers the history of government policies that removed many Aboriginal and Torres Strait Islander peoples from their lands, thereby undermining their ability to prove continuous connection with their lands and waters, in accordance with their traditional laws and customs.

78. Chief Justice French AC of the High Court of Australia, in an extra-curial speech, suggested that the *Native Title Act 1993* could be amended to provide for a presumption in favour of native title applicants, which 'could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from settlement to the present time'.[55] The Committee on the Elimination of Racial Discrimination has also expressed concern about the onerous evidential burden on claimants proving native title.[56]

79. The Commission supports amending the Native Title Act to establish a presumption of continuous connection once the requirements of the registration test set out by s 190A of the Native Title Act have been met. This amendment would shift the onus of proof away from native title claimants having to prove continuity. Instead, in order to set aside the presumption of continuous connection, the respondent would need to demonstrate evidence of 'substantial interruption' in the acknowledgment of traditional laws and the observation of traditional customs by the native title claimants.[57]

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants.

(b) Consideration of reasons for interruption

80. With regard to the meaning of 'substantial interruption', as s 223 of the Native Title Act does not include continuity, it similarly does not contemplate what constitutes a substantial interruption in continuity. Given that the Court is currently unable to take into account the reasons for the interruption in the acknowledgment of traditional laws and the observation of traditional customs by the native title claimants,[58] what constitutes a 'substantial interruption' is therefore not settled. A consequence of the construction of s 223 is that there is little room to raise the impact of certain aspects of colonisation as a counter to the loss of, or change in, the nature of acknowledgment of laws or the observance of customs.[59]

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to provide a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded in relation to interruption or change in the acknowledgement and observance of traditional laws and customs, such as the forced removal of children and the forced relocation of communities onto missions.

(c) Definition of traditional

81. The current interpretation of 'traditional' under s223 of the Native Title Act sets a very high test for native title claimants to successfully meet the requirements of the definition of native title. Significantly, it does not allow for the traditional laws and customs of Aboriginal and Torres Strait Islander peoples to develop and adapt over time. As noted by the Special Rapporteur on the rights of indigenous peoples, Victoria Tauli-Corpuz, on her country visit to Australia in 2017:

> In order to succeed, claimants under the Native Title Act must prove that they have had an uninterrupted connection to the area being claimed, and that they have continued to practice their traditional laws and customs. This is an extraordinary challenge and burden of proof in the context of the historical forced removal and dispossession policies of Australia.[60]

82. A certain degree of flexibility should be allowed when determining connection under s 223 of the Native Title Act in order to accommodate the many ways that Aboriginal and Torres Strait Islander peoples' cultures have evolved and adapted since colonisation. This was recognised in Recommendation 5-1 of the ALRC *Connection to Country* report, which states that:

> The definition of native title in s 223 of the *Native Title Act 1993* (Cth) should be amended to provide that traditional laws and customs may adapt, evolve or otherwise develop.[61]

83. The Commission supports an approach that allows for 'the traditional laws acknowledged, and the traditional customs observed' under s 223 of the Native Title Act, to change over time, provided they remain 'identifiable', are consistent with the recognition of Aboriginal and Torres Strait Islander peoples' rights to culture and would clarify the level of adaptation allowable under the law.[62] Furthermore, a presumption of continuity as suggested above would be undermined if respondents could rebut the presumption simply by establishing that a traditional law or custom is not practised as it was at the date of sovereignty.

(d) Physical connection

84. Sections 62(1)(c) and 190B(7) of the Native Title Act outline that a native title claimant's application and the registration test for native title must establish that a member of the claim group currently has, or previously had, any 'traditional physical connection' with any of the land or waters covered by the application.

85. The ALRC *Connection to Country* Report recommended repealing ss 62(1)(c) and 190B(7) to reflect the decision of the Full Federal Court in *De Rose v South Australia No 2* (2005) 145 FCR ('De Rose (No 2)'), which rejected the need for claimants to prove an ongoing physical connection with the land.[63] The ALRC did not go so far as to recommend amending the Native Title Act in accordance with the judgment on the basis that 'the law is already clear in this regard'[64] and it wanted to avoid 'disturbing the settled law, causing uncertainty and unnecessary litigation'.[65]

86. In 2015, Mick Gooda, a former Aboriginal and Torres Strait Islander Social Justice Commissioner, noted that, although the changes recommended by the

ALRC may bring important clarity to sections of the Native Title Act that were in conflict with the substantive law in De Rose (No 2), he was disappointed that the ALRC did not recommend amending this point of the law. In particular, he noted that a specific amendment to reflect De Rose (No 2) would have "brought greater certainty to Aboriginal and Torres Strait Islander communities and eased the barriers still faced by our people in satisfying connection requirements when negotiating with State parties and others in consent determinations." [66]

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) so that it is consistent with the Full Federal Court's decision in *De Rose v South Australia No 2* (2005) 145 FCR.

5.3 Commercial native title rights and interests

87. The Native Title Act does not specify that native title rights and interests can be used for a commercial purpose. Notwithstanding this, the High Court in *Akiba v Commonwealth* (2013) 250 CLR 209 (Akiba) and *Western Australia v Brown* (2014) 306 ALR 168 (Brown) held that a distinction should not be made between a right and its exercise. Decisions such as *State of Western Australia v Willis* (2015) 239 FCR 175 (Willis) and *Rrumburriya Borroloola v Northern Territory of Australia* [2016] FCA 776 (Borroloola) further indicate that the courts are moving away from a narrow interpretation of the purpose for which a native title right may be exercised.

88. The ALRC *Connection to Country* report made a recommendation to give effect to the principle of a broadly-defined native title right as recognised in Akiba and Brown. The report stated that, 'a right may comprise a right that may be exercised for any purpose—including commercial and non-commercial purposes', and that s 223(2) of the Native Title Act should be repealed and substituted with a subsection to reflect this.[67] The intention behind this recommendation was to 'incorporate the principles from Akiba and Brown, which confirm that it is not necessary to provide evidence of the numerous ways in which a right might be exercised in order to confirm the existence of the right'.[68]

89. The Commission welcomes this interpretation by the ALRC regarding the nature and content of native title. The Native Title Act should be amended to reflect the principles from Akiba and Brown that native title rights may comprise a right that may be exercised for any purpose, including commercial or non-commercial purposes.

90. The ability of native title holders to exercise their native title rights and interests for any purpose, including commercial or non-commercial purposes, is consistent with the right of Aboriginal and Torres Strait Islanders to self-determination. This right is enshrined in article 3 of the Declaration, which states that Indigenous peoples should be able to 'freely pursue their economic, social and cultural development'.[69]

91. Amending the Native Title Act to enable native title holders to exercise their native title rights for commercial purposes is a key factor in ensuring economic development and providing a platform for sustainable business. It is also directly relevant to one of the objectives of the Options Paper: to improve the economic

development opportunities for Aboriginal and Torres Strait Islander peoples and their communities.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to clarify that native title rights may be exercised for any purposes, including commercial and non-commercial, and provide a non-exhaustive list of native title rights and interests.

5.4 Good faith

92. The Commission has raised concerns surrounding the obligation under the Native Title Act to negotiate in good faith in numerous submissions and Native Title reports.[70] This issue continues to be of ongoing concern to the Commission.

93. Article 32(2) of the Declaration provides that:

> States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.[71]

94. The good faith negotiation requirement is an important legal safeguard that native title parties have under the future act regime contained within the Native Title Act. However, uncertainty still exists for native title parties following the decision in *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 (FMG v Pilbara), which found the Native Title Act does not require parties to reach a certain stage in negotiations before a party can apply to the arbitral body for a determination that the future act can proceed. The Commission considers that the Federal Court decision in *FMG v Pilbara* has diluted the content of this important procedural right for native title parties.[72]

95. The Senate Standing Committee on Legal and Constitutional Affairs considered good faith negotiations in their report on the Native Title Amendment Bill 2012. The Committee recommended incorporating the Njamal Indicia set out in *Western Australia v Taylor* (1996) 134 FLR 211 (Western Australia v Taylor) as the good faith negotiation criteria.[73]

96. The Commission is of the view that the Native Title Act should contain explicit criteria as to what constitutes 'good faith' under the Act. This criteria should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth) and the Njamal Indicia. These legislative provisions should also be supplemented by a code or framework to guide the parties as to their duty to act in good faith.

97. The Commission is of the view that consideration should also be given to:

- including a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith, and

- inserting a 'reasonable person' test which may be used in assessing the actions of a proponent seeking a determination when negotiations are at a very early stage.[74]

98. The Native Title Amendment Bill 2012 proposed s 31A, which set out good faith requirements for parties in relation to negotiating a proposed agreement. These requirements were outlined in proposed s 31A(2) and included the negotiating parties:

    - attending and participating in meetings at reasonable times,
    - disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner,
    - making reasonable proposals and counter proposals,
    - responding to proposals made by other negotiation parties for the agreement in a timely manner,
    - giving genuine consideration to the proposals of other negotiation parties,
    - refraining from capricious or unfair conduct that undermined negotiation,
    - recognising and negotiating with the other negotiation parties or their representatives,
    - refraining from acting for an improper purpose in relation to the negotiations, and
    - any other matter the arbitral body considers relevant.

99. In its submissions to the ALRC *Connection to Country* report and the Senate Legal and Constitutional Affairs Legislation Committee inquiry for the Native Title Amendment Bill 2012, the Commission welcomed these amendments as they clarify the requirements for parties who need to demonstrate that they have negotiated in good faith. These amendments are a key legal safeguard for native title parties under the future act regime and address the uncertainty held by native title parties following the FMG v Pilbara decision.[75] The Commission continues to hold this view.

Recommendation: that the Australian Government amend the *Native Title Act 1993* (Cth) to include explicit criteria as to what constitutes 'good faith' in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the *Fair Work Act 2009* (Cth), consistent with the Njamal Indicia set out in the *Western Australia v Taylor,* and suggested legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith'.

5.5 Procedural rights over offshore areas

100. Section 26(3) of the Native Title Act limits the right to negotiate to acts that relate to a place that is on the landward side of the mean high-water mark of the sea. However, the High Court's decision in *Commonwealth v Yarmirr* (2001) 208 CLR 1 recognised that non-exclusive native title rights and interests can exist over offshore areas.

101. Previous Aboriginal and Torres Strait Islander Social Justice commissioners have highlighted the anomaly between s 26(3) and the courts recognition that non-exclusive native title rights and interests can exist in relation to offshore areas.[76]

102. An amendment to repeal s 26(3) was also included in the Native Title Amendment (Reform) Bill 2011, and the subject of inquiry and report by the Senate Legal and Constitutional Affairs Legislation Committee.[77]

Recommendation: permit procedural rights in relation to offshore areas.

6 INDIGENOUS PROPERTY RIGHTS PROJECT

103. From 2015 to 2016 the Commission facilitated the Indigenous Property Rights Project (Project), which provided a forum for a national dialogue between Aboriginal and Torres Strait Islander peoples, government and other stakeholders about ways to leverage the economic potential of the Indigenous Estate with the consent and guidance of Traditional Owners. The Project was directed by an Indigenous Strategy Group (ISG).

104. In May 2015, a Roundtable on Indigenous property rights was held in Broome, Western Australia, on Yawuru country. Mick Gooda, the former Aboriginal and Torres Strait Islander Social Justice Commissioner, made the following observation after the Roundtable:

> Overwhelmingly, what participants told us at the Roundtable was that whilst there has been an expansion of the Indigenous Estate since the commencement of the Native Title Act, it has not delivered sustainable outcomes for Aboriginal and Torres Strait Islander peoples. In some cases, participants identified that native title had actually become a burden that drowned them in a sea of regulation, red tape and process without the necessary support.[78]

105. In response to this failure to deliver sustainable outcomes, a number of key challenges that face Aboriginal and Torres Strait Islander peoples were explored at the Broome Roundtable and subsequent meetings and roundtables throughout Australia. Although an objective of the Project was the development of a set of recommendations comprising a reform agenda, the ISG did not reach consensus on a number of important issues before the Project ended due to lack of funding. Notwithstanding this, the Project delivered a clear set of well-articulated priorities 'to ensure that Aboriginal and Torres Strait Islander peoples are in a position to drive economic development of their choosing and to respond to development proposals from a position of strength where the Indigenous Estate is not compromised form the outset'.[79] Many of these priorities are relevant to the current reforms proposed in the Options Paper. These priorities include:

- providing Indigenous Estate holders with comprehensive and consistently updated 'maps' of the Indigenous Estate,
- comprehensive integration of information of the Indigenous Estate, including native title and land rights information, into state and territory land registers,
- long term lease arrangements over the Indigenous Estate,

- increasing incorporation options for PBC, including under the Corporations Act, and regulation by the Australian Securities & Investments Commission (ASIC) rather than the Office of the Registrar of Indigenous Corporations (ORIC), and

- progressing the recommendation of the Expert Indigenous Working Group in the Investigation into Indigenous Land Administration and Use for exemptions and concession from land user charges, land taxes and duties where Indigenous land is granted as freehold or leasehold to Indigenous land holding bodies and PBCs.

106. The Expert Indigenous Working Group also included some of these priorities in its Principles to the COAG Investigation. For example, ensuring that native title holders are able to choose how they set up and structure their PBC.[80]

Recommendation: that the Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.

Recommendation: that the Australian Government incorporate the priorities delivered from the Australian Human Rights Commission's Indigenous Property Rights Project into the development of any future reforms to the *Native Title Act 1993* (Cth) and the broader native title system, in particular in relation to enhancing economic development opportunities for Aboriginal and Torres Strait Islander peoples through native title.

Recommendation: that the Australian Government support and resource the continuation of the Indigenous Property Rights Project with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, in order for the agenda developed by the Indigenous Strategy Group to be further advance and achieved.

7 Appendix 1 — Relevant recommendations on Native Title Reform made by the Human Rights Council, the Human Rights Committee, Committee on Economic, Social and Cultural Rights, the Committee on the Elimination of Racial Discrimination and the Australian Human Rights Commission

Report/Submission	Recommendations
Human Rights Council	
Universal Periodic Review – 2011	86.102 Reform the Native Title Act 1993, amending strict requirements which can prevent the Aboriginal and Torres Strait Islander peoples from exercising the right to access and control their traditional lands and take part in cultural life (United Kingdom)
Committee on the Elimination of Racial Discrimination	
CERD Report on Australia – 2017	21. The Committee is concerned that after centuries of conflict and negotiations over their traditional land rights, the claims of indigenous peoples to land remain unresolved. Despite the Committee's previous recommendation (see CERD/C/AUS/CO/15-17, para. 18), the Native Title Act remains a cumbersome tool that requires indigenous claimants to provide a high standard of proof to demonstrate ongoing connection with the land. The Committee is also concerned about information that extractive and development projects are carried out on lands owned or traditionally used by indigenous peoples without seeking their prior, free and informed consent. 22. The Committee recommends that the State party move urgently to effectively protect the land rights of indigenous peoples, including by amending the Native Title Act 1993, with a view to lowering the standard of proof required and simplifying the applicable procedures. It also urges the State party to ensure that the principle of free, prior and informed consent is incorporated into the Native Title Act 1993 and into other legislation, as appropriate, and fully implemented in practice. Furthermore, the Committee recommends that the State party respect and apply the principles enshrined in the United Nations Declaration on the Rights of Indigenous Peoples and consider adopting

	a national plan of action to implement those principles. The State party is also encouraged to reconsider its position and ratify the International Labour Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169).
CERD Concluding Observations on Australia – 2010	18. Reiterating in full its concern about the Native Title Act 1993 and its amendments, the Committee regrets the persisting high standards of proof required for recognition of the relationship between Indigenous peoples and their traditional lands, and the fact that in spite of large investment of time and resources by Indigenous peoples, many are unable to obtain recognition of their relationship to land (art. 5). The Committee urges the State party to provide more information on this issue, and take the necessary measures to review the requirement of such a high standard of proof. The Committee is interested in receiving data on the extent to which the legislative reforms to the Native Title Act in 2009 will achieve "better native title claim settlements in a timely manner". It also recommends that the State party enhance adequate mechanisms for effective consultation with Indigenous peoples around all policies affecting their lives and resources.
CERD Concluding Observations on Australia – 2005	16. The Committee notes with concern the persistence of diverging perceptions between governmental authorities and indigenous peoples and others on the compatibility of the 1998 amendments to the Native Title Act with the Convention. The Committee reiterates its view that the Mabo case and the 1993 Native Title Act constituted a significant development in the recognition of indigenous peoples' rights, but that the 1998 amendments wind back some of the protections previously offered to indigenous peoples, and provide legal certainty for government and third parties at the expense of indigenous title. The Committee stresses in this regard that the use by the State party of a margin of appreciation in order to strike a balance between existing interests is limited by its obligations under the Convention. (article 5) The Committee recommends that the State party should not adopt measures withdrawing existing guarantees of indigenous rights and that it should make all efforts to seek the informed consent of indigenous peoples before adopting decisions relating to their rights to land. It further recommends that the State party reopen discussions with indigenous peoples with a view to discussing possible amendments to the Native Title Act and finding solutions acceptable to all. 17. The Committee is concerned about information according to which proof of continuous observance and acknowledgement of the laws and customs of indigenous peoples since the British acquisition of sovereignty over Australia is required to establish elements in the statutory definition of native title under the Native Title Act. The

	high standard of proof required is reported to have the consequence that many indigenous peoples are unable to obtain recognition of their relationship with their traditional lands. (article 5) The Committee wishes to receive more information on this issue, including on the number of claims that have been rejected because of the requirement of this high standard of proof. It recommends that the State party review the requirement of such a high standard of proof, bearing in mind the nature of the relationship of indigenous peoples to their land.
Human Rights Committee	
HRCttee Concluding Observations on Australia – 2017	51. While noting the various reforms implemented, the Committee remains concerned (see CCPR/C/AUS/CO/5, para. 16) about the high standard of proof required to demonstrate ongoing connection with the land under the Native Title Act 1993 and about the extreme difficulties in obtaining compensation under the current native title scheme for those people who had their native title extinguished. The Committee also notes that many recommendations of Australia Law Reform Commission's Connection to Country Review of the Native Title Act 1993 (Cth) and of the Council of Australian Governments' Investigation into Indigenous Land Administration and Use have not been implemented (arts. 2 and 27). 52. The State party should remove the barriers to the full protection of indigenous land rights and consider amending the Native Title Act 1993, taking into account the Covenant and relevant international standards.
HRCttee Concluding Observations on Australia – 2009	16. The Committee, while welcoming recent reforms, notes with concern the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act. It regrets the lack of sufficient steps taken by the State party to implement the Committee's recommendations adopted in 2000. (arts. 2 and 27) The State party should continue its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples.
Committee on Economic, Social and Cultural Rights	

CESCR Concluding Observations on Australia – 2017	15. The Committee is also concerned about: (c) Persistent difficulties in proving land titles under the Native Title Act 1993, which is still undergoing reform; 16. The Committee urges the State party to: (d) Proceed with the legal reform of the Native Title Act 1993 in close consultation with all concerned stakeholders, taking into consideration the recommendations of the Australian Law Reform Commission review of the Native Title Act 1993, and the report by the Council of Australian Governments into indigenous land administration and use; (e) Ensure that the principle of free, prior and informed consent is incorporated in the Native Title Act 1993 and in other legislation as appropriate, and is fully implemented in practice;
CESCR Concluding Observations on Australia – 2009	The Committee notes with concern that, despite the reforms to the native title system, the high cost, complexity and strict rules of evidence applying to claims under the Native Title Act, have a negative impact on the recognition and protection of the right of indigenous peoples to their ancestral lands. (art.15) The Committee recommends that the State party increase its efforts to improve the operation of the Native Title system, in consultation with Aboriginal and Torres Strait Islander Peoples, and remove all obstacles to the realization of the right to land of indigenous peoples.
CESCR Concluding Observations on Australia – 2000	16. The Committee notes with regret that the amendments to the 1993 Native Title Act have affected the reconciliation process between the State party and the indigenous populations, who view these amendments as regressive.
Australian Human Rights Commission — Aboriginal and Torres Strait Islander Social Justice Commissioner, Native Title Reports	
Native Title Report 2016	Recommendation 14: The Australian Government work with the states, territories and relevant stakeholders including the National Native Title Tribunal, to ensure the integration of key information about the Indigenous Estate on state and territory land title information systems.

	Recommendation 15: The Australian Government support Indigenous land holders to more comprehensively map the extent of their Indigenous Estate. Recommendation 16: The Australian Government support the Indigenous Strategy Group's endorsed model(s) for long-term leasing. Recommendation 17: The Australian Government support the review of state and territory land use planning regimes in consultation with Indigenous organisations to ensure the Traditional Owners of the Indigenous Estate can exercise the right to free, prior and informed consent regarding land use planning decisions. Recommendation 18: The Australian Government: • recognise the key roles that native title Prescribed Bodies Corporate (PBCs), Native Title Representative Bodies and Service Providers (NTRB/SPs), the National Native Title Council and locally based, Indigenous-led specialist cultural and economic development organisations play in driving and supporting economic development on the Indigenous Estate; and • ensure these Indigenous-led organisations are properly funded and supported to carry out this important work, in addition to any statutory duties they may have. Recommendation 19: The Australian Government support locally based research and scoping initiatives to identify Indigenous-led economic development opportunities suited to the unique land holdings and strengths of Traditional Owner groups, including opportunities to develop the cultural economy, partner with local operations and 'tap in' to industry initiatives in the broader region. Recommendation 22: The Australian Government support legislative and policy measures to allow Prescribed Bodies Corporate (PBCs) to freely choose the best incorporation method for their purposes and support the regulators to assist PBCs in governance and incorporation matters.
Native Title Report 2015	Recommendation 6: The Australian Government support and resource the Australian Human Rights Commission to undertake, with Aboriginal and Torres Strait Islander peoples, government and other stakeholders, a process to identify options for leveraging Indigenous property rights for economic development purposes.

	Recommendation 9: The Australian Government recognise the level of research and consultation involved in the Australian Law Reform Commission's Inquiry into the Native Title Act 1993 (Cth) and take action to implement its recommendations. Recommendation 10: The Australian Government take action to synchronise the work of the: • COAG Indigenous Expert Working Group • COAG Investigation into Indigenous land use and administration • White Paper on Developing Northern Australia • Australian Law Reform Commission's Inquiry into the Native Title Act 1993 (Cth) • Broome Roundtable on Indigenous property rights to avoid duplication and to maximise outcomes for Indigenous communities in relation to the land and native title into the future.
Native Title Report 2013	3.12: The Australian Government reintroduces the Native Title Amendment Bill 2012 (Cth) and supports its passage through the Parliament. 3.13: The Australian Government considers the following outstanding recommendations in the Native Title Report 2009: 1. That the Native Title Act 1993 (Cth) be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test. 2. That the Native Title Act 1993 (Cth) provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society.
Native Title Report 2012	1. That the Australian Government establish and resource a working group which includes members from Native Title Representative Bodies, Native Title Service Providers, Aboriginal and Torres Strait Islander peoples, Australian and State and Territory governments and respondent stakeholders including mining and pastoralists to be tasked with developing proposals to amend the Native Title Act.

	2. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* are given full effect. 3. That the Australian Government reviews the *Native Title Act 1993* (Cth), *the Native Title (Prescribed Bodies Corporate) Regulations* 1999 and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) to ensure the statutes are consistent with the United Nations Declaration on the Rights of Indigenous Peoples. 4. That the Australian Government amends the *Acts Interpretation Act 1901*(Cth) to ensure all legislation is interpreted in accordance with the *United Nations Declaration on the Rights of Indigenous Peoples*. 5. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternative legislation in relation to their lands, territories and resources.
Native Title Report 2011	**Review of the Native Title Act** 1. That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with the United Nations Declaration on the Rights of Indigenous Peoples. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. This inquiry could form part of the Australian Government's National Human Rights Action Plan. **International human rights mechanisms** 2. That the Australian Government take steps to formally respond to, and implement, recommendations which advance the rights of Aboriginal and Torres Strait Islander peoples to their lands, territories and resources, made by international human rights mechanisms including: ◦Special Rapporteur on the rights of indigenous peoples • Expert Mechanism on the Rights of Indigenous Peoples • United Nations Permanent Forum on Indigenous Issues • Treaty reporting bodies

	Implementation of the recommendations from Native Title Reports 4. That the Australian Government should implement outstanding recommendations from the Native Title Report 2010 and provide a formal response for next year's Report which outlines the Government's progress towards implementing the recommendations from both the Native Title Report 2010 and Native Title Report 2011. **Implementation of the Declaration** 5. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect. **Lateral violence, cultural safety and security in the native title system** 6. That targeted research is undertaken to develop the evidence base and tools to address lateral violence as it relates to the native title system. This research should be supported by the Australian Government. 8. That all governments working in native title ensure that their engagement strategies, policies and programs are designed, developed and implemented in accordance with the United Nations Declaration on the Rights of Indigenous Peoples. In particular, this should occur with respect to the right to self-determination, the right to participate in decision making guided by the principle of free, prior and informed consent, non-discrimination, and respect for and protection of culture. 9. That the Australian Government pursue legislative and policy reform that empowers Aboriginal and Torres Strait Islander peoples and their communities, in particular: a. reforming the Australian Constitution to recognise Aboriginal and Torres Strait Islander peoples, and address the provisions that permit discrimination on the basis of race b. ensuring that the National Human Rights Framework includes the United Nations Declaration on the Rights of Indigenous Peoples to guide its application of human rights as they apply to Aboriginal and Torres Strait Islander peoples c. creating a just and equitable native title system that is reinforced by a Social Justice Package.

Native Title Report 2010	**Chapter 2: 'The basis for a strengthened partnership': Reforms related to agreement-making** 2.1 That the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards. Further, that the terms of reference for this review be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Such terms of reference could include, but not be limited to, an examination of: • the impact of the current burden of proof • the operation of the law regarding extinguishment • the future act regime • options for advancing negotiated settlements (including the potential for alternative, comprehensive settlements). 2.2 That the Australian Government work with Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups to explore options for streamlining agreement-making processes, including options for template agreements on matters such as the construction of public housing and other infrastructure. 2.3 That the Australian Government make every endeavour to finalise the Native Title National Partnership Agreement. Further, that the Australian Government consider options and incentives to encourage states and territories to adopt best practice standards in agreement-making. 2.4 That the Australian Government pursue reforms to clarify and strengthen the requirements for good faith negotiations in 2010–2011. 2.5 That the Australian, state and territory governments commit to only using the new future act process relating to public housing and infrastructure (introduced by the Native Title Amendment Act (No 1) 2010 (Cth)) as a measure of last resort. 2.6 That the Australian Government begin a process to establish the consultation requirements that an action body must follow under the new future act process introduced by the Native Title Amendment Act (No 1) 2010 (Cth). Further, that the Australian Government ensure that Aboriginal and Torres Strait Islander peoples are able to participate effectively in the development of these requirements.

	2.7 That the Australian Government: • consult and cooperate in good faith in order to obtain the free, prior and informed consent of Aboriginal and Torres Strait Islander peoples • provide a clear, evidence-based policy justification before introducing reforms that are designed to ensure the 'sustainability' of native title agreements. 2.8 That, as part of its efforts to ensure that native title agreements are sustainable, the Australian Government ensure that Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate and other Traditional Owner groups have access to sufficient resources to enable them to participate effectively in negotiations and agreement-making processes. **Chapter 3: Consultation, cooperation, and free, prior and informed consent: The elements of meaningful and effective engagement** 3.1 That any consultation document regarding a proposed legislative or policy measure that may affect the rights of Aboriginal and Torres Strait Islander peoples contain a statement that details whether the proposed measure is consistent with international human rights standards. This statement should: • explain whether, in the Australian Government's opinion, the proposed measure would be consistent with international human rights standards and, if so, how it would be consistent • pay specific attention to any potentially racially discriminatory elements of the proposed measure • where appropriate, explain the basis upon which the Australian Government asserts that the proposed measure would be a special measure • be made publicly available at the earliest stages of consultation processes. 3.2 That the Australian Government undertake all necessary consultation and consent processes required for the development and implementation of a special measure.
Native Title Report 2009	**Chapter 2: Changing the culture of native title** 2.1 That the Australian Government ensure that reforms to the native title system are consistent with the rights affirmed by the Declaration on the Rights of Indigenous Peoples.

	2.2 That the Australian Government adopt and promote the recommendations of the Expert Meeting on Extractive Industries through the processes of the Council of Australian Governments. For example, the recommendations could form the basis of best practice guidelines for extractive industries. 2.3 That the Australian Government work with Aboriginal and Torres Strait Islander peoples to develop a social justice package that complements the native title system and significantly contributes to real reconciliation between Indigenous and non-Indigenous Australians. **Chapter 3: Towards a just and equitable native title system** 3.1 That the Australian Government adopt measures to improve mechanisms for recognising traditional ownership. 3.2 That the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the applicant has met the relevant threshold requirements. 3.3 That the Native Title Act provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgement and observance of traditional law and custom and of the relevant society. 3.4 That the Native Title Act be amended to define 'traditional' more broadly than the meaning given at common law, such as to encompass laws, customs and practices that remain identifiable over time. 3.5 That section 223 of the Native Title Act be amended to clarify that claimants do not need to establish a physical connection with the relevant land or waters. 3.6 That the Native Title Act be amended to empower Courts to disregard an interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so. 3.7 That the Australian Government fund a register of experts to help NTRBs and native title parties access qualified, independent and professional advice and assistance. 3.8 That the Australian Government consider introducing amendments to sections 87 and 87A of the Native Title Act to either remove the requirement that the Court must be satisfied that it is 'appropriate' to make the order sought or to provide greater guidance as to when it will be 'appropriate' to grant the order.

	3.9 That the Australian Government work with state and territory governments to encourage more flexible approaches to connection evidence requirements. 3.10 That the Australian Government facilitate native title claimants having the earliest possible access to relevant land tenure history information. 3.11 That the Australian, state and territory governments actively support the creation of a comprehensive national database of land tenure information. 3.12 That the Australian Government consider options to amend the Native Title Act to include stricter criteria on who can become a respondent to native title proceedings. 3.13 That section 84 of the Native Title Act be amended to require the Court to regularly review the party list for all active native title proceedings and, where appropriate, to require a party to show cause for its continued involvement. 3.14 That the Australian Government review section 213A of the Native Title Act and the Attorney-General's Guidelines on the Provision of Financial Assistance by the Attorney-General under the Native Title Act 1993 to provide greater transparency in the respondent funding process. 3.15 That the Australian Government consider measures to strengthen procedural rights and the future acts regime, including by: • repealing section 26(3) of the Native Title Act • amending section 24MD(2)(c) of the Native Title Act to revert to the wording of the original section 23(3) • reviewing time limits under the right to negotiate • amending section 31 to require parties to have reached a certain stage before they may apply for an arbitral body determination • shifting the onus of proof onto the proponents of development to show their good faith • allowing arbitral bodies to impose royalty conditions. 3.16 That section 223 of the Native Title Act be amended to clarify that native title can include rights and interests of a commercial nature.

	3.17 That the Australian Government explore options, in consultation with state and territory governments, Indigenous peoples and other interested persons, to enable native title holders to exercise native title rights for a commercial purpose. 3.18 That the Australian Government explore alternatives to the current approach to extinguishment, such as allowing extinguishment to be disregarded in a greater number of circumstances. 3.19 That section 86F of the Native Title Act be amended to clarify that an adjournment should ordinarily be granted where an application is made jointly by the claimant and the primary respondent unless the interests of justice otherwise require, having regard to such factors as: • the prospect of a negotiated outcome being reached • the resources of the parties • the interests of the other parties to the proceeding. 3.22 That the Australian Government work with native title parties to identify and develop criteria to guide the evaluation and monitoring of agreements.
Native Title Report 2008	**Chapter 2: Changes to the native Title system – one year on** 2.1 That any further review or amendment that the Australian Government undertakes to the native title system be done with a view to how the changes could impact on the realisation of human rights of Aboriginal and Torres Strait Islander peoples. 2.2 That the Australian Government respond to the recommendations made in the Native Title Report 2007 on the 2007 changes to the native title system. 2.5 That the Australian Government create a separate funding stream specifically for Prescribed Bodies Corporate and corporations which are utilising the procedural rights afforded under the Native Title Act.

	2.7 That the Registrar of Indigenous Corporations and the Minister for Families, Housing, Community Services and Indigenous Affairs, work closely to ensure that funding provided to registered PBCs is consistent with the aim of building PBC's capacity to operate. **Chapter 3: Selected native title cases – 2007-2008** 3.1 That the Australian Government pursues consistent legislative protection of the rights of Indigenous peoples to give consent and permission for access to or use of their lands and waters. A best practice model would legislatively protect the right of native title holders to give their consent to any proposed acquisition. A second best option would be to amend s 26 of the Native Title Act to reinstate the right to negotiate for all compulsory acquisitions of native title, including those that take place in a town or city. 3.2 That the Australian Government amend the Native Title Act to provide a presumption of continuity. This presumption could be rebutted if the non-claimant could prove that there was 'substantial interruption' to the observance of traditional law and custom by the claimants. 3.3 That the Australian Government amend the Native Title Act to address the court's inability to consider the reasons for interruption in continuity. Such an amendment could state: In determining a native title determination made under section 61, the Court shall treat as relevant to the question whether the applicant has satisfied the requirements of section 223: • whether the primary reason for any demonstrated interruption to the acknowledgment of traditional laws and the observance of traditional customs is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander • whether the primary reason for any demonstrated significant change to the traditional laws acknowledged and the traditional customs observed by the Aboriginal peoples or the Torres Strait Islanders is the action of a State or Territory or a person who is not an Aboriginal person or Torres Strait Islander. 3.4 That the Australian Government amend the Native Title Act to define 'traditional' for the purposes of s 223 as being satisfied when the culture remains identifiable through time.
Native Title Report 2007	**Chapter 1: Changes to the Native Title System**

	1.1 That the Australian Government immediately appoint an independent person to conduct a comprehensive review of the whole native title system and report back to the Attorney-General by 30 June 2010. This review is to: • focus on delivering the objects of the Native Title Act in accordance with the preamble; • seek significant simplification of the legislation, and structures so that all is in an easily discernible form; and • call for wide input from all stakeholders in native title, especially ensuring that the voice of Indigenous peoples is heard. 1.2 That the government convene a national summit on the native title system with extensive representation. 1.3 That the Attorney-General monitor the 2007 changes to the Native Title Act and prepare a report to Parliament before the end of 2009, in such a way that it identifies: • the extent to which Indigenous people are gaining recognition and protection of native title in accord with the preamble to the Native Title Act; • the extent, if at all, to which the parties' rights are compromised by the changes; and • the extent to which the new powers given to the National Native Title Tribunal are used. **Chapter 8: Where to native title** 8.1 That the Attorney-General use the power in Section 137 of the Native Title Act to ask the National Native Title Tribunal to hold a public inquiry: • into how the compensation provisions of the Native Title Act are currently operating; and • whether they operate to effectively provide for Indigenous peoples' access to their human right to compensation. In undertaking the inquiry the tribunal collaborate with native title claimants, Indigenous communities, native title representative bodies, prescribed bodies corporate, registered native title bodies corporate, the Federal Court, and the federal, state and territory governments. The tribunal present to Parliament specific options for reform: • to ensure Indigenous people can effectively and practically access their human right to compensation; and • to ensure the amount of compensation is just, fair and equitable.

	8.2 That the Native Title Act be amended to insert a definition of 'traditional' for the purposes of Section 223 that provides for the revitalisation of culture and recognition of native title rights and interests. 8.3 That Section 82 of the Native Title Act be amended to include Subsections (1), (2), and (3) of Section 82 as it was originally enacted in 1993. 8.4 That the Attorney-General prepare guidelines for the Federal Court and parties to native title proceedings on the application of Section 82 of the Native Title Act. In preparing these guidelines the Attorney-General should consult closely with Indigenous peoples to ensure the guidelines reflect and respect the culture and practices of Indigenous peoples.
Native Title Report 2005	**Recommendation 1: Native title policy reform** That State, Territory and Commonwealth governments alter their native title policies to: • increase funding to NTRBs and PBCs • adopt and adhere to the National Principles on economic development for Indigenous lands set out in the Native Title Report 2004. These principles are that native title agreements and the broader native title system should: 1. Respond to the traditional owner group's goals for economic and social development 2. Provide for the development of the group's capacity to set, implement and achieve their development goals 3. Utilise to the fullest extent possible the existing assets and capacities of the group 4. Build relationships between stakeholders, including a whole of government approach to addressing economic and social development on Indigenous lands 5. Integrate activities at various levels to achieve the development goals of the group.

Australian Human Rights Commission – Submission to Connection to Country: Review of the Native Title Act 1993 (Cth) (ALRC Report 126)	
Australian Law Reform Commission	The Australian Human Rights Commission recommends that the ALRC: 1. assess the Native Title Act and the broader operation of the native title system against international human rights standards and address concerns raised by the Committee on the Elimination of Racial Discrimination. 2. work in conjunction with existing native title working groups, review and inquiry committees to ensure an efficient and consistent approach is applied to reform processes. 3. recommend that the Australian Government reintroduces and supports the passage of the Native Title Amendment Bill 2012 through the Parliament. 4. recommend that the Native Title Act be amended so that it is consistent with the Full Federal Court's decision in De Rose. 5. recommend that the Native Title Act be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test; and provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society, rebuttable if the respondent proves that there was 'substantial interruption' to the observance of traditional law and custom by the claimants. 6. Recommends amendments to the Native Title Act that: i. address the Court's inability to consider the reasons for interruptions in continuity, and empower the Court to disregard any interruption or change in the acknowledgement and observance of traditional laws and customs where it is in the interests of justice to do so. ii. clarifies that where the State establishes that the society which existed at settlement has not been able to maintain 'continuity and vitality' in its observance of laws and customs due to the actions of settlers, that the lack of continuity and vitality shall be disregarded. iii. provides a definition or a non-exhaustive list of historical events to guide courts as to what should be disregarded, such as the forced removal of children and the forced relocation of communities onto missions. 7. recommend that the Australian Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment of native title to be disregarded. 8. recommends reverting s 24MD(2)(c) of the Native Title Act to its original wording. 9. recommend that the Native Title Act be amended to clarify that native title rights and interests can include commercial or economic rights and interests.

	10. recommend repealing section 26(3) of the Native Title Act to allow procedural rights in relation to offshore areas. 11. recommends inclusion of explicit criteria as to what constitutes 'good faith' in the Native Title Act. The criteria for good faith should be based on the model set out in s 228 of the Fair Work Act 2009 (Cth), consistent with the Njamal Indicia set out in the Western Australia v Taylor, and suggested legislative provisions should be supplemented by a code or framework to 'guide the parties as to their duty to act in good faith'.
Australian Human Rights Commission – Submissions to Parliamentary Inquiries concerning the Native Title Amendment Bill 2012	
House Standing Committee on Aboriginal and Torres Strait Islander Affairs Inquiry into the Native Title Amendment Bill 2012	1. Support the passage of the Native Title Amendment Bill 2012. 2. Consider incorporating the changes outlined in paragraph 15 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways: i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants. 3. Consider the implications of the amendment outlined in paragraph 28 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body. 4. Collaborate with the Senate Legal and Constitutional Affairs Legislation Committee on their Inquiry into the Native Title Amendment Bill 2012. 5. Consider the following outstanding recommendations in the Native Title Report 2012 in relation to implementing the United Nations Declaration on the Rights of Indigenous Peoples: i. That the Australian Government work in partnership with Aboriginal and Torres Strait Islander peoples to develop a national strategy to ensure the principles of the United Nations Declaration on the Rights of Indigenous Peoples are given full effect. ii. That the Australian Government ensures that the Native Title Act 1993 (Cth), the Native Title (Prescribed Bodies Corporate) Regulations 1999 and the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth) are consistent with the United Nations Declaration on the Rights of Indigenous Peoples. 6. Consider the following outstanding recommendations in the Native Title Report 2009 in relation to shifting the burden of proof for native title:

	i. That the Native Title Act 1993 be amended to provide for a shift in the burden of proof to the respondent once the native title applicant has met the relevant threshold requirements in the registration test. ii. That the Native Title Act 1993 provide for presumptions in favour of native title claimants, including a presumption of continuity in the acknowledgment and observance of traditional law and custom and of the relevant society. 7. Consider repealing section 26(3) of the Native Title Act 1993 to allow procedural rights in relation to offshore areas. 8. Consider amending section 223(2) of the Native Title Act 1993 to specify that native title rights and interests include the 'right to trade and other rights and interests of an economic nature'. 9. Consider the following outstanding recommendation in the Native Title Report 2012 in relation to Prescribed Bodies Corporate: i. That the Australian Government provides Prescribed Bodies Corporate with adequate funding levels to meet their administrative, legal and financial functions. The level of funding should reflect the particular circumstances of the Prescribed Body Corporate, such as the location, membership, cultural and language requirements, and the extent to which the Prescribed Body Corporate may be required to deal with alternate legislation in relation to their lands, territories and resources. 10. Recommend that the Australian Government establish an independent inquiry to review the operation of the native title system and explore options for native title reform, with a view to aligning the system with the United Nations Declaration on the Rights of Indigenous Peoples. The terms of reference for this inquiry should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples. Participants in this inquiry should include representatives from Native Title Representative Bodies, Native Title Service Providers, Prescribed Bodies Corporate, Aboriginal and Torres Strait Islander peoples, Australian, State and Territory governments, and respondent stakeholders including mining and pastoral interests.
Senate Legal and Constitutional Affairs Legislation Committee	1. Support the passage of the Native Title Amendment Bill 2012. 2. Consider incorporating the changes outlined in paragraph 13 of this submission into the Native Title Amendment Bill 2012 – that is, expand the proposed section 47C in the following two ways: i. alter the wording of the amendment so that the proposed section 47C operates in a manner similar to sections 47, 47A and 47B; namely, so that it is understood that agreement will be provided to disregard historical extinguishment as the starting point rather than requiring such agreement to be reached for every potential matter ii. expand section 47C to allow historical extinguishment of native title to be disregarded over any areas of Crown land where there is agreement between the government and native title claimants.

	3. Consider the implications of the amendment outlined in paragraph 26 of this submission into the Native Title Amendment Bill 2012 – in particular, the implications of replacing section 24CK with a provision that removes the objection process for ILUAs certified by a native title representative body. 4. Collaborate with the House Standing Committee on Aboriginal and Torres Strait Islander Affairs on an amendment to the Bill that would effectively reverse the onus of proof for native title claimants in relation to their on-going connection to their traditional lands, territories and resources, and to implement any other proposals recommended by that Committee for the future reform of the native title system.
Australian Human Rights Commission Submission — Native Title Amendment (Reform) Bill 2011	
Senate Legal and Constitutional Affairs Committee	1. The Committee endorse the stated intention of the Reform Bill. 2. The Committee recommend the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the United Nations Declaration on the Rights of Indigenous Peoples. 3. A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances. 4. The Committee recommend the Australian Government give full consideration to items 5-9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.

[1] The Commission is Australia's national human rights institution with 'A' status accreditation, and is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). The Commission has responsibilities under the AHRC Act to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples. The Commission also has responsibilities to report on the effect of the *Native Title Act 1993* (Cth) on the exercise and enjoyment of human rights of Aboriginal people and Torres Strait Islanders. See s 209 of the *Native Title Act 1993* (Cth).
[2] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
[3] *Native Title Act 1993* (Cth), preamble.
[4] *Native Title Amendment Act 1998* (Cth). Also see Z Antonios, *Native Title Report 1998,* Human Rights and Equal Opportunity Commission, pp 73–116; T Calma, *Native Title Report 2009*, Australian Human Rights Commission, pp 4–7.
[5] T Calma, *Native Title Report 2009*, Australian Human Rights Commission, p 6.
[6] *Native Title Amendment Act (No 1) 2010* (Cth). See M Gooda, *Native Title Report 2010*, Australian Human Rights Commission, pp 36–37.
[7] M Gooda, *Social Justice and Native Title Report 2013,* Australian Human Rights Commission, p 76.
[8] M Gooda, *Social Justice and Native Title Report 2016,* Australian Human Rights Commission, p 115.
[9] Report to the Council of Australia Governments, "Investigation into Indigenous Land Administration and Use", Senior Officers Working Group (December 2015), p.10.
[10] M Gooda, *Social Justice and Native Title Report 2013,* Australian Human Rights Commission, p 104.
[11] T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Human Rights and Equal Opportunity Commission (2006), p 35.
[12] M Gooda, *Social Justice and Native Title Report 2016,* Australian Human Rights Commission (2013), p 129.
[13] See Australian Human Rights Commission, Social Justice and Native Title Reports, at: http://www.humanrights.gov.au/social-justice-and-native-title-reports
[14] M Gooda, *Social Justice and Native Title Report 2013,* Australian Human Rights Commission, p 84; and Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), pp. 30-32.
[15] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015) p.30.
[16] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015) p.31.
[17] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015) p.31.
[18] M Gooda, *Social Justice and Native Title Report 2015,* Australian Human Rights Commission (2015), p.84.
[19] M Gooda, *Social Justice and Native Title Report 2015,* Australian Human Rights Commission (2015), p.84.
[20] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.31.
[21] Report to the Council of Australia Governments, "Investigation into Indigenous Land Administration and Use", Senior Officers Working Group (December 2015), p.11.
[22] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295, UN Doc A/61/L.67 (2007), art 32(2).
[23] Report to the Council of Australia Governments, "Investigation into Indigenous Land Administration and Use", Senior Officers Working Group (December 2015), Table 1 Item 16.
[24] Options Paper, "Reforms to the *Native Title Act 1993* (Cth)", November 2017, Attorney-General's Department, p. 25.
[25] Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the Native Title Amendment Bill 2012, p.7.
[26] Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the Native Title Amendment Bill 2012, p.8.
[27] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126, recommendations 10.1, 10.2, 10.3 and 10.4; and Report to the Council of Australia Governments, "Investigation into Indigenous Land Administration and Use", Senior Officers Working Group (December 2015), Table 1 Item 2, Table 1 Item 9, Table 1 Item 10, and Table 1 Item 11.

[28] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No126 (2015), p.33.
[29] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No126 (2015), p.25.
[30] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), pp.42-43.
[31] Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the Native Title Amendment Bill 2012, p.5; and Submission 005, the Australian Human Rights Commission, to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, inquiry in to the Native Title Amendment Bill 2012, pp.7-8.
[32] Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the Native Title Amendment Bill 2012; and Submission 005, the Australian Human Rights Commission, to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, inquiry in to the Native Title Amendment Bill 2012.
[33] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in Australia,* Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29.
[34]See former s 23(3) of the *Native Title Act 1993* (Cth); and T Calma, *Native Title Report 2009*, Australian Human Rights Commission, p.106.
[35] M Gooda, *Native Title Report 2011*, Australian Human Rights Commission, p.187.
[36] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 39.
[37] United Nations Permanent Forum on Indigenous Issues, A draft guide on the relevant principles contained in the United Nations Declaration on the Rights of Indigenous Peoples, International Labour Organisation Convention No 169 and International Labour Organisation Convention No 107 that relate to Indigenous land tenure and management arrangements, UN Doc E/C.19/2009/CRP.7 (undated), p 21.
[38] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No126 (2015), recommendations 5-1, 5-2, 5-3.
[39] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 42.
[40] M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission, p 12.
[41] M Dodson, *Native Title Report January–June 1994*, Human Rights and Equal Opportunity Commission, p 12.
[42] See for example, United Nations General Assembly, *Report of the Working Group on the Universal Periodic Review – Australia,* Human Rights Council, Seventeenth Session, 24 March 2011, UN Doc A/HRC/17/10, pp 19-21, recommendations 86.102-86.118; Committee on the Elimination of Racial Discrimination, concluding observations, UN Doc CERD/C/AUS/CO/15-17 (2010) para 18; and Human Rights Committee, concluding observations*,* UN Doc CCPR/C/AUS/CO/5 (2009), para 16.
[43] Committee on the Elimination of Racial Discrimination, 2596th and 2597th meetings, 26 December 2017: concluding observations on the 18th to 20th periodic reports of Australia (CERD/C/AUS/CO/18-20), [21].
[44] Committee on the Elimination of Racial Discrimination, 2596th and 2597th meetings: concluding observations on the 18th to 20th periodic reports of Australia (CERD/C/AUS/CO/18-20), [22].
[45]Human Rights Committee, 121st session, 9 November 2017: concluding observations on the 6th periodic report of Australia (CCPR/C/AUS/CO/6), [51].
[46] Human Rights Committee, 121st session, 9 November 2017: concluding observations on the sixth periodic report of Australia (CCPR/C/AUS/CO/6), [52].
[47] *United Nations Declaration on the Rights of Indigenous Peoples,* UN Doc A/Res/61/295 (13 September 2007).
[48] For a discussion of the legal status of the Declaration, see P Joffe, 'Canada's Opposition to the UN Declaration: Legitimate Concerns or Ideological Bias?' in J Hartley, P Joffe and J Preston (eds), *Realizing the UN Declaration on the Rights of Indigenous Peoples: Triumph, Hope, and Action* (2010) 70, pp 85–93; Permanent Forum on Indigenous Issues, Report on the eighth session, UN Doc E/C.19/2009/14 (2009), Annex, General Comment 1, paras 6-13.
[49] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Art 26.
[50] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Art 27.
[51] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Art 32.

[52] Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, 8 August 2017 (A/HRC/36/46/Add.2), p.21.
[53] Mick Gooda, *Native Title Report 2011,* Australian Human Rights Commission, Chapters 2 and 4.
[54] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.218; see also AIATSIS, Submission 36; Law Council of Australia, Submission 35; National Congress of Australia's First Peoples, Submission 32; Kimberley Land Council, Submission 30; NSW Young Lawyers Human Rights Committee, Submission 29; Central Desert Native Title Services, Submission 26; Queensland South Native Title Services, Submission 24; Goldfields Land and Sea Council, Submission 22; Native Title Services Victoria, Submission 18; North Queensland Land Council, Submission 17; National Native Title Council, Submission 16; Law Society of Western Australia, Submission 9; Cape York Land Council, Submission 7; Just Us Lawyers, Submission 2; Australian Human Rights Commission, Submission No 1 to the Australian Law Reform Commission, Review of the Native Title Act (14 May 2014) 12.
[55] Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), [29].
[56] Committee on the Elimination of Racial Discrimination, Concluding Observations, UN Doc CERD/C/AUS/CO/15-17 (2010).
[57] Section 190A of the *Native Title Act 1993* (Cth). Also see T Calma, *Native Title Report 2009*, Australian Human Rights Commission, p xv.
[58] *Yorta Yorta v Victoria* (2002) 214 CLR 422, para 90.
[59] See Recommendation 5-1 from the Australian Law Reform Commission, Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report, Report No 126 (2015), p.29.
[60] Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Australia, 8 August 2017, A/HRC/36/46/Add.2.
[61] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No126 (2015), p.29.
[62] For a discussion of the rights of Indigenous peoples to culture, including adaptation and revitalisation of culture, see T Calma, *Native Title Report 2008*, Australian Human Rights Commission, pp 87−88.
[63] *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.
[64] Australian Law Reform Commission, Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report, Report No 126 (2015), p.20, citing *De Rose v South Australia (No 2)* (2005) 145 FCR 290, 306; see also *Dale v Moses* [2007] FCAFC 82 (7 June 2007) [306]; *Moses v Western Australia* (2007) 160 FCR 148, 222.
[65] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.181.
[66] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.182.
[67] See Recommendation 8-1: the Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.30.
[68] Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993 (Cth) Final Report*, Report No 126 (2015), p.244.
[69] *United Nations Declaration on the Rights of Indigenous Peoples,* UN Doc A/Res/61/295 (13 September 2007) art 3.
[70] See Australian Human Rights Commission, Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the Native Title Amendment Bill 2012; Submission 005, the Australian Human Rights Commission, to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, inquiry in to the Native Title Amendment Bill 2012; and Australian Human Rights Commission, Submission 24 to the Senate Legal and Constitutional Affairs Committee, Native Title Amendment (Reform) Bill 2011.
[71] United Nations Declaration on the Rights of Indigenous Peoples, GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), Art 32(2).
[72] T Calma, *Native Title Report 2009*, Australian Human Rights Commission, p 34.
[73] Senate Standing Committees on Legal and Constitutional Affairs, *Native Title Amendment Bill 2012 [Provisions],* Commonwealth of Australia 2013, 18 March 2013, pp vii and 7-9.
[74] For further information on these options, see T Calma, *Native Title Report 2009*, Australian Human Rights Commission, pp 31–35 & 104–107; S Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, p 15; and Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [76].
[75] See See Australian Human Rights Commission, Submission 3, the Australian Human Rights Commission, to the Senate Legal and Constitutional Affairs Legislation Committee, inquiry in to the

Native Title Amendment Bill 2012; Submission 005, the Australian Human Rights Commission, to the House Standing Committee on Aboriginal and Torres Strait Islander Affairs, inquiry in to the Native Title Amendment Bill 2012; and Australian Human Rights Commission, Submission 24 to the Senate Legal and Constitutional Affairs Committee, Native Title Amendment (Reform) Bill 2011.

[76] See W Jonas, *Native Title Report* 2000, Australian Human Rights Commission, pp 85–115; and T Calma, *Native Title Report 2009*, Australian Human Rights Commission, p 106.

[77] Senate Legal and Constitutional Affairs Legislation Committee, *Inquiry into the Native Title Amendment (Reform) Bill 2011* (Parliament of Australia).

[78] M Gooda, *Social Justice and Native Title Report 2015,* Australian Human Rights Commission, p.70.

[79] M Gooda, *Social Justice and Native Title Report 2016,* Australian Human Rights Commission, p.123.

[80] Report to the Council of Australia Governments, "Investigation into Indigenous Land Administration and Use", Senior Officers Working Group (December 2015), p.12.