

Investigation into Indigenous Land Administration and Use

Report to the Council of Australian Governments

Senior Officers Working Group
December 2015

The Senior Officers Working Group acknowledges the significant contribution of Mr Brian John Wyatt, Deputy Chair of the Expert Indigenous Working Group, who sadly passed away in October 2015. Mr Wyatt was an integral part of this Investigation, and made a life-long contribution to the lives of Aboriginal and Torres Strait Islander people.

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EXECUTIVE SUMMARY

Today, Indigenous Australians' rights and interests in land are formally recognised over around 40 per cent of the land area of Australia.¹ A further 37 per cent of Australia is subject to application for recognition of native title rights.² This is a significant asset base for Indigenous Australians that has not reached its full potential in supporting their economic independence and in turn their social, cultural and physical wellbeing.

On 10 October 2014 the Council of Australian Governments (COAG) announced an urgent Investigation into Indigenous land administration and use, to enable traditional owners to readily attract private sector investment and finance to develop their own land with new industries and businesses in order to provide jobs and economic advancement for Indigenous people.

A Senior Officers Working Group was established to take forward the Investigation. The working group's membership is drawn from first ministers' departments and departments with relevant Indigenous affairs policy responsibility from the Commonwealth, New South Wales, Victoria, Queensland, South Australia and the Northern Territory.

On 16 December 2014, native title ministers referred a range of native title reform proposals to improve the efficiency and effectiveness of the native title system to the Investigation for consideration and consultation with key Indigenous stakeholders. The Investigation has considered these proposals, and where supported for implementation or further consideration, these are included in the Recommendations. The feedback received on all the proposals (including those that are not recommended for implementation or further consideration) will be provided to the Attorney-General.

An Expert Indigenous Working Group was established by the Commonwealth in February 2015 to provide:

- guidance to the Investigation on policy directions and proposals for Indigenous land administration and use;
- input and advice on the report to COAG; and
- leadership on consultation and engagement with Indigenous stakeholders.

The Expert Indigenous Working Group has worked with the Senior Officers Working Group to ensure the report reflect the views of Indigenous stakeholders.

The members of the Expert Indigenous Working Group are Mr Wayne Bergmann (Chair), Mr Brian Wyatt (Deputy Chair), Dr Valerie Cooms, Mr Craig Cromelin, Mr Maluwap Nona, Ms Shirley McPherson, Mr Murrandoo Yanner and Mr Djawa Yunupingu.

¹ National Native Title Tribunal data, current as at 30 June 2015. This includes both determinations of native title and land granted under statutory Indigenous land rights regimes.

² National Native Title Tribunal data, current as at 30 June 2015.

The Senior Officers Working Group terms of reference are:

1. The Senior Officers Working Group will focus its investigation and advice on improving the Indigenous land legislative, regulatory, administrative and operational systems and processes to:
 - 1.1. enable Indigenous land owners to derive economic benefits from their land
 - 1.2. enable jobs and economic advancement for Indigenous peoples;
 - 1.3. enable Indigenous home ownership and commercial enterprise;
 - 1.4. attract private sector investment and finance; and
 - 1.5. develop industries and businesses that support service delivery and infrastructure investment.
2. The Senior Officers Working Group will:
 - 2.1. work with the Expert Indigenous Working Group to identify issues and develop options for COAG's consideration;
 - 2.2. consult with key stakeholder groups including Land Councils, native title organisations, traditional owners, native title ministers, industry associations and financial institutions;
 - 2.3. consider, including with the Expert Indigenous Working Group, and report on proposals raised by native title ministers; and
 - 2.4. provide a report to the first COAG meeting of 2015.³

The Investigation has considered both native title and statutory land rights regimes. The Expert Indigenous Working Group notes that issues relating to specific land rights regimes will need to be addressed with the involvement of the relevant Indigenous representative bodies in that jurisdiction.

This Senior Officers Working Group recognise there are diverse views on the topics explored in this Investigation. The Investigation met with over 40 Indigenous, industry and government stakeholders as part of targeted consultations across Australia and received close to 40 written submissions. Based on these consultations and significant experience, the Expert Indigenous Working Group has provided a clear voice for Indigenous perspectives and valuable insights to the report to COAG.

Indigenous land and native title arrangements differ across jurisdictions and can be complex. The Investigation is an opportunity to describe the dynamics of these systems and identify common strengths and weaknesses. The Investigation looked across jurisdictions for examples where the Indigenous land administration framework has supported successful developments and also where it has led to missed opportunities.

The Investigation found these systems are in a period of transition, from a focus on recognition and protection of Indigenous rights in land to being able to use those rights for economic development. Current systems of Indigenous land administration and use can support economic development. However, there is potential to improve the efficiency and flexibility of these systems. Governments need to articulate their role in supporting these systems as they transition and mature.

³ On 17 April 2015, COAG agreed the Investigation would report to the late 2015 meeting of COAG.

This report sets out a cohesive policy direction for governments to support Indigenous peoples' use of their rights in land and waters for economic development. The Investigation identified five key areas where governments should focus their efforts:

- Gaining efficiencies and improving effectiveness in the process of recognising rights
- Supporting bankable interests in land
- Improving the process for doing business on Indigenous land and land subject to native title
- Investing in the building blocks of land administration
- Building capable and accountable land holding and representative bodies.

Chapter 1 - Gaining efficiencies and improving effectiveness in the process of recognising rights

This chapter focuses on the effectiveness and efficiency of claim processes under the *Native Title Act 1993* (Cth) (Native Title Act) and statutory land rights regimes. The process of recognising Indigenous peoples' rights and interests in land can be time consuming and expensive. Stakeholders identified various reasons for the lengthy timeframes and expense, including the need for extensive anthropological research to establish connection, challenges associated with settling boundary disputes, extensive tenure analysis, and limited resources.

Chapter 2 - Supporting bankable interests in land

This chapter focuses on the ability of Indigenous people to use their rights and interests in land and water to raise capital for investment. As Indigenous land is mostly a communal and inalienable title (meaning it cannot be sold or mortgaged) innovative mechanisms are required so that land can be used as collateral for a loan. Leasing is an effective mechanism to create bankable interests on statutory land.

Chapter 3 - Improving the processes for doing business on Indigenous land and land subject to native title

This chapter focuses on the processes for doing business on Indigenous land and land subject to native title, such as the processes required under the future act provisions of the Native Title Act. Compliance with the processes under the Native Title Act and the various statutory land rights regimes can be time consuming and expensive and a deterrent to investment. More efficient and accountable decision-making processes can facilitate greater investment and economic development opportunities.

Chapter 4 - Investing in the building blocks of land administration

This chapter focuses on the need for an effective land administration system as a precursor to economic development. Remote Indigenous communities often have limited or no access to the basic building blocks of a land administration system such as complete cadastre surveys, town planning and zoning and essential services infrastructure. This can impose significant cost hurdles for development. State and territory legislation such as environmental, planning and heritage regulations (that apply to all land), when applied to the particular circumstances of remote Indigenous communities can unreasonably restrict development opportunities.

Chapter 5 - Building capable and accountable land holding and representative bodies

This chapter focuses on the critical role Indigenous land holding and representative bodies play in facilitating economic development on Indigenous land and land subject to native title. As the interface between Indigenous land owners, native title holders, and development proponents, these bodies must balance the competing pressures of commercial and legislative timeframes with the need to ensure effective and culturally appropriate consultation. Stakeholders highlighted the need to build the capacity of these bodies to support economic outcomes for Indigenous land owners and native title holders.

Many processes have considered these issues in detail before. They provided valuable evidence for the Investigation. These processes include:

- In June 2015, the Commonwealth released *Our North, Our Future: White Paper on Developing Northern Australia*. It announced new Commonwealth investment in relation to Indigenous land and native title, as well as affirming the Commonwealth's intention to work through the COAG Investigation and with Indigenous stakeholders to consider how to support Indigenous Australians to leverage their land assets for economic development.
- Also in June 2015, the report by the Australian Law Reform Commission (ALRC) *Connection to Country: Review of the Native Title Act 1993* was tabled in Parliament. This is a result of a two year inquiry into the connection, joinder and authorisation aspects of the Native Title Act. Where recommendations of the ALRC support the outcomes sought by this Investigation, they have been recommended for implementation.
- In May 2015, the Australian Human Rights Commission (AHRC) facilitated an Indigenous Leaders Roundtable on Property Rights in Broome to discuss issues to enable better economic development within the Indigenous estate. The Commonwealth Attorney-General committed to support the AHRC to facilitate a dialogue on these issues going forward. Noting the benefits of the AHRC process, the Investigation has identified opportunities for partnership with the AHRC in relation to some Recommendations.
- On 1 August 2014, the *Creating Parity – the Forrest Review* was released. The Review, conducted by Mr Andrew Forrest, considered improvements that could be made to help create parity between Indigenous Australians and other Australians, including through development on Indigenous land and land subject to native title.
- On 21 May 2014, the Commonwealth released Deloitte Access Economics' Review of roles and functions of Native Title Organisations. The review examined the role and functions of native title organisations 20 years after their establishment in the native title system.

EXPERT INDIGENOUS WORKING GROUP - STATEMENT OF INTENT

The Expert Indigenous Working Group was constituted to articulate the Indigenous perspective in the COAG Investigation into Indigenous land administration and use and to provide advice to COAG in relation to how Indigenous land and waters can be better utilised to promote self-determination and economic development for Indigenous land owners and native title holders.

Whilst the group has only existed for a relatively short period of time, members feel that to do the Indigenous people who they represent in this process justice, it was necessary to convey their thinking and some of the general themes of their deliberations in what is a very important area for Indigenous Australia.

Throughout consultations, the Expert Indigenous Working Group have been cautioned by Indigenous people and organisations that there is potential for the COAG Investigation to represent nothing more than a 'Trojan horse' through which governments and industry would seek to further weaken Indigenous land rights legislation in the interest of promoting Indigenous economic development through more efficient 'processing' of land use proposals for third party interests.

The Expert Indigenous Working Group is adamant that the time has come for a very different conversation. The outdated 'traditional' approach to making land administration and use more efficient through weakening and mandating time limits for procedural rights afforded to Indigenous land holders has been shown not to work. The Expert Indigenous Working Group would argue that any approach on Indigenous land and waters that does not properly recognise and respect traditional ownership of that land (whether or not that ownership is fully recognised at law) will only lead to ill-feeling, project uncertainty and delays. Such an approach has the effect of diminishing hard fought gains in this area and well established principles around the human rights of traditional owners. Such an approach also has the effect of entrenching the current cycle of welfare dependency and poverty by creating a culture of dependency on government. It also does little to shift the responsibility for the social wellbeing of Indigenous people from the current status quo of inefficient, tax payer-funded government service delivery and provision of welfare.

This outdated 'historical' approach shifts responsibility for impacts that accrue from development directly onto government and the taxpayer. The Expert Indigenous Working Group considers that it is far more efficient and empowering for impacts from development to be dealt with at the front end by those who are most affected.

The lessons learnt are particularly pertinent as governments, in the search for new industry and opportunities in the Asia Century, look to pivot north and capitalise on development opportunities on Indigenous land using water and resources that have sustained these communities for tens of thousands of years.

It is the strong view of the Expert Indigenous Working Group that development on Indigenous land and waters will only be successful and sustainable where Indigenous people are provided with the opportunity to be partners in development, to give their free, prior and informed consent and to benefit economically and socially from the development. Such an approach is consistent with the *United National Declaration on the Rights of Indigenous Peoples* which was endorsed by the Australian Government in April 2009. There is a clear incentive where they are given the opportunity to engage as equals for Indigenous people to find ways to make development work on their country.

The Expert Indigenous Working Group is confident that where they are treated as equals, development on Indigenous land and water will become more efficient and will provide economic benefits for all stakeholders. The opportunity has always been there for development on Indigenous lands. Often it is the attitude of government, industry and third parties that has been a major impediment to development proceeding.

The right to economic development is fundamental to a successful society. The ability for Indigenous people to fully utilise their property rights to create wealth and prosperity is critical for Indigenous people and Indigenous societies to be able to participate and drive economic opportunities in the mainstream economy. The law and government policy needs to be amended to enable this and the Expert Indigenous Working Group would argue that this requires immediate redress.

However, as recognised in the chapters that follow, in addition to law reform, Indigenous people need to be supported and resourced to fulfil their potential and engage with the mainstream economy. Whilst not lacking in enterprise and endeavour, Indigenous groups face a number of disadvantages and potential hurdles in being able to fully capitalise on their assets. A major issue is the fact that the land and water that is either capable of being claimed or is owned by Indigenous people is often the land that has otherwise not been developed or acquired by the Crown. This means that development of Indigenous land is hampered by a lack of infrastructure, the high transaction costs of doing business and sometimes just the simple fact that this land sits outside mainstream state and territory land administration systems. There is also the well documented gap in socio-economic living standards which provides significant challenges in terms of the capacity of people and communities to take advantage of economic opportunities. This gap is also reflected in institutional capacity and governments should also ensure that a level playing field exists in commercial negotiations so that land use agreements and business partnerships are fair and in the best interests of the Indigenous people who are affected by development.

To allow Indigenous land use to fulfil its potential, government needs to support Indigenous people in their economic initiatives and to work with Indigenous people and their representative organisations to remove or reduce the barriers which prevent entry into the mainstream economy. It is important that government recognises that where money is not invested to support Indigenous participation in the economy and reforms are not instituted to empower Indigenous economic development, government will inevitably be required to pick up the tab and subsidise the impacts on Indigenous people which accrue from non-participation and the cycle of welfare dependency which delivers little in the way of economic or social returns. It should be noted that this does not take away the responsibility of government to deliver services and programs to Indigenous Australia, rather government service delivery will become more effective if it is supported by private sector commercial activity.

It is clear that we are entering the next phase of land rights in Australia. The Expert Indigenous Working Group welcomes the Commonwealth Government's focus on the potential of land rights and native title to deliver positive economic outcomes and social advancement. To ensure its voice is captured, the Expert Indigenous Working Group has established a set of principles which are outlined below. These principles provide a guide to government on how Indigenous land reform and legislation that affects Indigenous peoples' rights (e.g. reform of Commonwealth fishing legislation in the Torres Strait) is pursued in the future, and what the Indigenous core principles are in relation to how reform should occur. Whilst the Expert Indigenous Working Group does not profess to speak for

all Indigenous people in Australia, it hopes that through the diversity of the group and the scope of the consultations, it has accurately recorded a set of core principles which most people would support and which government should follow in assessing what the Indigenous position is likely to be in respect of proposals for reform.

In particular the Expert Indigenous Working Group wishes to clarify that it is not purporting to make recommendations in relation to the specific land rights legislation that exists in the states and territories, or to speak on behalf of traditional owners in these jurisdictions. Whilst many of the principles outlined by the Expert Indigenous Working Group may have broad application (in particular the recommendation that there should be no weakening of existing land rights or winding back of hard won gains in the recognition of land rights), it should be a matter for government to settle any specific recommendations made in relation to the operation of statutory land rights systems with the affected Land Councils and Native Title Representative Bodies.

Ultimately the effectiveness of any reform or recalibration of policy in this area will depend upon how recommendations stemming from this Investigation are implemented and the devil will be in the details in terms of how successful the issues are identified are addressed. The Expert Indigenous Working Group notes that it has only been constituted for a relatively short period and given the complexity and potential impacts on Indigenous people's fundamental rights, there is a need for an ongoing dialogue with Indigenous people in relation to how government responds.

The Expert Indigenous Working Group also highlights the importance of constitutional recognition for Australia's first people and the recognition of the property rights that have existed for thousands of generations. Whilst the work the subject of this Investigation sits outside of discussion around constitutional recognition, the incorporation of Indigenous Australians in the mainstream economy forms part of the broad reconciliation discussion and through the framework that lands rights legislation represents provides an opportunity for each native title group within Australia to pursue its own self-determination and a form of reconciliation with the Crown.

SENIOR OFFICERS WORKING GROUP'S RECOMMENDATIONS TO COAG

Guiding principles All governments agree the following:

- a. Indigenous land owners and native title holders should be involved in the development of reforms that affect their ability to use their rights in land and waters.
- b. Indigenous land owners and native title holders should have the choice to strike a balance between economic and cultural uses of their rights in land and waters.
- c. Indigenous land owners and native title holders should have the opportunity to be partners in development on their land and waters.
- d. Reducing red tape and simplifying administrative processes can reduce the time and cost associated with doing business on Indigenous land, and land and waters subject to native title.
- e. Maximising economic development on Indigenous land, and land and waters subject to native title is critical to the Closing the Gap agenda and strengthens the Australian economy.

Recommendation 1 All governments commit to gaining efficiencies and improving the effectiveness of claims processes under the *Native Title Act 1993* (Cth) and statutory land rights regimes, including taking the following actions:

- a. The Commonwealth, state and territory governments establish – where they do not already occur – meetings with the Federal Court, National Native Title Tribunal and other parties with a key role in the resolution of native title claims, to achieve better coordination within the native title system.
- b. The Commonwealth, in consultation with states, territories and relevant stakeholders, implement amendments to the *Native Title Act 1993* (Cth) outlined in **Table 1**, and give further consideration to possible amendments outlined in **Table 2**, to support efficient and effective claims resolution processes.

Recommendation 2 All governments commit to supporting the ability of Indigenous landowners and native title holders to use their rights in land and waters to raise capital for investment, including taking the following actions:

- a. The Commonwealth facilitate a new forum for Indigenous stakeholders and the banking sector to better understand opportunities for private investment on Indigenous land and land subject to native title.
- b. Commonwealth, state and territory governments remove legal barriers to creating long-term leases on all Indigenous land, where Indigenous land owners support that option and there is a demonstrated benefit to the community.
- c. Commonwealth, state and territory governments give further consideration to removing the legal barriers to creating bankable interests on exclusive possession native title land while retaining underlying native title.
- d. The Commonwealth, in consultation with states, territories and relevant stakeholders, consider further how native title holders may beneficially use commercial native title rights.
- e. The Commonwealth review remaining caveats on Aboriginal and Torres Strait Islander Commission assets and remove unnecessary restrictions to support economic development for Indigenous land owners.

Recommendation 3 All governments commit to working with Indigenous stakeholders to improve the processes for doing business on Indigenous land and land subject to native title, including taking the following actions:

- a. Where it is not happening already, state and territory governments work with native title holders and their representatives to develop template land use agreements to streamline and support best practice agreement making.
- b. The Commonwealth work with the Northern Territory Government, Northern Territory Land Councils and industry to assess whether the exploration and mining provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) can operate more effectively and efficiently. This will include an assessment of the appropriateness of implementing the recommendations of the Aboriginal Land Commissioner's 2013 review of Part IV of this Act noting that the Commonwealth has agreed not to amend the Act without the agreement of the Northern Territory Land Councils in this term of Government.
- c. The Commonwealth, state and territory governments work with Indigenous representative bodies to increase the availability of information to support land users' understanding of the application, approval and negotiation processes for developing land use agreements.
- d. The Commonwealth, state and territory governments and Indigenous stakeholders support more effective and efficient local decision-making where appropriate, including through delegated decision-making under statutory land regimes and better use of standing authorisations for Prescribed Bodies Corporate.
- e. The Commonwealth, in consultation with states, territories and Indigenous stakeholders, consider ways to streamline approval processes which would support Indigenous land owners and native title holders where they are the proponents of development.
- f. The Commonwealth, in consultation with states, territories and relevant stakeholders, implement amendments to the *Native Title Act 1993* (Cth) outlined in **Table 1**, and give further consideration to possible amendments outlined in **Table 2** to create choice in decision-making for native title holders and efficiencies in future act processes.

Recommendation 4 All governments commit to investing in the building blocks of land administration to lay the foundations for Indigenous people to use their rights and interests in land for economic development, including taking the following actions:

- a. State and territory governments commit to work with Indigenous stakeholders to integrate information about Indigenous land and native title interests into state and territory land title systems.
- b. The Commonwealth, state and territory governments work with Indigenous stakeholders to publish information about interests in Indigenous land, such as long term leases, where appropriate.
- c. State and territory governments work with local governments to ensure land use regulations do not unreasonably restrict development on Indigenous land and land subject to native title, including following best practice examples.
- d. All levels of government work to reduce complexity from overlapping legislative responsibility which impacts on the exercise of Indigenous land and native title interests.

Recommendation 5 All governments commit to building capable and accountable land holding and representative bodies to effectively represent their communities' aspirations and facilitate economic development, including taking the following actions:

- a. The Commonwealth implement measures that support Prescribed Bodies Corporate access to quality advice and capacity-building services.
- b. Where this is not already taking place, state and territory governments better support economic development through building partnerships with Indigenous landowners and native title holders and establishing regular forums to engage Indigenous land owners and native title holders at the regional or state level.
 - i. Commonwealth and Northern Territory officials commit to a biannual strategic forum with Northern Territory Land Councils to support better and more forward looking engagement.
 - ii. The Commonwealth support the Australian Human Rights Commission to continue the discussion at a national level on land issues with Indigenous leaders and representative bodies to support national dialogue on these important issues.
- c. The Commonwealth, in consultation with states, territories and relevant stakeholders, give further consideration to possible amendments to the *Native Title Act 1993* (Cth) outlined in **Table 2** to build the capability and strengthen the accountability of Prescribed Bodies Corporate, including a system of low-cost arbitration to adjudicate on Prescribed Bodies Corporate membership matters.

Recommendation 6 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.

EXPERT INDIGENOUS WORKING GROUP PRINCIPLES

Chapter 1 Gaining efficiencies and improving effectiveness in the process of recognising rights

The recognition of Indigenous peoples' rights and interests in land and water is a fundamental first step for government to engage with Indigenous people.

Initiatives and policies should incentivise and resource the settlement of native title claims by agreement and directing resources to post-determination outcomes rather than focusing on the mere existence of native title. This should include assistance with strategic planning and establishment of Prescribed Bodies Corporate (PBCs), the grant of commercially and culturally valuable land to PBCs and Indigenous land holding entities and the comprehensive settlement of compensation for extinguishment (including for pre-1975 extinguishment).

Policy and legislative reforms and initiatives should make the native title claims and determinations process fairer and more efficient for Indigenous claimants, without weakening or compromising the strength of native title rights and interests.

Chapter 2 - Supporting bankable interests in land

It is important that, wherever possible, the fundamental inalienable character of Indigenous land and native title should be maintained to preserve communal and intergenerational interests and strengthen the Indigenous estate.

Reforms should allow native title holders to fully realise the value of their traditional land and create economic opportunities through borrowing money and raising capital, without extinguishing the underlying native title interest. This should include looking at appropriate bodies providing loan guarantees, registering Indigenous title in land administration systems and providing Indigenous people with the same home ownership opportunities that non-Indigenous people have (i.e. without giving up their native title/land rights).

Where rights to take resources are established in native title determinations, governments should recognise native title holders' entitlements to use these rights for commercial purposes and provide support to ensure that traditional owners are able to benefit and create economic opportunities in areas where there is otherwise often a paucity of opportunity.

Chapter 3 - Improving the processes for doing business on Indigenous land and land subject to native title

Decision-making and approval processes should be made more efficient, but not through weakening Indigenous land owners' and native title holders' procedural rights.

The principle of free, prior and informed consent should underpin any decision to delegate, streamline or pre-authorise decision-making.

The most effective way of increasing efficiency and timeliness of decision-making and approvals processes is to increase the capacity of Indigenous land holding and representative bodies to effectively respond to land use applications.

As much as possible, Indigenous land holding and representative bodies' internal decision-making processes should not be externally mandated, and should be capable of being customised to take account of cultural protocols and commercial imperatives.

Indigenous groups should retain complete autonomy to choose how they set up and structure their PBC or land holding entities (i.e. either under *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) or *Corporations Act 2001* (Cth), and the default PBC should not be the Indigenous Land Corporation (ILC)).

Land use approval processes support Indigenous land owners and native title holders to be partners and proponents in economic development on their land and waters, not just part of a 'tick a box' approvals process.

Chapter 4 - Investing in the building blocks of land administration

It is critical the fundamentals of effective land administration are in place on Indigenous land and land subject to native title as they are for non-Indigenous land.

Government approvals processes for Indigenous led development on Indigenous land or land subject to native title should be streamlined, simplified and customized so that they are accessible for and supportive of land and water use proposals by traditional owners.

There should be exemptions and concessions from land user charges, land taxes and duties where Indigenous land is granted as freehold or leasehold to Indigenous land holding bodies and PBCs.

Land that is beneficially held for Indigenous Australians should be converted to exclusive possession native title.

Chapter 5 - Building capable and accountable land holding and representative bodies

Indigenous land holding and representative bodies (including PBCs) are charged with exercising statutory functions and it is important that they are resourced accordingly to ensure they are able to operate effectively and efficiently.

In consultation with the Productivity Commission, governments should investigate introducing a national measure to ensure Indigenous land holding entities and PBCs are appropriately resourced.

It is essential that cultural governance and decision-making processes are undertaken either as part of the claims resolution process or immediately post-determination.

State governments must better support economic development through building partnerships with Indigenous land owner and Native Title Representative Bodies (NTRBs).

Indigenous groups should retain complete autonomy over Indigenous benefits but that initiatives to use funds under Indigenous management to support economic development be supported and supplemented by government funding and policy measures.

The role of Office of the Registrar of Indigenous Corporation (ORIC) as regulator under the CATSI Act is incompatible with the complex systems of cultural governance and decision-making in PBCs. NTRBs should have primary responsibility for the regulation of PBCs and are well placed to manage dispute resolution scenarios with reference to ethnographic material, decision-making processes and regional context.

TABLE 1: Native Title Act amendment proposals recommended to be implemented

This table contains proposals to amend the *Native Title Act 1993* (Cth) (Native Title Act) that are supported in principle by both the Senior Officers Working Group and the Expert Indigenous Working Group.⁴ The proposals arise from those referred to the Investigation from native title ministers and also from the Australian Law Reform Commission (ALRC) report.

The Senior Officers Working Group recommends the Commonwealth, in consultation with states, territories and relevant stakeholders, implement these proposals.

Item	PROPOSAL	Explanatory notes
Chapter 1 - Gaining efficiencies and improving effectiveness in the process of recognition of rights		
<i>Implement changes to streamline authorisation, joinder and court processes</i>		
1	Amend section 251B of the Native Title Act to provide that a claim group may authorise an applicant <i>either</i> by a traditional decision-making process <i>or</i> a process agreed to and adopted by the group. <i>Refer ALRC 10–1</i>	<p>These ALRC recommendations would require minor changes to the Native Title Act and would be beneficial to improving the efficiency of claims resolution. Over the years, some features of the authorisation and joinder processes have become cumbersome and inflexible.</p> <ul style="list-style-type: none"> Flexibility in the choice of how decisions are made by claim groups would ensure effective and relevant decision-making for a claim process. A default position of decisions by majority where the authorisation does not provide otherwise could reduce delays. Mandatory notification for parties directly involved in native title would give earlier indication of matters and reduce delay. Allowing parties to limit their involvement in proceedings to matters which involve their interests would reduce delay for parties and reduce administrative burden for the Court. Clarifying court dismissal procedures provides greater certainty for parties.
2	Amend the Native Title Act to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise. <i>Refer ALRC 10–6</i>	
3	Amend section 66(3)(a) of the Native Title Act to provide that the Registrar must notify the NSW Aboriginal Land Council and Local Aboriginal Land Councils, established under the <i>Aboriginal Land Rights Act 1983</i> (NSW), of a native title application. <i>Refer ALRC 11–1</i>	
4	Support the provision of Federal Court of Australia practice notes (or similar mechanisms) to a person who becomes a party to proceedings under section 84(3) or 84(5) of the Native Title Act to elect to participate only in respect of the matters listed in sections 225(c) and 225(d) of the Act. <i>Refer ALRC 11–2</i>	
5	Amend the Native Title Act to clarify that the Federal Court’s power to dismiss a party (other than the applicant) under section 84(8) is not limited to the circumstances contained in s 84(9). <i>Refer ALRC 11–4</i>	

⁴ The Expert Indigenous Working Group support these proposals in principle but note there were differing views from their consultations. Those that were not supported by stakeholders are marked with an asterisk. The Expert Indigenous Working Group note consultation with Indigenous stakeholders needs to be a part of implementation of all proposals.

Item	PROPOSAL	Explanatory notes
<i>Promote efficient processes in the resolution of native title claims</i>		
6	Amend section 47(1)(b)(iii) of the Native Title Act to permit the making of a determination that native title co-exists with a pastoral lease held by the claimants where claimants are members of a company that holds the pastoral lease.	This proposal would simplify the application of this beneficial provision and correct a technical oversight within the current legislation.
7	Governments progress options for allowing a corporation governed by the <i>Corporations (Aboriginal and Torres Strait Islander) Act 2006</i> (Cth) (CATSI Act) to sign a body corporate agreement at the time of a native title determination.*	This is possible now but there are a number of difficulties with it in practice.
<i>Clarifying compensation processes</i>		
8	Consider amending Part 2, Division 5 of the Native Title Act to allow a Prescribed Body Corporate (PBC) to be the applicant on a compensation claim.	<p>This proposal would allow native title holders the option to nominate their PBC, the body that holds or manages native title on behalf of native title holders, to manage and make decisions about the compensation process. This would create efficiencies as the standing of the PBC in compensation matters is currently unclear.</p> <p>It is agreed action needs to be taken to address this issue but further work needs to be done to identify the best possible solution.</p>
Chapter 3 - Improving the processes for doing business on Indigenous land and land subject to native title		
<i>Improve flexibility of decision-making processes</i>		
9	Amend section 251A of the Native Title Act to provide that native title holders may authorise an Indigenous Land Use Agreement (ILUA) <i>either</i> by a traditional decision-making process, <i>or</i> a decision-making process agreed to and adopted by the group. <i>Refer ALRC 10–2</i>	<p>These ALRC recommendations would require minor changes to the Native Title Act and would improve flexibility in decision-making processes for native title groups.</p> <p>Currently, the Native Title Act and PBC Regulations require traditional decision-making process to be used. However, the ALRC notes that traditional decision-making processes may not always be appropriate for the types of decisions to be made. Improvement in the efficiency of decision-making could be achieved if native title groups could agree to an alternative decision-making process for a range of identified decisions.</p>
10	Amend regulation 8 of the <i>Native Title (Prescribed Bodies Corporate) Regulations 1999</i> (Cth) (PBC Regulations) to provide that native title holders may give consent to a native title decision using <i>either</i> a traditional decision-making process <i>or</i> a decision-making process agreed on and adopted by the group. <i>Refer ALRC 10–3</i>	
11	Amend section 203BC(2) of the Native Title Act to provide that a native title holder or a person who may hold native title may give consent to any general course of action that a representative body takes on their behalf using <i>either</i> a traditional decision-making process <i>or</i> a decision-making	

Item	PROPOSAL	Explanatory notes
	process agreed to and adopted by the group. <i>Refer ALRC 10–4</i>	
<i>Streamline agreement making processes relating to the future acts regime</i>		
12	Amend the Native Title Act to ensure that the future acts regime applies to land and waters to which section 47B applies to disregard previous exclusive possession acts on vacant crown land.	<p>This proposal would improve future act processes by clarifying how the current law operates.</p> <p>Section 47B allows prior extinguishment of native title to be disregarded by a court making a native title determination.</p> <p>Currently, there is uncertainty about how the Native Title Act applies to acts done on land and waters subject to a native title claim which relies on s 47B. Clarification is needed to address the process, validity and effect of such dealings. One way to do this is to clarify that dealings done in this period are valid subject to compliance with the future act provisions (Part 2, Division 3).</p>
13	Amend section 24EB of the Native Title Act to allow parties to an ILUA to agree that the ILUA does not provide compensation for a future act.	<p>This proposal would improve future act processes by clarifying how the current law operates.</p> <p>Sometimes it can be difficult for parties negotiating an ILUA to assess what would be fair compensation before those acts are done. In some jurisdictions, it is unclear whether parties to an ILUA can defer their decision about compensation until after the ILUA is made, and following the doing of the future act. Clarification on this issue would provide certainty about agreement making, making this process more efficient.</p>
14	Minor amendments to streamline ILUA processes based on Schedule 3 of the <i>Native Title Amendment Bill 2012</i> (Cth), including allowing body corporate ILUAs to cover areas where native title has been extinguished, providing that an representative body is party to an area ILUA only if it enters into the agreement, allowing minor technical amendments to be made to ILUAs without requiring re-registration, removing the requirement that the Registrar give notice of an area ILUA if it was not satisfied the ILUA could be registered.	<p>Streamline processes associated with ILUA negotiation and registration will reduce negotiation costs for all parties. This would improve the efficiency of processes for doing business on land subject to native title.</p> <p>The Expert Indigenous Working Group support most elements of this proposal but do not support specific proposals that reduce the period for objection to uncertified area ILUAs, and the current form the proposal to address the need for broad consultation about the authorisation of an ILUA, where a native title determination has not yet been made. However, they support further consideration of how to address this issue.</p>

Item	PROPOSAL	Explanatory notes
15	Implement a requirement to stamp ILUAs with the seal of the Native Title Registrar.	Where a person is not a party to an ILUA, this will allow the person to verify the authenticity of the ILUA.
16	Consider options for allowing a PBC to enter into a contract, as opposed to a ILUA, about certain types of future act that would not require the PBC to consult with, and obtaining the consent of the native title group.*	<p>This would create efficiencies in future act process by allowing PBCs to more freely deal with native title. Consideration would need to be given to ensuring an appropriate balance between legislative protections for native title holders and allowing PBCs to freely deal with the native title they hold or manage. This ability could be limited to certain future acts and those future acts not involving surrender of native title. A further option would be to consider the use of 'standing orders' from the native title group to authorise the PBC to enter into agreements on the group's behalf in relation to an agreed category of acts.</p> <p>It is agreed action needs to be taken to address this issue but further work needs to be done to identify the best possible solution and to ensure accountability and transparency in PBC decision-making.</p>
17	Consider amending section 30A of the Native Title Act so that Government parties are not required to be a party to a section 31 agreement (for example, an agreement about mining).*	Sometimes the Commonwealth, state or territory government is not the grantee or proponent of a future act. Where this is the case, and all parties agree, allowing the government party to cease participating in the negotiation may create efficiencies.

TABLE 2: Native Title Act amendment proposals for further consideration

This table contains proposals to amend the *Native Title Act 1993* (Cth) (Native Title Act) which the Senior Officers Working Group recommend merit further consideration. The Expert Indigenous Working Group does not support these proposals.

The Senior Officers Working Group recommends the Commonwealth consider these further, in consultation with states, territories and relevant stakeholders taking into consideration the reasons expressed by the Expert Indigenous Working Group for not supporting these proposals. The Commonwealth Attorney-General should report on progress of consideration of these proposals to Native Title Ministers.

Item	PROPOSALS	Explanatory notes
<i>Chapter 1 - Gaining efficiencies and improving effectiveness in the process of recognition of rights</i>		
<i>Clarifying compensation processes</i>		
1	Progress options for clarifying compensation processes over areas subject to a previous exclusive possession act.	<p>Before or at the same time as receiving a compensation determination, native title groups must receive a determination of native title. However, native title groups cannot make an application for a determination of native title over areas subject to certain extinguishing acts. The effect is that there are difficulties in making a compensation determination over some areas where native title has been extinguished.</p> <p>It is agreed action needs to be taken to address this issue but further work needs to be done to identify the best possible solution.</p>
<i>Chapter 3 - Improving the processes for doing business on Indigenous land and land subject to native title</i>		
<i>Improving the processes for doing business on land subject to native title relating to the future acts regime</i>		
2	Consider amending section 199C of the Native Title Act to clarify that removal of details of an ILUA from the Register does not invalidate a future act that is the subject of the ILUA.	This proposal would improve future act processes by clarifying how the current law operates. Where a registered ILUA that validates past or future acts is subsequently removed from the register for reasons unrelated to the validation, it should be clear that the validation continues to apply. The clarifying amendment would limit uncertainty and consequent court processes to confirm validation.
3	Consider allowing native title holders to vary the effect of section 211, which creates a protection for the exercise of traditional hunting, fishing, gathering, cultural or spiritual activities from regulation by Commonwealth, state and territory laws, through an ILUA.	This proposal would improve future act processes by clarifying how the current law operates. It is currently unclear whether parties to an ILUA can vary the effect of s 211 in terms of the ability of native title holders to carry on traditional hunting, fishing, gathering, cultural or spiritual activities without a licence. Confirmation or clarification that native title

Item	PROPOSALS	Explanatory notes
		holders can, if they wish to, agree via an ILUA to the manner in which traditional hunting, gathering and fishing rights, along with the practice of cultural or spiritual activities, will be exercised. It does not alter the balance of rights under the Native Title Act as it would be up to the native title group to decide on a case-by-case basis whether to agree to an ILUA or not.
4	Consider options for amending the objection process created by section 24MD (6B), which applies to some compulsory acquisitions of native title and the creation or variation of a right to mine for the sole purpose of constructing an infrastructure facility.	The objections process for this part of the Native Title Act is currently unclear, such as whether a Government party can proceed with an act where an objection to the act has been raised but not subsequently referred to an independent body for adjudication. Clarification of this process will provide a mechanism to deal with objections and support efficient processes for doing business on land subject to native title.
5	Consider options for allowing a PBC to contract about future acts and compensation, including allowing a PBC contract out of future acts and compensation provisions of the Native Title Act.**	This proposal would allow a PBC, on behalf of native title holders, to opt out of any of the processes required under the Native Title Act future act regime, as well as compensation entitlement for identified future acts. This would reduce process costs. Currently, it is common for ILUAs to include such contracting out provisions. Any proposal will need to be considered carefully and ensure such an option would be exercised on a voluntary and informed basis.
6	Consider options for addressing the relationship between state and territory natural resource management activities and native title rights including amending section 24LA to permit the doing of low-impact future acts following a determination that native title exists.	Following a native title determination, land management activities that states had previously carried out on land subject to native title – like clearing weeds, controlling feral animals, and environmental regeneration – must comply with different future act provisions of the Native Title Act. States say there are tensions between the time they need to comply with the changed future act provision, and their responsibility to carry out land management activities for public health and safety reasons. Consideration should be given to improving the interaction between the Native Title Act and state and territory natural resource management activities. There are already

Item	PROPOSALS	Explanatory notes
		ways this can be addressed, such as a comprehensive ILUA covering a range of land management activities.
7	Consider options to encourage electronic transmission of notices including amending sections 29 and 6(1)(a) of <i>Native Title (Notices) Determination 2011 (No 1)</i> to provide that notices can always be transmitted electronically.	Electronic transmission of some notices (e.g. via email and online public notice) would enable the use of a more efficient, timely and inexpensive notification option. Currently notices are sent by mail and published in local newspapers. Additionally there are time and resource benefits if notices could be sent electronically with links to digital maps.
Chapter 5 - Building capable and accountable land holding and representative bodies		
<i>Improve accountability to the native title group regarding benefits from agreements</i>		
8	Consider providing regulatory oversight to matters such as compliance with the PBC Regulations including the investment and application of native title monies.	Native title corporations must comply with the CATSI Act, their own rule book, and the PBC Regulations. Importantly, the PBC Regulations set out the key functions of a PBC, including requirements for consultation, and for the management and use of native title monies. There is currently a regulatory gap in relations to the PBC Regulations. Regulatory cover would provide an accessible and cost effective accountability mechanism to the benefit of the native title group who would otherwise be required to enforce their native title interests through the courts. It has been suggested through the native title ministers meeting process that the Office of the Registrar of Indigenous Corporations, the independent statutory agency that supports and regulates indigenous organisations, including PBCs, under the CATSI Act, would be well placed to take on this function.
9	Consider amending the PBC Regulations to extend the transparency and accountability provisions that apply to native title monies held by a PBC to also apply to native title monies held outside PBC.	The transparency and accountability provisions which apply to native title monies held by PBCs do not apply to native title monies held outside of PBCs. Where monies are not held by a PBC, this can result in the native title group having reduced oversight and less of a say in how the group's benefits are used. Extending the transparency and accountability provisions to non-PBC bodies would improve accountability for the use of those monies to the native title group.

Item	PROPOSALS	Explanatory notes
<i>Build dispute resolution capability</i>		
10	Consider a system that delivers low cost and final resolution of disputes between members of the native title group and PBC.	Disputes can be a significant drain on PBC resources. For native title holders denied PBC membership, there is no independent arbitrator to make a decision about eligibility other than seeking redress through the courts. Further consideration should be given to identify an appropriate mechanism to address this issue.

** The Expert Indigenous Working Group support this proposal in principle but Senior Officers Working Group members are not agreed on the specific measures proposed to address this issue and consider this requires further consideration.

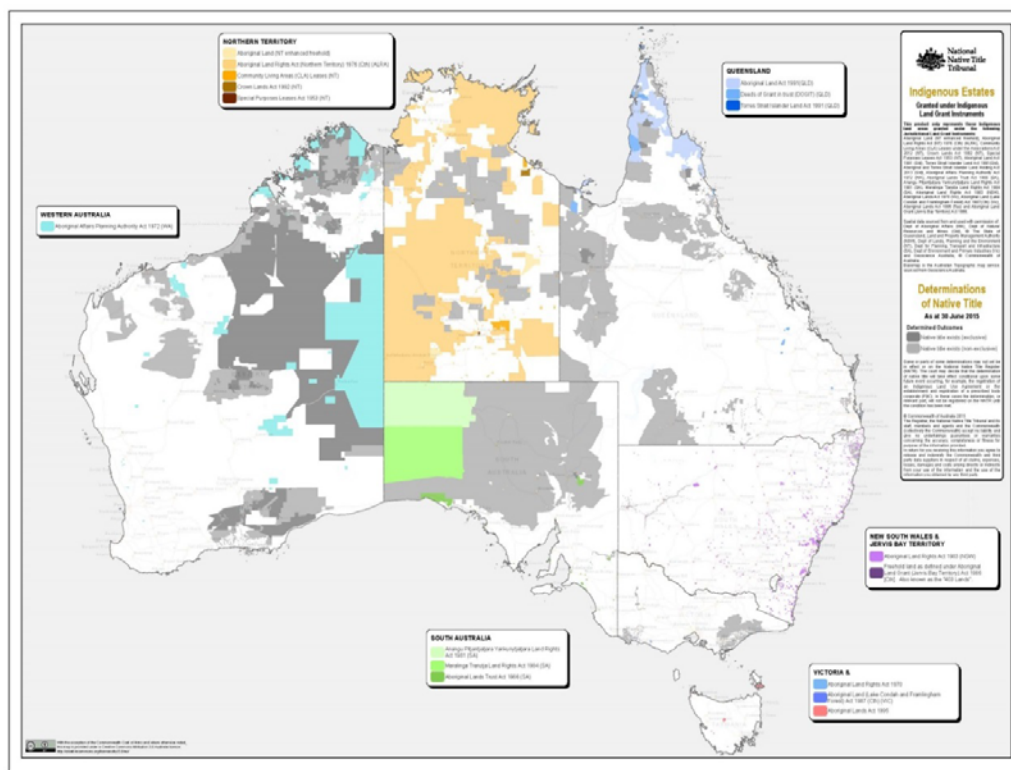
INTRODUCTION

Connection to land and waters is very important to Indigenous Australians and is at the core of Indigenous spirituality. This connection is the basis of relationships, identities, and cultural practices. The recognition of Indigenous rights in land and waters by the Australian legal, political and economic systems is a key foundation to the process of reconciliation.

The legal processes of recognising Indigenous Australians' connection to land and waters have been underway for over 40 years. Recognition of native title and land rights allows Indigenous people to express their collective rights, consistently with the principles in the *United Nations Declaration of the Rights of Indigenous People*, which was formally endorsed by the Australian Government in 2009.

The passing of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (NT ALRA), the High Court's decision in *Mabo v Queensland [No 2]*,⁵ and subsequent enactment of the Native Title Act are historic moments for Australia.

Indigenous Australians have had their ownership and rights formally recognised over around 40 per cent of the Australian land mass, including its islands, under various land rights and native title regimes.⁶ This is a great achievement and a part of Australia's legal landscape that has become respected and celebrated.



Source: National Native Title Tribunal website (www.nntt.gov.au), current as at 30 June 2015.

⁵ *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1 F.C. 92/014.

⁶ National Native Title Tribunal data, current as at 30 June 2015.

However, the Indigenous estate has not yet reached its full potential to support the economic independence of Indigenous Australians. While an Indigenous land system (based on connection to country) has existed for many thousands of years, interaction with a Western land system (based on property ownership) is still in its early stages. Further work is required to properly integrate these two land systems in order to realise the potential benefits of both. Communities' capacity to be able to capitalise on their lands to improve community wellbeing, and establish a prosperous future, is important in the effort to close the gap in outcomes between Indigenous and non-indigenous Australians.

Rights in land and waters are important for Indigenous Australians as they can provide a foundation for economic development. Indigenous people told the Investigation they want to be able to manage the balance between the cultural, social and economic opportunities presented by their rights in land and waters.

Indigenous rights in land and waters fall into two broad categories: native title, first recognised by common law and now recognised in accordance with the Native Title Act, and Indigenous land, recognised under various statutory land rights regimes across different states and territories.

The Investigation considered the various land administration regimes and the native title system operating across Australia. The complexity and uncertainty about these differing regimes often leads to the observation that Indigenous land and native title are barriers to development and investment. The Investigation found the story is a bit more complicated – many factors affect successful development. The report aims to unpack this complexity.

Native title is rights and interests in relation to land and waters held by Aboriginal and Torres Strait Islander People under their traditional laws and customs which are recognised by the common law of Australia in accordance with the Native Title Act. The Native Title Act establishes a national framework for determining where native title exists, who holds it, the content and the nature of rights, and the protection of those rights when other people wish to use the land. Native title rights are broadly categorised as exclusive and non-exclusive possession. Exclusive possession native title is the right to assert sole possession, occupation, use and enjoyment in relation to the land or waters. It includes a right to make decisions about the land or waters and a right to control access. Non-exclusive possession native title rights co-exist with other interests in the land. An example is the right to access and use an area of land or water for ceremony. Non-exclusive rights are not usually a strong basis for investment because they are restricted by other interests. For example, the rights of a pastoralist prevail over the rights of the native title holders where these conflict.

Native title rights and interests may be recognised over water where it is evidenced that the group (according to traditional laws acknowledged and customs observed) hold such rights. These rights may include the right to fish, hunt and gather from the water, and the right to take and use water for domestic and subsistence purposes. Native title rights in water are non-exclusive and are subject to and exercisable in accordance with existing valid laws and rights created under such laws. This includes the operation of state and territory legislation governing access to and use of water.

Indigenous land is established or granted under statutory land rights regimes. Land administration is primarily the responsibility of the states and territories. Many states have statutory land rights regimes (see Attachment A for a description of the various land administration regimes which operate across Australia). In the Northern Territory, the Commonwealth has direct responsibility through the NT ALRA.

The NT ALRA is one of the strongest forms of Indigenous land title in the world, delivering Indigenous land owners inalienable freehold title and a high level of control over access and resource use by others. The *Aboriginal Land Rights Act 1983* (NSW) (NSW ALRA) is also a strong form of Indigenous land title and is unique in that it can grant ordinary freehold based on historical association rather than traditional ownership.

Native title holders and Indigenous land owners may economically benefit from their rights and interests in land when they:

- Enter into land use agreements, such as agreeing to lease portions of Indigenous land to businesses in exchange for the provision of infrastructure services to that area.
- Partner with businesses to support activity on Indigenous land and land subject to native title, such as the harvesting of native plants or fishing.
- Negotiate employment opportunities as part of procurement arrangements with businesses wanting to operate on Indigenous land and land subject to native title.
- Initiate community-controlled commercial activities utilising natural and cultural resources, such as tour-operating companies which are operated and staffed by community members, or cultural conservation enterprises which build on traditional knowledge to provide land management services.
- Receive compensation for an act that extinguishes native title or is inconsistent with its continued enjoyment, such as when a state or territory government grants an interest (for example a mining lease) over an area of land subject to native title.

Indigenous land and native title rights often have two key features. First, rights are often inalienable, which means they cannot be sold or mortgaged. Second, rights are usually communally held. These two characteristics recognise Indigenous Australians' ongoing cultural connection to land and ensure this connection is preserved.

Indigenous land and native title are not mutually exclusive with development. There are already many successful developments on Indigenous land and land subject to native title across Australia. Indigenous land owners and native title holders are not anti-development. Many Indigenous stakeholders told the Investigation they wanted to use their land to support sustainable economic outcomes for themselves and their communities.

Supporting Indigenous land owners and native title holders to leverage their assets and rights for economic development is a national challenge. It requires facilitation through appropriate legal, regulatory and policy frameworks, and a demonstrated commitment from all levels of government and the private sector. Enabling Indigenous land owners and native title holders to use their rights and interests in land and waters will not only support Indigenous advancement, it will enhance the ongoing strength and growth of the Australian economy.

The Investigation identified five key areas of focus for governments to better enable Indigenous land owners and native title holders to use their rights and interests in land and waters for economic development. These five areas are:

- Gaining efficiencies and improving effectiveness in the process of recognising rights
- Supporting bankable interests in land
- Improving the processes for doing business on Indigenous land and land subject to native title
- Investing in the building blocks of land administration
- Supporting capable and accountable land holding and representative bodies.

This framing reflects the fact that Indigenous Australians are at various stages along the rights process, from still seeking recognition of those rights, to holding these rights and successfully doing business on their land. It also recognises the difficulties faced in developing land and providing beneficial opportunities for all parties.

Indigenous land and native title rights are an important part of enabling economic independence and addressing social disadvantage for Indigenous people. But it is not the whole story. Many complex factors that are not dealt with in this report — including the nature and impact of the colonisation process, remoteness, lack of economic activity and established markets, access to those markets, lack of infrastructure and social disadvantage — have a significant impact on the economic potential of Indigenous land and land subject to native title.

The Senior Officers Working Group and the Expert Indigenous Working Group hope the Investigation will do its part in focusing all governments' attention on getting the settings right to support Indigenous land owners and native title holders' through options to use their rights and interests to best support their aspirations.

Chapter 1. Gaining efficiencies and improving effectiveness in the process of recognising rights

Recognition of native title and Indigenous land rights by the Australian legal system provides protection for those rights and a clear way for them to be used in the mainstream economy. Recognition allows native title holders and Indigenous land owners to focus their resources and energies on enjoying their rights.

"Industry proponents and government approval agencies need clarity and certainty, including whether the proposed development area is the subject of native title."
(Association of Mining and Exploration Companies submission)

There are still many Indigenous Australians pursuing formal recognition of their rights in land and waters. This chapter focuses on ways to improve the efficiency and effectiveness of the processes for recognising these rights through the Australian legal system.

The Expert Indigenous Working Group considers that the recognition of Indigenous peoples' rights and interests in land and water is a fundamental first step for government to engage with Indigenous people.

The Native Title Act enables native title holders to seek a determination from the Federal Court that they hold certain rights and interests in land or waters. National Native Title Tribunal (NNTT) figures show that, as of 30 June 2015, native title rights were determined to exist over about 30 per cent of Australia's land mass and another approximately 37 per cent of land in Australia is subject to a claim.

Claims can take a long time. The recent determination of the Barkandji people's claim to native title over 128,000 square kilometres in New South Wales took 18 years. Federal Court Justice Jagot remarked, "no one in Australia should have to wait for 18 years to have their claim resolved... When justice is delayed it is also denied. No one should be in any doubt, the winds of change are still blowing through how parties deal with native title claims... The glacial pace at which they've moved in the past is palpably unjust."⁷

Indigenous and government stakeholders said the claims process can be time and resource intensive for the following reasons:

- Native title applicants have to show that they have sufficient connection to the land or waters claimed back to the time of European settlement. Gathering this type of anthropological evidence can be a costly, time consuming, and complex process. If parties have limited resources and capacity, this will delay the claim.
- The boundaries of the claim area need to be clear. This often requires negotiation with neighbouring groups.
- Native title is extinguished by the grant of an inconsistent interest in the land, such as when the land is granted as freehold. Ascertaining the extinguishment of native title over an area (called 'tenure analysis') can be time consuming and complicated.

⁷ *Barkandji Traditional Owners #8 v Attorney-General of New South Wales [2015] FCA 604*, pp 12.

- Complexities arise from interaction with some statutory land regimes (e.g. NSW ALRA).
- The claims process can be impacted by the behaviour of parties, including their willingness to settle claims by agreement or take a less rigorous approach to agreeing connection evidence or carrying out tenure analysis.

The Investigation heard that while the recognition of native title rights is important in-and-of-itself, the effectiveness of these native title determinations in delivering economic development outcomes is often very limited.

The Expert Indigenous Working Group note that, while some native title determination outcomes provide for economic development, many do not. This is in contrast to how statutory land rights claims can focus specifically on economic development of Indigenous communities and acknowledge both cultural connection and economic development.

There are claims processes under some statutory land rights regimes in some states and the Northern Territory. The number of outstanding claims varies across jurisdictions. For instance, there are 43 claims outstanding under the NT ALRA.⁸ A 'sunset' provision of the NT ALRA has had the practical effect of inhibiting new claims since June 1997 and none have been submitted since that date. Under the NSW ALRA, there are over 27,000 outstanding claims. Claims remain outstanding for a variety of reasons, including the capacity of parties to navigate the court systems, and evidentiary requirements to resolve native title as well, and the ability and willingness of parties to resolve the claim.

What is happening now and what works well?

There are a range of ways parties have been seeking to improve the timeliness, cost and effectiveness of claims processes within the current system. These efforts are contributing to an increase in the rate of claims resolution and supporting economic opportunities.

Prioritising claims

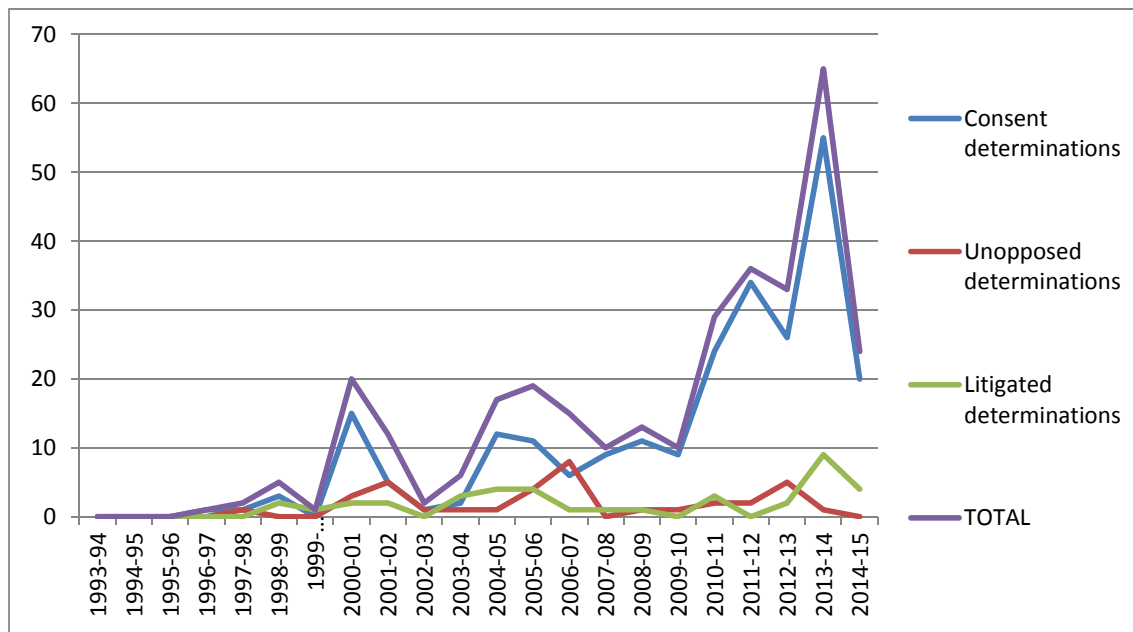
The Federal Court has improved the efficiency of native title claims resolution through the use of priority lists. More claims were determined in 2013-14 (65) than for the entire ten-year period 1993-94 to 2002-03 (43). The majority of Federal Court determinations have been either unopposed or made through consent between parties in almost every year.

Determining native title by consent

Much of the recent improvement in the rate of native title claims determination is from claims being settled by consent. This means the outcome of a claim is agreed between the parties and not fully litigated before the Court. Of the 326 native title determinations as at 14 September 2015, 241 were obtained by consent. The increased number of consent determinations shows the willingness of parties to negotiate outcomes in appropriate claims leading to speedier resolutions.

⁸ Department of the Prime Minister and Cabinet data, current at 22 September 2015.

Number of determinations handed down by the Federal Court by Financial Year (to 30 June 2015)



Source: National Native Title Tribunal data – Native Title Summary Statistics, current as at 30 June 2015

For example, since 2007 the Northern Territory has engaged with representative bodies and stakeholders to resolve pastoral lease claims by consent including by:

- not disputing the existence of the native title holding group at sovereignty (subject to extinguishment);
- progressing claims in ‘group clusters’ based on geographical and anthropological commonalities;
- using a short-form anthropological connection report;
- agreeing a template ‘statement of agreed fact’ and ‘joint submissions’;
- relying on a generic list of public works existing; and
- streamlining governmental approval processes.

Upon the recommendation of the Federal Court, New South Wales has adopted a proportional approach to tenure searching and analysis, whereby priority parcels are searched followed by a random selection of parcels. This approach avoids a full historical search of all parcels to ascertain whether there has been extinguishment or not. The hope is that the adoption of the proportional approach will shorten timeframes for the resolution of some native title claims. The proportional approach has had mixed success in other jurisdictions.

The Expert Indigenous Working Group identified that the preference of both native title claimants and governments is for claims to be settled by consent, and that states should apply established legal principles consistently in accordance with their obligations as a model litigant and to not diminish economic outcomes post-determination.

Resolving native title claims by comprehensive settlement

Comprehensive settlements provide a foundation for native title holders to pursue economic development. They allow parties to take a broad, rather than a narrow legalistic, approach to native title claims settlement.

Comprehensive settlements can benefit both governments and native title parties. These claims resolve the governments' compensation liability for extinguishment, and also give claimants a resolution to their claim which will support their aspirations. This could include business development and job outcomes for the community or the transfer of culturally significant land which was unable to be claimed under native title.

"Comprehensive agreements, while presenting significant challenges... in implementation, do demonstrate how native title process can be used to achieve much greater outcomes than a bare determination."

(Australian Institute of Aboriginal and Torres Strait Islander Studies submission)

For example, the Arabana people and the South Australian Government negotiated a comprehensive settlement of Arabana native title claim. In addition to a consent determination recognising non-exclusive native title over an area of approximately 69,000 square kilometres in the central north of South Australia, the South Australian Government and Arabana native title group were able to reach a number of significant agreements as part of the comprehensive settlement. These included co-management of the Wabma Kadarbu Mound Springs Conservation Park, a 99-year lease for conservation, cultural heritage and tourism purposes in favour of the native title holders over Finniss Springs, and the grant of freehold title over eight allotments in the town of Maree. The settlement also finally resolved all compensation for past acts and establishes a streamlined way for doing certain types of development in future.

"[Dialogue is needed on] rectifying the existing unfair processes for compensation for [the] extinguishment of native title, and considering how addressing unfinished business could leverage economic development opportunities"

(Communique of the Australian Human Rights Commission Indigenous Leaders Roundtable on Economic Development and Property Rights – Broome, 19-20 May 2015)

Under the Native Title Act, native title groups are entitled to compensation for certain acts that affected their native title rights. Liability to pay compensation lies with the Commonwealth, state or territory government which did the act affecting the native title. In most cases this will be a state or territory government given their land administration responsibilities and can require significant financial resources.

The decision about whether a claim should be comprehensively settled, however, should have regard to all the circumstances of the claim and the views of the parties. Comprehensive settlements take more time to negotiate.

Comprehensive settlements may also be perceived as more costly than separating the resolution of native title claims into a two stage process of determining native title first, followed by settling compensation for extinguishment of native title.

The Expert Indigenous Working Group supports initiatives and policies that incentivise and resource the settlement of native title claims by agreement and directing resources to post-determination outcomes, rather than focusing on the mere existence of native title. This should include assistance with strategic planning and establishment of PBCs, the grant of commercially and culturally valuable land to PBCs and Indigenous land holding entities and the comprehensive settlement of compensation for extinguishment (including for pre-1975 extinguishment).

The Expert Indigenous Working Group notes that where there is not a comprehensive settlement of native title, there are likely to be further native title claims (i.e. compensation, applications to re-recognise commercial rights) even where native title has been determined. Noting that the question of compensation has generally been deferred, the Expert Indigenous Working Group also recommends that there be further investigation into how the process for claiming compensation for extinguishment and impairment of native title can be made more accessible and streamlined for native title claimants, to reduce litigation costs and assist PBCs build an economic base.

Resolving native title claims by alternative settlements

An 'alternative settlement' is also a type of comprehensive settlement. An alternative settlement differs from other types of comprehensive settlements in that it resolves a native title claim without the recognition of native title. For example, an alternative settlement can involve native title holders surrendering their native title rights in exchange for recognition under a separate system and/or benefits for Indigenous people. This is achieved by consent through a process of negotiation. It may not be the preferred option of all native title claimant groups.

For example, Victoria's *Traditional Owner Settlement Act 2010* (Vic) serves as an alternative to having the Federal Court determine native title and/or compensation claims under the Native Title Act. The Victorian Government reached settlements with the Gunaikurnai people in 2010 and with the Dja Dja Wurrung people in 2013, assisted by funding from the Commonwealth and support provided through Indigenous Business Australia (IBA) and the ILC. Both communities now operate successful businesses and employ over thirty traditional owners between them. The native title service provider for Victoria has a strategy to assist most Victorian traditional owner groups to reach settlements under the Traditional Owner Settlement Act by 2017. Since the Act commenced, no native title claims hearings have been held at the Federal Court and the number of Victorian native title claims has reduced from 14 to two.

Another example of an alternative settlement is the Western Australian Single Noongar settlement. The Single Noongar settlement is a comprehensive regional settlement resolving all native title issues in South-West Western Australia over an area of approximately 220,000 square kilometres. It aims to yield significant and enduring social, economic and cultural benefits for the Noongar people and the broader community.

The Indigenous Land Corporation's role

The ILC, an independent statutory authority, can support comprehensive claims settlement.

The ILC was established in 1995 to support Indigenous Australians who were unable to prove native title as a result of dispossession from their traditional lands. As at 30 June 2014, the ILC has acquired a total area of 6.1 million hectares of land in urban, rural and remote areas, and reported total assets of over \$600 million. This supports a range of Indigenous enterprises.

The Expert Indigenous Working Group raised the role of the ILC in native title settlements as an issue requiring consideration. The Expert Indigenous Working Group recommends the ILC redirect some of its resources to its initial purpose, which is to acquire land that is otherwise not capable of being claimed by native title holders. That is, the ILC use its resources to acquire land to allow native title groups to claim exclusive possession of this land in order to enable economic independence. The Government should also take advice from Indigenous people and Indigenous peak organisations in relation to the appointment of the ILC board. The Department of the Prime Minister and Cabinet should consider these proposals in consultation with relevant stakeholders.

Streamlining approaches for statutory land claims

In some jurisdictions, the courts, governments, and Indigenous land owners are working out ways to streamline the claims process. Some approaches step outside the standard land claims process and negotiate the settlement of multiple claims simultaneously, or negotiate a range of alternative outcomes that better serve both of their strategic interests.

Under the NSW ALRA, there are over 27,000 outstanding claims. Recent amendments to the NSW ALRA allow land owned by the State to be granted to a Local Aboriginal Land Councils (LALC) under an Aboriginal land agreement, even where the land does not meet the claim criteria set out in the legislation. These amendments provide for a wider range of social, economic, and cultural benefits from the recognition of land rights. They have been introduced, in part, as recognition of the need for alternative approaches to resolving a backlog of undetermined land claims.

For land claims under the NT ALRA, there are also examples of comprehensive claims resolution. This includes a package of claims relating to stock routes and reserves, and subsequently a package of claims relating to national parks and reserves. This created certainty for Indigenous land owners, governments and others about arrangement for the use of these vast areas.

The Investigation recognises the positive impact the Aboriginal Land Commissioner, a Federal Court Judge, has had on the efficiency of claims resolution under the NT ALRA through rigorous oversight of particular outstanding claims subject to settlement negotiations.

Shifting to outcomes-focussed funding

The Commonwealth commits around \$110 million annually to support the native title system. This funding supports NTRBs, determined native title holders, native title respondents and anthropologists. It also supports the administration of the NNTT and the Federal Court of Australia. The way it delivers this funding can improve the efficiency and effectiveness of claims processes.

In the White Paper on Developing Northern Australia, the Commonwealth stated its aspiration to have existing native title claims across Australia finalised in 10 years. On 30 June 2015, there were 337 current claims on the native title claims register. All governments' commitment to the Recommendations in this chapter will support the achievement of this aspiration.

Under the Indigenous Advancement Strategy, the Australian Government is developing new funding agreements with NTRBs and Native Title Service Providers (NTSPs) to take effect from 2016-17. The new arrangements will involve a shift from historical input-based funding to the purchasing of outcomes. This will provide an opportunity to focus the work of these representative organisations on key outputs, such as the resolution of native title claims.

Multi-year funding will be considered based on performance rather than a one-size-fits-all approach. The Department of the Prime Minister and Cabinet has been consulting NTRBs on the details of new arrangements.

What more can be done?

In addition to what is happening already, the Investigation identifies a range of actions which could support the efficient and effective resolution of claims.

The Expert Indigenous Working Group supports policy and legislative reforms and initiatives to make the native title claims and determinations process fairer for Indigenous claimants and more efficient, without weakening or compromising the strength of native title rights and interests.

(a) The Commonwealth, state and territory governments establish – where they do not already occur – meetings with the Federal Court, National Native Title Tribunal and other parties with a key role in the resolution of native title claims, to achieve better coordination within the native title system.

Some states already meet regularly with the major players in the native title system in their jurisdiction to discuss matters of common interest. These meetings have proved successful in shifting the dialogue about native title away from litigation to a more collaborative approach. This supports broader policy based responses to matters that would otherwise be addressed on a case by case basis. All states and territories should implement these arrangements to replicate this success.

Despite recent success in the rate of claims resolution, there will be an ongoing need to deal with new issues arising within the system at the Federal level. These future pressures make it important for the Commonwealth to work with the Federal Court and NNTT to share information and support better coordination within the native title system. Issues include priority claims, responding to changing approaches by states, the management of resources, and support for comprehensive claims negotiations including flexible timeframes. The Commonwealth Attorney-General's Department should reconstitute the Native Title Coordination Committee to address this ongoing need.

(b) The Commonwealth, in consultation with states, territories and relevant stakeholders, implement amendments to the *Native Title Act 1993* (Cth) outlined in Table 1, and give further consideration to possible amendments outlined in Table 2, to support efficient and effective claims resolution processes

The Senior Officers Working Group and Expert Indigenous Working Group considered a range of proposals to amend the Native Title Act from two sources:

1. proposals put forward by states and territories through the Native Title Ministers' Meeting (NTMM); and
2. the report of the ALRC on its inquiry into the Native Title Act, which was tabled in Parliament during the Investigation.

The Senior Officers Working Group considers that some of these proposals would support improving the efficiency and the effectiveness of claims resolution processes. The Senior Officers Working Group recommends implementing those proposals that are supported by the Expert Indigenous Working Group and these are detailed in **Table 1**. Where the proposals are not supported by the Expert Indigenous Working Group, they are recommended to be further considered in consultation with states, territories and relevant stakeholders, and detailed in **Table 2**.

These proposals promote efficient processes in the resolution of native title claims by:

- rectifying some features of the authorisation and joinder processes which have become cumbersome;
- increasing the flexibility in decision-making processes for claims groups;
- reducing delays in court proceedings;
- clarifying compensation processes; and
- allowing PBCs to pursue compensation claims on behalf on the native title group.

The Expert Indigenous Working Group supports the recommendations of the ALRC, in particular the recognition that native title rights can evolve over time and can be exercised for all purposes including commercial.

The Expert Indigenous Working Group also recommended, through their consultations, the reconsideration of parts of Schedules 1 and 2 of the Native Title Amendment Bill 2012. The Expert Indigenous Working Group supports further investigation into how the process for claiming compensation for extinguishment and impairment of native title can be made more accessible. These issues should be included in the Commonwealth's consideration of proposals in **Table 2**.

Chapter 2. Supporting bankable interests in land

Lending and investment allows people to build on the assets they have and pursue economic development outcomes. This could include home ownership or start up loans for small business enterprises. Indigenous land and native title rights provide a significant potential asset base for Indigenous Australians to attract lending and private investment.

Banks generally take a security interest in an asset so that if the borrower defaults on the loan, the bank can sell the asset and recoup its debt. The ‘bankability’ of an asset is a measure of the bank’s willingness to use the asset as security for a loan.

Banks take a range of factors into account when assessing the ‘bankability’ of an asset. For example, banks need to comply with responsible lending obligations under the *National Consumer Credit Protection Act 2009* (Cth) and be satisfied that the right market conditions are in place to justify its investment.

“The ability to purchase and use available land for home ownership and business is the key to prosperity and empowerment for most Australians. They build their wealth and security through home ownership, business development and investment.”
(The Report of the Forrest Review: Creating Parity)

Across the Australian economy, various types of interests in land are used as collateral for a loan. Freehold tenure is commonly used. In the event of a loan default, a bank can easily transfer a freehold interest without permission from the landowner and, provided economic conditions are good, it can recoup its debt.

Unlike ordinary freehold, Indigenous land and native title rights and interests are mostly ‘inalienable’. This means they can’t be transferred, sold or mortgaged. Indigenous land granted under the NSW ALRA is an exception to this general rule.

There are existing mechanisms which support the creation of bankable interests on Indigenous land under various statutory land rights regimes. Leasing is a good way of preserving the underlying communal title whilst creating a sufficiently transferable interest to be used as collateral for a loan.

The Expert Indigenous Working Group considers it important that, wherever possible, the fundamental inalienable character of Indigenous land and native title should be maintained to preserve communal and intergenerational interests and strengthen the Indigenous Estate.

The Expert Indigenous Working Group supports affordable home ownership on Indigenous land and considers it important that Indigenous families have the same rights and responsibilities as families seeking home ownership on non-Indigenous land.

What is happening now and what works well?

Leasing on Indigenous land

Various stakeholders acknowledged the inalienability of Indigenous land does not prevent the creation of transferable interests on that land. Leases can have many of the characteristics of freehold tenure, including being long term or renewable, having full transferability, and a broad permitted use with few limitations on what the leaseholder can do with the lease.

“It is not necessary to disturb the principle of inalienability to create tradable interests in land.”
(Indigenous Business Australia submission)

Leasing Indigenous land under the NT ALRA is common practice, with leases underpinning most government investment in the Northern Territory. Around 75 per cent of Northern Territory Government assets have been secured using leases. The leasing process requires a Land Council to identify and consult with traditional owners and other affected Aboriginal people and attain traditional owner consent to the lease. The Land Council then directs the Aboriginal Land Trust to grant the lease (following Ministerial consent from the Commonwealth Minister if the lease is over \$1 million or for a period longer than 40 years). There are no time limits on Land Councils compliance with these statutory responsibilities. This can result in an expensive and time consuming process.

In South Australia, leasing land held by the Aboriginal Lands Trust (ALT) near communities in the Yorke Peninsula and the Coorong has generated income and employment. In Queensland, the *Aboriginal Land Act 1991* (Qld) (ALA) and the *Torres Strait Islander Land Act 1991* (Qld) (TSILA) enables the trustees of Indigenous land to create long-term leases.

Township leasing – Northern Territory

A township lease is a specific type of long-term lease over a township on NT ALRA land that can provide long-term tradeable tenure. It was introduced via amendments to the NT ALRA in 2006 to simplify and streamline land use processes to help attract outside investment. The lease over a whole town area is granted to an ‘approved entity’ which is currently the Commonwealth through the Executive Director of Township Leasing (EDTL) (a Commonwealth statutory office holder). An approved entity or could be a Northern Territory entity or a Commonwealth approved, community-held entity.

The land under a township lease remains Indigenous land and the head lease sets out the rules for how the land can be administered, including the basis on which subleases can be issued to land users in the town. Under the EDTL model, traditional owners have ongoing input throughout the life of the township lease through a Consultative Forum.

There are township leases on the Tiwi Islands at Wurrumiyanga, Milikapiti and Wurankuwu and in the Groote Eylandt region at Angurugu, Umbakumba and Milyakburra. These leases are held for between 80 and 99 years, by the EDTL.

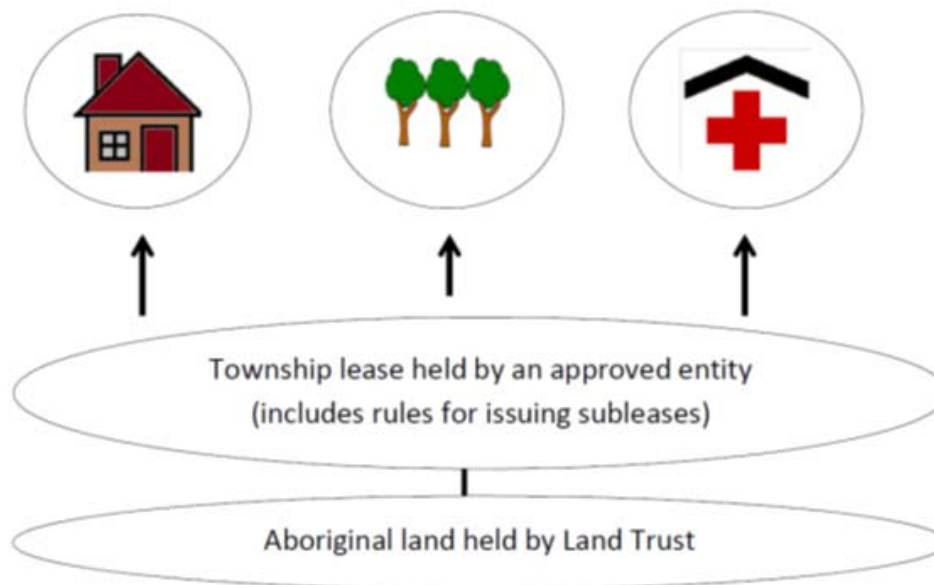
Recently, Gumatj clan leader Galarrwuy Yunupingu signed an agreement to develop a township lease over the Gumatj community of Gunyangara. This model differs from current township leases as the headlease is held by a traditional owner and community entity. This can support Indigenous land owners to have even greater control over development on their land.

By creating land administration arrangements that deliver transferability equivalent to freehold, township leasing can give confidence to investors and improve the bankability of Indigenous land. This has led to positive economic development outcomes in township lease communities, including home ownership and the establishment of local Indigenous business operations, such as supermarket at Wurrumiyanga. Almost all home ownership loans secured by leases on Indigenous land in the Northern Territory have occurred in township lease communities.

The Expert Indigenous Working Group notes that it would require more information to fully assess the effectiveness of township leasing, but would generally support rolling out the township leasing model in other regions as long as traditional owners are afforded the opportunity to consent to the head leaseholder and there isn't already a system of community tenure which provides for effective management by traditional owners.

How township leasing works

Subleases which individuals and businesses can use as collateral for a loan



Options for ordinary freehold

Indigenous land is already held as ordinary freehold in some jurisdictions. In New South Wales, land is generally held by LALCs as freehold (subject to a determination of native title being made and approval from the NSW Aboriginal Land Council). Amendments to the NSW ALRA commencing on 1 July 2015 expand the potential for LALCs to use their freehold land for economic benefit, by clarifying how LALCs may engage in business enterprises.

Even though Indigenous land can support bankable interests, Indigenous land owners and native title holders may wish to convert some or all of their interests in to ordinary freehold. This is an option available under most statutory land rights legislation and the native title system. This option has supported the Yawuru Home Ownership Project to deliver shared equity home ownership opportunities for Yawuru people on freehold title in Broome.

In Queensland, the ALA and TSILA provide an option for creating ordinary freehold over Indigenous land in Indigenous communities. While these are bankable and transferable interests, there are restrictions on who can be granted the initial freehold title. Queensland is currently completing a pilot programme with interested communities to explore the benefits of this option.

Government support for business development and financial literacy

Challenging market factors in remote communities can impact on the ability of Indigenous land owners and native title holders to attract finance and investment. For example, banks may not be confident that there will be a secondary property market in areas where demand and capacity for home ownership is low and the remote location of housing may make costs unaffordable. These issues are not specific to Indigenous land and native title, with the same issues prominent in remote communities located on ordinary freehold.

There are good examples of government, industry and Indigenous people working in partnership to create economic opportunities on Indigenous land and land subject to native title. These partnerships can give Indigenous land owners and native title land holders the tools to become proponents of development.

The Northern Territory Government has committed to support Indigenous land owners to identify areas that are 'open for business', by working with Land Councils to develop an 'investment prospectus'. The Tiwi Island Investment Prospectus is an example of this, providing Indigenous land owners and businesses with the information they need to pursue development opportunities in the Tiwi region. The Investment Prospectus sets out information on local land tenure arrangements, residential statistics, and data and analysis of the Tiwis' potential for agriculture, aquaculture and tourism activity.

"Any comprehensive programme to encourage... economic development on Aboriginal land or land where native title rights and interests exists needs to ensure that Indigenous individuals, families and communities are aware of the opportunities, risks, responsibilities and rewards of borrowing and investing".

(Australian Bankers Association submission)

The Expert Indigenous Working Group support governments working with Indigenous land owners to commission scientific resource assessments to enable Indigenous businesses to investigate intensive land use activities such as agriculture, aquaculture and horticulture on Indigenous land.

Industry stakeholders told the Investigation the capacity of Indigenous land owners to engage in financial and business development opportunities was key to the quality of economic outcomes.

Governments and banks already provide a range of education and financial literacy programmes for Indigenous people about home ownership, business development, and financial and economic participation.

IBA has a role in assisting Indigenous Australians to create wealth and achieve their financial aspirations. This support includes advice on developing a business plan or saving for a deposit for a home loan. IBA can provide financing where mainstream banks may not.

The Expert Indigenous Working Group recommends the Commonwealth support IBA, the ILC or other financial institutions to guarantee bank loans where Indigenous land and land subject to native title is used to secure debts, similar to the role the Export Finance and Insurance Corporation play in providing financial solutions to Australian exporters. For larger loans, IBA could appoint a director to the board of the relevant PBC or traditional owner corporation. Where there is a default on a loan, the ILC and IBA could work with the relevant Indigenous business to manage the situation (e.g. by buying back a foreclosed asset). This could be supplemented through looking at alternative ways of valuing assets and land. This option would provide Indigenous land owners and native title holders with opportunities to pursue loans from mainstream banking institutions, while still ensuring that land is not lost from the Indigenous estate in the event of a default.

The Senior Officers Working Group notes the Expert Indigenous Working Group's views. The Department of the Prime Minister and Cabinet is working with IBA to support its ability to enable Indigenous home ownership in a range of markets.

What more can be done?

Although the legal mechanisms exist for creating bankable interests on most Indigenous land, the systems supporting these mechanisms can be improved. In relation to native title, it is more difficult to use these rights and interests in a commercial way because native title is not a form of tenure. More work is needed on how these rights and interests can be used as the basis of investment.

(a) The Commonwealth facilitate a new forum for Indigenous stakeholders and the banking sector to better understand opportunities for private investment on Indigenous land and land subject to native title.

Industry and Indigenous stakeholders told the Investigation misconceptions exist among lenders, investors and Indigenous land owners about the opportunities and constraints to lending on Indigenous land. Providing platforms for engagement between these parties can help set realistic expectations around the depth of markets, increase understanding about Indigenous land and native title arrangements and investor requirements clarify the lending process for borrowers, and develop commercial partnerships.

The Senior Officers Working Group recommends this forum include IBA and ILC, as well as other key industry associations from the banking industry. A similar idea was identified as an outcome of the AHRC Indigenous Leaders Roundtable in Broome and the Department of the Prime Minister and Cabinet should work with the AHRC on potentially delivering this forum together. The forum could consider emerging models for investment such as impact investing.

"While legislative changes may offer a solution [to bankability of Indigenous land], further work should be done to... help partner traditional [owners] with those wishing to invest capital in communities."
(Financial Services Council submission)

This proposal is supported by the Expert Indigenous Working Group. The Expert Indigenous Working Group suggest this forum could potentially include the Productivity Commission and look at producing something similar to the guidelines of the World Bank Grants Facility for Indigenous People, which establishes a set of priorities for funding Indigenous-led projects globally.

(b) Commonwealth, state and territory governments remove legal barriers to creating long-term leases on all Indigenous land, where Indigenous land owners support that option and there is a demonstrated benefit to the community.

Stakeholders told the Investigation that sometimes creating bankable interests is not legally possible.

This is the case in relation to some town camps in the Northern Territory. Town camps are located in or near urban centres and can provide significant opportunities for economic development. Of the 17 town camps in Alice Springs, 15 are Special Purpose Leases to Aboriginal organisations granted under the *Special Purposes Leases Act* (NT). This Act prohibits the subdivision of any Special Purpose Lease. The grant of a lease, licence or right to occupy different parts of the land for a term longer than 12 years is a subdivision requiring consent under the *Planning Act* (NT). This means that subleases in town camps cannot be granted for a sufficient length of time to support loans for home ownership or other economic development purposes.

There are also restrictions on the period of a lease to third parties in the Anangu Pitjantjatjara Yankunytjatjara Lands (APY lands) and Maralinga Tjarutja Lands (MT lands) in South Australia. The APY lands and MT lands cover a remote and arid part of South Australia. Mining is already permitted under the legislation by agreement where the requirements in the APY and MT legislation are met.

Although economic conditions may not have required leases for private investment in the past, governments should support the option for this occurring in the future, where Indigenous land owners support that option and where there is a demonstrated benefit to the community.

The Expert Indigenous Working Group notes that there is currently potential in Western Australia for management of Aboriginal Lands Trust (ALT) land to be divested back to PBCs (i.e. through management orders or leases) and for systems of economic and tradeable tenure to be developed through leases and sub-leases. However, the Expert Indigenous Working Group are of the view that much of the ALT estate remains non-productive land because the ALT is under-resourced and lacks the capacity to work with traditional owners on innovative and productive land management outcomes.

In Queensland Indigenous land can be held by CATSI Act bodies, including PBCs, as trustees. Trustees can issue leases for any purpose with the only restriction being they are limited to 99 years in term, though they can be renewed.

(c) Commonwealth, state and territory governments give further consideration to removing the legal barriers to creating bankable interests on exclusive possession native title land, while retaining underlying native title.

Through their consultations, the Expert Indigenous Working Group identified a need to further consider ways that native title holders can use their exclusive possession native title rights for commercial purposes, including accessing loans. Exclusive possession native title rights and interests cannot be leased like Indigenous land, as they are not treated as a form of tenure. Native title rights are not currently a sound basis for investment and leasing exclusive possession native title would likely require legislative reform.

The Expert Indigenous Working Group supports measures which allow native title holders to fully realise the value of their traditional land and create economic opportunities through borrowing money and raising capital, without extinguishing the underlying native title interest. This should include looking at appropriate bodies providing loan guarantees, registering Indigenous title in land administration systems and providing Indigenous people with the same home ownership opportunities that non-Indigenous people have (i.e. without giving up their native title/land rights).

Indigenous stakeholders raised this as a major impediment to Indigenous economic development. Native title holders want to be able to use their exclusive possession native title rights to support lending and attract private investment, without giving up their hard-fought and culturally significant rights.

One option suggested by Indigenous stakeholders is to enable exclusive possession native title to be able to be leased without losing the underlying native title right. The Australian Government committed to explore options for this in the White Paper on Developing Northern Australia.

Another option raised through the consultation process involves governments granting Indigenous land (under the relevant statutory land rights regime) where exclusive possession native title is determined. Indigenous land does not need to extinguish native title, and it can be leased. This could allow native title holders to exercise all their available rights (native title or statutory land rights) over the one piece of land and maximise opportunities for leasing their land.

“The economic exploitation of native title without significant risk to the underlying native title estate is paramount [to] achieving Indigenous and government objectives for economic development outcomes from native title.”

(Australian Institute of Aboriginal and Torres Strait Islander Studies submission)

The Expert Indigenous Working Group recommends that governments provide support to register native title within the mainstream Torrens title land system to create certainty. The Expert Indigenous Working Group proposes reforms which would see exclusive possession native title registered as a form of land tenure in the Torrens Title System, which could then be sub-leased, have licenses granted over it, and provide a mechanism for native title to be recognised formally as a property right and asset. The registration would be automatic and would eliminate the complexity of aligning inalienable native title with standard forms of land tenure.

The Expert Indigenous Working Group notes that for such a system to be effective it would need to be supported with investments to ensure that cadastral and surveying information is accurately recorded and effective. The Expert Indigenous Working Group recommends that the application of different models that have been used in different regions (i.e. township leasing in the Northern Territory, granting Indigenous freehold in Queensland) should be investigated further.

The Commonwealth (led by the Attorney-General's Department with the Department of the Prime Minister and Cabinet) should work with states, territories and other relevant stakeholders to develop options to address this issue. A similar idea was identified as an outcome of the AHRC Indigenous Leaders Roundtable in Broome, and the AHRC should be consulted as part of this work.

(d) The Commonwealth, in consultation with states, territories and relevant stakeholders, consider further how native title holders may beneficially use commercial native title rights.

A native title right, such as a right to fish, that may be exercised for commercial purposes has only recently been recognised by the Australian legal system. In *Akiba v Commonwealth*,⁹ the High Court of Australia recognised that a native title right to access and take resources could be exercised for any purpose—commercial or non-commercial. Following on from this recognition, further consideration needs to be given to how such commercial rights may be used most beneficially by native title holders.

Indigenous stakeholders advised they want banks to take into consideration the value of commercial native title rights when assessing lending. For example, one PBC spoke of its right to fish a quota of rock lobster, and that it would like banks to include the commercial value of this right in considering a loan application. A loan to the PBC could support capital investment (e.g. cold rooms to store the catch prior to processing and sale) and capability development to turn this quota into a sustainable commercial enterprise.

Where rights to take resources are established in native title determinations, the Expert Indigenous Working Group seeks that governments recognise native title holders' entitlements to use these rights for commercial purposes and provide support to ensure that traditional owners are able to benefit and create economic opportunities in areas where there is otherwise often a paucity of opportunity.

This issue was also identified through the AHRC Indigenous Leaders Roundtable in Broome. This work should be done in conjunction with the work identified at Recommendation 2(c), and the AHRC should be consulted on the development of any options. Chapter 4 of this report also considers the impact of other regulation on the exercise of these rights.

⁹ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.

(e) The Commonwealth review remaining caveats on Aboriginal and Torres Strait Islander Commission assets and remove unnecessary restrictions to support economic development for Indigenous land owners.

The Commonwealth retains caveats over former Aboriginal and Torres Strait Islander Commission (ATSIC) assets, which include a range of land holdings run by Indigenous groups. Stakeholders said these caveats can cause delays of up to 12 months when they are looking to diversify, expand or sell the property. The Senior Officers Working Group recommends the Commonwealth look at removing these caveats where appropriate and where it will enable Indigenous land owners to pursue economic development. This process should include proper consultation with all interested parties, including native title holders.

The Expert Indigenous Working Group recommends that governments immediately remove any caveats on Indigenous land (e.g. former ATSIC assets) which restrict the economic use of that land, noting that there may be exceptions in respect of land that is of strong cultural significance.

Chapter 3. Improving the processes for doing business on Indigenous land and land subject to native title

Indigenous land owners and native title holders have a stake in how economic development activities are carried out on land where they have rights and interests. Businesses, governments and individuals typically seek agreement from the Indigenous land owner or native title holders to do business on this land. This is pursued through a permit, licence or lease under statutory land regimes, and in accordance with the future acts regime under the Native Title Act.

Under the future acts regime, native title groups have procedural rights to be notified, consulted or the right to negotiate for land and resource deals that affect their native title. Native title groups do not have veto rights over mining or exploration. For a future act to be undertaken, the relevant native title holders can enter into an Indigenous Land Use Agreement (ILUA) with a developer or government. An ILUA is a contract, and is legally enforceable against the parties to the agreement.

Statutory land regimes can give Indigenous land owners stronger rights than native title holders to decide what happens on their land. The NT ALRA gives Indigenous land owners a right of consent, including over mineral exploration. The NSW ALRA requires Indigenous land owners' consent for mining rights in relation to certain minerals.

The communal nature of Indigenous land and native title rights means land use decisions are often made collectively. This is important to ensure Indigenous land owners and native title holders can negotiate and shape the economic development activities occurring on their land, take advantage of economic opportunities, and maintain their obligations to traditional law and custom.

"Measures which encourage and facilitate the making of... agreements could better enable Indigenous land owners to derive economic benefits from their land."
(Association of Mining and Exploration Companies submission)

The efficiencies of these processes rely on clarity about who speaks for country. This is determined differently under different statutory regimes and the native title system. This is a highly resource intensive process but is critical to creating certainty for Indigenous people and business.

States, territories and stakeholders have raised concerns that navigating collective decision-making processes can be complex, lengthy and resource-intensive. They told the Investigation that sometimes the transaction costs of doing business on Indigenous land and land subject to native title are disproportionate to the value or impact of the proposed activity. Where this occurs, high transaction costs can reduce the viability of certain projects. Investment decisions are often made over short time frames to capitalise on commercial opportunities. Efficient and accountable decision-making and approval processes can facilitate greater investment and economic development opportunities.

While the Expert Indigenous Working Group is supportive of decision-making and approval processes being made more efficient, the Group opposes any measure to achieve this through weakening Indigenous land owners' and native title holders' procedural rights.

The Expert Indigenous Working Group notes that consent should mean more than the ability to agree to development – it should include the right to say ‘no’ to development as well (particularly for high-impact activities such as exploration and mining). The Expert Indigenous Working Group note that relatively minor commercial activities can have significant impacts where they are undertaken in areas that are culturally significant or are not undertaken in accordance with cultural protocols. The AHRC has prepared useful guidelines on free, prior and informed consent in the context of native title.

The Expert Indigenous Working Group seeks that the principle of free, prior and informed consent still underpins any decision to delegate, streamline or pre-authorise decision-making.

What is happening now and what works well?

Support for best practice engagement and agreement-making

Collective decision-making processes are a normal part of doing business on Indigenous land and land subject to native title. Many developers and industry groups understand the benefits of proper and early engagement.

There are existing mechanisms which can streamline agreement making. These include parties agreeing more efficient processes for low impact acts in an ILUA, or native title holders providing authority to their PBC to act on their behalf for certain decisions.

Governments should lead by example and involve Indigenous land owners and native title holders early and comprehensively when they are planning development. For example, the Queensland Government included a strategic engagement plan in relation to its capital works programme in Indigenous communities. This means Indigenous communities have time to engage and take advantage of opportunities from this investment, such as jobs, and governments can plan with greater certainty the roll out of these programmes. The Expert Indigenous Working Group notes that this has only been applied in relation to trust land and should be applied to other communities and native title land as well.

“By engaging early with native title holders in relation to proposed activities on native title lands, all facts of those activities can be tailored to ensure they deliver maximum opportunities for sustainable economic development. Without meaningful consultation with native title holders and their representatives who have relevant knowledge in relation to what works and what doesn’t... proponents often arrive at a negotiation table with entrenched protocols which might tick the box on delivering these opportunities, without achieving that in substance.”

(Burrabayji Thalanyji PBC submission)

To support best practice, the Expert Indigenous Working Group recommends governments establish national benchmarks and principles in agreement-making, or authorise a judicial or arbitral body to make assessments on the level of compensation and commercial benefits that is negotiated in native title and land access agreement and whether it is fair and reasonable.

The Senior Officers Working Group note that improved coordination mechanisms between government, the Federal Court, the NNTT and native title groups suggested in Chapter 1 could support information-sharing on best-practice in the native title system.

The Expert Indigenous Working Group recognises the benefits of industry-based engagement platforms between industry bodies (e.g. Minerals Council Australia, National Farmers Federation etc.) and traditional owners to provide an enabling environment for strong engagement and effective agreement-making. The Expert Indigenous Working Group notes the effectiveness of a similar engagement platform established by the Federal Court of Australia for various matters in their jurisdiction (the Federal Court User Groups). The Senior Officers Working Group note the new banking forum suggested in Chapter 2 could be a good platform for these conversations to occur if not already happening at the state level.

Capacity-building for Indigenous land holding bodies and their representatives

The efficiency of communal decision-making processes is greatly affected by the capacity of Indigenous land holding and representative bodies. The volume of work for these bodies is sometimes significant. For example, one PBC advised it received over 115 separate future act notifications for proposed developments in its area over a 12 month period. The PBC said it struggles to effectively manage the procedural rights associated with this large volume of notifications.

The Expert Indigenous Working Group notes the most effective way of increasing efficiency and timeliness of decision-making and approvals processes is to increase the capacity of Indigenous land holding and representative bodies to effectively respond to land use applications.

The Expert Indigenous Working Group acknowledges the importance of Indigenous land owners and native title holders being adequately represented in engagements with government and proponents, and the role that Indigenous representative bodies have in ensuring that agreements meet regional benchmarks, both in terms of economic outcomes as well as management of environmental, social and cultural impacts.

What more can be done?

(a) Where it is not happening already, state and territory governments work with native title holders and their representatives to develop template land use agreements to streamline and support best practice agreement-making.

Many states have been facilitating template ILUAs on a regional and industry basis to streamline future act processes. The use of template agreements for certain activities, rights or interests can reduce the time and cost associated with securing agreement to develop and invest on land subject to native title. In developing template agreements, governments could make the non-commercial terms publicly available to support best-practice agreement making.

Template ILUAs avoid the transaction costs of reinventing the wheel each time a future act is negotiated. For example, the Queensland Government has prepared a number of template ILUAs including a pastoral template ILUA and a freehold upgrade ILUA template. The use of regional ILUAs in Victoria for earth resource exploration authorisations is a means by which a native title group declares it is 'open for business' subject to certain conditions being met. This increases the certainty of the approval process and can establish an industry standard of conditions.

Regional Township ILUAs could provide simplified native title consent processes for development in township areas where economic activity is needed. This could be supported by tenure resolution and rationalising land holding bodies for native title and statutory land rights, to enable a single point-of-entry and improve the processes for agreement making. Tenure resolution is explored further in Chapter 4.

Some native title groups have expressed interest in developing industry-based template ILUAs. For example, the Torres Strait Regional Authority and local PBCs have proposed developing industry template ILUAs for tourism projects and fishing-related activities in the Torres Strait region. These templates could set out the native title and cultural heritage requirements for business projects to provide regional consistency, efficiency and cost benefits.

It is important that template ILUAs are developed with native title holders and do not result in 'lowest common denominator' agreements. Template ILUAs should reflect best practice for all parties.

Template land use agreements are in place to streamline decision-making processes under some statutory land rights regimes. For example, the Northern Territory Government has agreed template housing leases with the Land Councils for public housing on Indigenous land. Template home ownership leases would help individuals navigate the process for getting a lease to support home ownership on Indigenous land.

The Expert Indigenous Working Group notes that while streamlined agreement-making may create some efficiencies at the front end of engagements, there needs to be mechanisms in place to ensure compliance and monitoring of individual activities for such agreements to be effective. It is also important that the creation of efficiencies is not achieved through weakening agreements that are negotiated.

(b) The Commonwealth work with the Northern Territory Government, Northern Territory Land Councils and industry to assess whether the exploration and mining provisions of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) can operate more effectively and efficiently. This will include an assessment of the appropriateness of implementing the recommendations of the Aboriginal Land Commissioner's 2013 review of Part IV of this Act, noting that the Commonwealth has agreed not to amend the Act without the agreement of the Northern Territory Land Councils in this term of Government.

Part IV of the NT ALRA outlines the processes that must be complied with before the Northern Territory Government – the owner of all non-Uranium minerals in the Northern Territory – can grant an exploration or mining tenement on Aboriginal land.

Given the large proportion of land in the Northern Territory that is Aboriginal land, it is important that Part IV processes operate efficiently and effectively so that all Territorians, including Indigenous landowners, can enjoy the benefits that potentially flow from natural resource development.

In 2012 the former Minister for Families, Community Services and Indigenous Affairs requested the Aboriginal Land Commissioner undertake a review of Part IV. He delivered his report in March 2013 and made 22 recommendations, which can be categorised as follows:

- Procedural recommendations, which include recommendations to increase compliance with statutory time limits, improve information sharing as well as procedural and consultation processes.
- Recommendations that relate to the content of exploration and mining agreements.
- Recommendations that relate to delegations and the roles of the Federal Minister and Northern Territory Mining Minister.
- Technical amendments that provide clarity to the legislative framework.

The Commonwealth and Northern Territory governments have committed to working with Northern Territory Land Councils to consider ways to improve the operation of Part IV, including which of the recommendations should be implemented.

The Expert Indigenous Working Group recommends that changes to Part IV are only implemented with the consent of Land Councils, noting the Expert Indigenous Working Group's position that the rights of traditional owners are to be respected, protected and not diminished as a result of the Investigation.

(c) The Commonwealth, state and territory governments work with Indigenous representative bodies to increase the availability of information to support land users' understanding of the application, approval and negotiation processes for developing land use agreements.

Various stakeholders noted the decision-making and agreement-making processes under the Native Title Act and statutory land rights regimes are difficult to navigate. Proponents are not always clear about the processes for developing agreements with Indigenous land owners and native title holders.

The Expert Indigenous Working Group notes that this confusion can be because cultural protocols and confidentiality obligations around how decisions are made means that third parties are not always privy to decision-making processes and therefore do not understand the rationale behind certain decisions.

"... the feedback we have received from... business groups is that they have found the system within which they have had to operate in relation to [developing commercial projects on land subject to native title] to be complicated and unwieldy."

(Wunan Foundation submission)

For the purposes of increasing understanding, the Senior Officers Working Group recommends the Commonwealth encourage representative bodies to publish information about the application and approval process in their area. Simple flowcharts outlining the various steps required to finalise agreement and the amount of time taken to do each step will go a long way in managing the expectations of proponents and Indigenous landowners.

Land Councils, PBCs and NTRBs could publish the timing of community consultation dates, where appropriate. Such notices would assist proponents to better plan the timing of applications, such as by prioritising requests to communities where consultations are imminent, or grouping multiple requests to a single community.

The Expert Indigenous Working Group note it is equally important that proponents recognise and respect the right of native title groups and Indigenous land holders to make land use decisions in accordance with their own cultural protocols and timeframes and that there is positive engagement to determine the requirements for land use approvals.

(d) Commonwealth, state and territory governments and Indigenous stakeholders support better local decision-making including through delegated decision-making under statutory land regimes and better use of standing authorisations for PBCs.

Land Councils, PBCs and NTRBs are often the primary interface between proponents and the relevant Indigenous land owners or native title holders. The processes and competing priorities of these bodies can contribute to an additional layer of bureaucracy that can delay developments supported by Indigenous land owners and native title holders. One way of achieving more efficient and better quality land use decisions is delegating decision-making to Indigenous land owners and native title holders, so that capable and accountable land holding and representative bodies can make decisions directly at the local level.

This is particularly relevant for land use decisions under the NT ALRA, where centralised Land Councils have statutory responsibilities for managing land use approvals on behalf of traditional owners for very large areas of land. This is in contrast to decision-making by PBCs, which is local and autonomous.

Industry stakeholders in the Northern Territory also spoke of their interest in a more tripartite relationship between Indigenous land owners, Land Councils and proponents, rather than the current relationship where Land Councils are seen as the gatekeeper between Indigenous land owners and proponents.

The NT ALRA contains mechanisms to delegate Land Council decision-making to Regional Committees and local-level Aboriginal and Torres Strait Islander Corporations. The Australian Government is working with Land Councils to improve the workability of these delegation provisions to support local decision-making.

PBCs exercise local decision-making powers under the Native Title Act. The transparency and efficiency of these decisions was supported by the 2010 amendments to the *Native Title (Prescribed Body Corporate) Regulations 1999* (Cth) (PBC Regulations), which provide two options for a PBC to simplify its decision-making processes. PBCs can agree their own processes in their constitution and PBCs can delegate standing authorisations to the board. These authorisations give the board authority to act in particular circumstances without further consultation with all native title holders.

The Expert Indigenous Working Group notes that, as much as possible, Indigenous land holding and representative bodies' internal decision-making processes should not be externally mandated, and should be capable of being customised to take account of cultural protocols and commercial imperatives.

The Expert Indigenous Working Group notes it was still not possible for a PBC to agree its own processes in the constitution for larger future acts (i.e. right to negotiate matters) and the obligations to consult with, and obtain the consent of, affected native title holders were difficult to comply with, particularly given the relatively short timeframes prescribed by the Native Title Act.

The Expert Indigenous Working Group recommends government further investigate a process to confirm the PBC board's authority to deal with all decisions which affect native title and how this can be made more efficient. For example, there needs to be consistency between the decision-making processes of PBCs and the corporate structure of native title group, and PBCs need to be better supported to ensure there is an appropriate balance between commercial and cultural considerations in decision-making processes. The PBC could be recognised to have the appropriate level of authority to deal with all native title impacts in its area, with all decisions reported to members annually to ensure transparency and accountability.

The Expert Indigenous Working Group recommends the wording in the PBC Regulations be clarified to make the consultation and consent obligations less absolute and for this obligation to be subject to appropriate funding being available and a discretion to act in the best interest of native title holders factoring in the relative strength of procedural rights and the likely alternatives to a negotiated outcome. The Senior Officers Working Group appreciates that a balance needs to be struck between efficient decision-making and accountability to native title holders.

(e) The Commonwealth, in consultation with states, territories and Indigenous stakeholders, consider ways to streamline approval processes which would support Indigenous land owners and native title holders where they are the proponents of development.

Approvals processes geared towards large-scale development can be hard for smaller entities and individuals to navigate. Easier pathways are needed for Indigenous people to obtain an interest in land to pursue economic development opportunities like home ownership and small businesses. This could support more diverse economic development activities in remote communities and ensure that land use decisions are processed efficiently.

Under the NT ALRA, Land Councils must sign off on most land use decisions. Endorsements are usually made by a Land Council's Full Council, which can meet as infrequently as twice a year. Stakeholders advised this can cause significant delays to obtaining or changing a lease that has already been agreed to by Indigenous land owners. One group of traditional owners spoke of their attempts at starting up a small mining operation on their own land and how time-consuming it was to get the relevant approvals.

The Expert Indigenous Working Group notes land use approval processes support Indigenous land owners and native title holders to be partners and proponents in economic development on their land and water, not just part of a 'tick a box' approvals process.

Northern Territory Land Councils have the option of delegating functions to an Executive Committee to support streamlined approval process. The Central Land Council has done this. Its Executive Committee meets monthly. As a positive step forward, the Northern Land Council, at its Full Council meeting in June 2015, committed to implement these arrangements.

Land Councils could also obtain standing instructions from a group of Indigenous land owners to approve certain land use applications, such as home ownership leases, or those from certain applicants like traditional owners, with conditions agreed up front. This would aim to provide a simple and expedited process for activities in line with traditional owner aspirations.

The Expert Indigenous Working Group supports streamlined approvals process to give effect to land use decisions where the consent of Indigenous land owners or native title holders has already been provided, such as where traditional owners are the applicant.

The Expert Indigenous Working Group notes simplified processes for small-scale development have to be carefully managed in areas of high prospectivity, where small operations can expand significantly with wider impacts.

This proposal raises the question of what are the rights of an individual within the group. This work has linkages with the work from Recommendation 2(e), about using native title in a commercial way.

(f) The Commonwealth, in consultation with states, territories and relevant stakeholders, implement amendments to the *Native Title Act 1993* (Cth) outlined in Table 1, and give further consideration to possible amendments outlined in Table 2 to create choice in decision-making for native title holders and efficiencies in future act processes.

As noted in Chapter 1, the Senior Officers Working Group and Expert Indigenous Working Group considered a range of proposals to amend the Native Title Act from the NTMM process and the ALRC report. Some of these proposals would support flexibility and efficiency in the future act process. Detail about these proposals is provided in **Tables 1 and 2**.

These proposals support flexibility and efficiency in the future act process by:

- giving native title holders the choice to make decisions using *either* a traditional decision-making process *or* an alternative decision-making process agreed on and adopted by the group; and
- clarifying and simplifying certain processes around the registration, notification and making of ILUAs, consistent with the aim articulated in the White Paper on Developing Northern Australia.

Chapter 4. Investment in the building blocks of land administration

There are many factors affecting the ability of Indigenous land owners and native title holders to use their rights in land and waters in the way they want.

A key factor is the existence and effectiveness of the basic building blocks of land administration. These include things like a complete cadastral survey, town planning and zoning, and adequate infrastructure to support development. Significant portions of Indigenous land and land subject to native title do not have these basic building blocks. This imposes high start-up costs on proponents seeking to do business in these areas.

“Land administration systems are invisible, yet essential, infrastructure for development on Indigenous land.”

(Cape York Institute and
Cape York Land Council
joint submission)

Some state, territory and local government laws also impose additional obligations on those seeking to do business on Indigenous land or land subject to native title. Most jurisdictions have zoning, environmental protection, cultural heritage and fisheries regulations which apply to all types of land. The application of these regulations in areas which have poor essential service infrastructure and a lack of proper planning, can make doing business unattractive for developers and investors.

The Expert Indigenous Working Group notes it is critical the fundamentals of effective land administration are in place on Indigenous land and land subject to native title as they are for non-Indigenous land.

What is happening now and what works well?

Cadastral survey and town planning investment

The basic building block in a land administration system is an identifiable land parcel. A land parcel is mapped out in a survey plan which is then identified in the cadastre. To use land as the basis of development, you need to be able to describe it and know who owns and/or has an interest in it.

In the absence of a survey plan, the cost of doing business on Indigenous land and land subject to native title can be prohibitive, especially for smaller developers. For example, the *Planning Act 1999* (NT) requires a survey plan for any lease over 12 years. Survey plans can be expensive and time consuming to prepare. The Northern Territory Government, with funding from the Commonwealth, is completing whole-of-community survey plans for communities on Indigenous land to make sure that compliance with Northern Territory legislation is less time consuming and expensive.

The White Paper on Developing Northern Australia announced the Commonwealth would invest an additional \$17 million to support the basic building blocks of land administration including through support for township leasing. Completion of these surveys means the time and cost to obtain development consent for long-term leases on Indigenous land will be significantly reduced for proponents.

The Queensland Government, through the Remote Indigenous Land and Infrastructure Program Office, is undertaking a programme of work which addresses these issues.

The programme includes developing and implementing town plans, cadastral surveys, road surveys, and state government asset surveys.

The programme is completing development applications and other necessary administrative work to enable long-term leases and resolve any outstanding title issues in remote Indigenous communities.

"Banks require robust land administration systems, including secure and clearly defined titles to land—that is, the existence of consistent and clearly defined zoning and planning schemes... the ability to register interests (rights) on that title, the ability for that title to be readily traded, clear development consent processes and clearly defined land use parameters."

(Australian Bankers' Association submission)

The Expert Indigenous Working Group recommends other states and territories implement similar initiatives to the Remote Indigenous Land and Infrastructure Program Office, to support development in Indigenous communities and on broad-acre Indigenous land.

Industry stakeholders told the Investigation development is better supported where land owners have considered their aspirations for future development. This can be done through town planning processes where land owners consider and designate future uses for particular areas. This provides important information to proponents and can streamline decision-making about land use.

In New South Wales, the Department of Aboriginal Affairs is working with the Department of Planning and Environment to remove barriers in the planning systems which affect the management of Aboriginal lands, through the Aboriginal Community Lands and Infrastructure Project. Firstly, the Project seeks to regularise the planning and management of 61 discrete Aboriginal communities located in mainly rural and remote areas. This will allow subdivision and home ownership, improved servicing and the transfer of infrastructure to local councils and facilitate economic opportunities. Secondly, the Project seeks to ensure the economic potential of lands owned by LALCs are better recognised by local and State planning authorities.

The Expert Indigenous Working Group recommends governments support and enable NTRBs and Land Councils to identify potential land uses and develop land planning schemes while land is under claim, so that Indigenous land owners and native title holders are in a strong position to leverage land for economic development and to also identify land with significant cultural and environmental values that require protection. The Department of the Prime Minister and Cabinet will consider this recommendation in its move to outcomes-based funding of NTRBs and support for PBCs.

Investment in essential service infrastructure to support service delivery and future development

Stakeholders told the Investigation there is a lack of public investment in essential services infrastructure, including transport access on the Indigenous estate. Stakeholders also told the Investigation that adequate infrastructure is required to create the conditions for development and meet legislative requirements for development (i.e. meet local planning law requirements).

Infrastructure is often operating at or over its capacity in remote Australia. There is often limited (or a total lack of) available serviced land. These factors impose major cost hurdles for new development in Indigenous communities.

For example, traditional owners at Wurrumiyanga on the Tiwi Islands in the Northern Territory had to purchase an electricity transformer costing over \$100,000 for the supermarket business they developed. This cost arose because the existing infrastructure was insufficient to support the new supermarket.

"The costs for starting-up business on undeveloped land with a poor infrastructure base, including the cost of pre-feasibility and feasibility assessments, and land development costs, are generally more expensive than in developed markets, and this cost can be prohibitive to many industries."

(Indigenous Business Australia submission)

The cost would be much less in Darwin, as it would be apportioned as part of Darwin's Development Contribution Plan, which sees developers share the costs of providing infrastructure to meet the demand generated by development.

Infrastructure investment is a crucial part of the Australian Government's strategy to boost economic growth and support jobs across Australia, including on Indigenous land and land subject to native title. The Commonwealth has committed to investing more than \$50 billion in infrastructure through its national Infrastructure Investment Programme.

"The development of physical infrastructure is critical to the overall development of Northern Australia. The absence of economic infrastructure, particularly water, power and transport impedes opportunities for economic development and liveability, as does poor access to telecommunications and global digital technologies"

(Central Land Council – Pivot North: Inquiry into the Development of Northern Australia)

The Australian Government has also recently undertaken several reviews which considered and committed infrastructure investment in remote Australia, including the White Paper on Developing Northern Australia and the Agricultural Competitiveness White Paper. The White Paper on Developing Northern Australia committed \$5 billion for a Developing Northern Australia Infrastructure Fund, and a further \$600 million for roads, \$100 million for beef roads fund, \$5 million for rail freight feasibility analyses, \$3.7 million for a new northern infrastructure pipeline, and \$39.6 million to upgrade airstrips and subsidize air services in remote Australia.

The Expert Indigenous Working Group support the promotion of Indigenous economic development in Northern Australia through measures such as this, but also notes that similar measures should be applied to Indigenous groups in other regions of Australia as well.

The Agricultural Competitiveness White Paper included a \$500 million National Water Infrastructure Fund for farmers' future water security. The CSIRO's TRANsport Network Strategic Investment Tool will be expanded to support future decisions on transport infrastructure investment to benefit agriculture.

What more can be done?

While continuing investment in the basic building blocks of land administration will go some way to supporting better economic opportunity, more can and should be done. Outlined below are some actions identified by the Investigation to further enhance economic opportunities for Indigenous-led development on Indigenous land and land subject to native title.

(a) State and territory governments commit to work with Indigenous stakeholders to integrate information about Indigenous land and native title interests on state and territory land title systems.

Access to relevant and reliable information about who owns the land or has an interest in it is essential to create certainty for government, Indigenous land owners, native title holders, and proponents and investors.

Currently, information about native title and Indigenous land is not generally shown on state or territory land registers. This means proponents have to look elsewhere, such as the NNTT website, for information about these interests. It would be beneficial to development if this information was reflected on the state and territory land registers which is usually the first port of call for developers. It would support better and earlier engagement if native title and Indigenous land interests were obvious as part of mainstream land information.

“Industry proponents and government approval agencies need clarity and certainty, including whether the proposed development area is the subject of native title.”
(Association of Mining and Exploration Companies submission)

The Senior Officers Working Group recommends states and territories, work with relevant stakeholders, to ensure the integration of information on Indigenous land and land subject to native title on state and territory title information systems. The Expert Indigenous Working Group supports this recommendation in principle.

(b) The Commonwealth, state and territory governments work with Indigenous stakeholders to publish information about interests in Indigenous land, such as long term leases, where appropriate.

Currently, much of the information about Indigenous land and native title rights and interests are held by Land Councils, NTRBs and PBCs. This includes things like long term leases on NT ALRA land. Unless the right or interest is registered with the state land titles office, no one except the parties to the agreement knows it exists. This creates uncertainty. Whenever it is unclear who has an interest in what, sustainable investment, development and land planning is made more difficult.

The Northern Territory Government has committed to working with Land Councils to collect non-confidential information on rights and interests in Indigenous land and land subject to native title in a central database. Subject to agreement from the Land Councils, the Northern Territory Government would like to see certain non-confidential information uploaded to an agreed system that is publically and easily accessible. This will ensure the rights and interests in Indigenous land and land subject to native title are transparent, searchable and sortable, even if they are not registered with the Land Titles Office.

The Senior Officers Working Group recommends the Commonwealth, states and territories work with Indigenous stakeholders to ensure publication of rights and interests in Indigenous land and land subject to native title, like long-term leases information, on mainstream tenure information systems where culturally appropriate. This would only involve disclosing the existence of the interest itself, not personal or commercially confidential information. The Expert Indigenous Working Group supports this recommendation in principle.

(c) State and territory governments work with local governments to ensure land use regulations do not unreasonably restrict development on Indigenous land and land subject to native title, including following best practice examples.

States are responsible for land administration. State land administration requirements place regulatory burdens on all land users, not just those doing business on Indigenous land and land subject to native title. Local governments, authorised under state legislation, have a role in land management activities through activities such as the development of local strategies and community management programmes.

The Expert Indigenous Working Group notes one of the main impediments to the utilisation of land for economic development is additional red tape imposed by government approvals. For example, the Western Australian Government has estimated that even where native title consent has been provided through an ILUA, the process to convert a pastoral lease into a general lease for agriculture in the Kimberley will take approximately eight years. Where such delays are likely, the Expert Indigenous Working Group is concerned that governments and developers will try and circumvent native title decision-making processes to expedite approvals.

The Expert Indigenous Working Group recommends that government approvals processes for development on Indigenous land or land subject to native title should be streamlined, simplified and customized so that they are accessible for and supportive of land and water use proposals by traditional owners.

Zoning and environmental regulation

The way states apply certain regulations can inhibit the types of development available to Indigenous land owners or developers. Zoning and environmental regulations are important for managing appropriate land use. However, where applied in places which have been built without proper planning they can unreasonably restrict development.

For instance, where local governments' apply 'greenfield' standards to Indigenous communities, which is premised on the land having never been used, Indigenous land owners and native title holders cannot reasonably meet zoning requirements. This prevents creation of bankable interests (like leases) that are in line with the planning scheme. State and territory governments should ensure these standards are applied in a way which recognises the prior lack of proper planning in Indigenous communities. Local governments have worked successfully with government to apply appropriate standards, such as the development of the Ilpeye-Ilpeye town camp in Alice Springs into a full subdivision.

The Investigation heard many examples of how the application of state and local government regulations can practically prevent development. One Land Council cited examples where land had been re-zoned as a green corridor (or had been surrounded by green corridors) shortly after the land grant, preventing the Indigenous land owners from developing the land for economic benefit.

A researcher from Cape York told the Investigation that local land use regulations meant all land outside urban areas in the Cape had been effectively limited to environment management, conservation or rural use. This severely limits options for development by Indigenous people on their land.

The New South Wales Government has recognised that, in some circumstances, approving authorities may not be aware that the NSW ALRA's intent is to support Indigenous people enjoying the economic benefits from the development of Indigenous land. To address this lack of understanding, the New South Wales Government is considering the following actions:

- Educate State planning authorities, local councils and the community that Land Council lands may have an economic potential, and have not been claimed solely for cultural/nature conservation reasons.
- State planning authorities and local councils to improve consultation with Indigenous communities to better understand community aspirations for land holdings, and improve community understanding of planning and heritage processes.
- State planning authorities and local councils to consider the economic potential of lands as part of their strategic planning processes.
- State planning authorities and local government to remove barriers in their statutory planning controls for the realisation of the economic potential for lands.

The Senior Officers Working Group thinks this planned approach would be beneficial in addressing this issue and should be considered across jurisdictions.

Land user costs

The Expert Indigenous Working Group notes land user charges such as rates, stamp duty and land taxes can present high up-front costs for new Indigenous land owners and native title holders and diminish their capacity to capitalise on economic development opportunities. These charges can start accruing as soon as land is granted, before Indigenous land owners or native title holders have developed an income from the land to service the charges.

Where a new PBC has been established they have not had the prior economic benefit of holding the land, and may not have sufficient financial capacity to service these charges. For example, on receiving land as part of their native title settlement, the Yawuru PBC in Broome had to deal with a myriad of land taxes and duties on land which they had been granted as a benefit.

The Expert Indigenous Working Group notes there should be exemptions and concessions from land user charges, land taxes and duties where Indigenous land is granted as freehold or leasehold to Indigenous land holding bodies and PBCs.

The Expert Indigenous Working Group recommends governments provide time-limited exemptions from land user charges for land that has recently been the subject of a land grant, and there be consideration as to whether the land is being used for a community benefit or an individual benefit in levying taxes and duties.

This option could provide Indigenous land owners and native title holders with a greater opportunity to develop their commercial and financial capacity before having to service the charges.

The Senior Officers Working Group recognises the potential benefit of this approach, noting it is already addressed as part of comprehensive settlements in some places.

(d) All levels of government work to reduce complexity from overlapping legislative responsibility which impacts on the exercise of Indigenous land and native title interests.

Many stakeholders said the Indigenous land rights and native title frameworks are working satisfactorily, but there is a need to align administration of state and territory laws with these frameworks. Most state land administration systems were enacted prior to the recognition of native title in 1992 by the High Court in *Mabo v Qld (No 2)*.¹⁰ This can mean state laws do not contemplate the particular need or challenges of the growing Indigenous estate.

Tenure resolution

Australia's systems of land tenure are derived from many pieces of Commonwealth and state legislation (see Attachment A for further detail). As a result, there are often multiple and overlapping tenure types for the same area of land. This can make it very hard for land owners or developers to do business on this land.

Tenure resolution is a process of rationalising the different types of tenure over an area of land. Tenure resolution is cost and time intensive but is important to realising the economic potential of land.

"In relation to land administration and use, perhaps the largest Torres Strait challenge for Traditional Owners, PBCs, public sector agencies and private proponents is the gross complexity and lack of coordination in the current land tenure system. The current system has truly reached gridlock. Other than through the application of excessive time and resources, most tenure dealings are unachievable."
(Torres Strait Region PBCs' submission)

Indigenous stakeholders in the Torres Strait told the Investigation that the current tenure system is a substantial barrier to economic development. Land tenures and administration in Torres Strait derive from eight pieces of legislation. Native title is held by a PBC, while the underlying tenure is held on trust for the community under a Deed of Grant in Trust (DOGIT), which is usually vested in a local government. This means different groups have different responsibility and rights in the same piece of land.

To address this complexity, the Queensland Government is progressively transferring DOGITs under the ALA or TSILA and replacing them with grants of an inalienable form of freehold title usually to the PBC.

¹⁰ *Mabo and Others v. Queensland (No. 2)* (1992) 175 CLR 1.

The DOGIT transfer process to a Badu Island non-government organisation started in 2007 and was finalised by the transfer of land back to Mura Badulgal (Torres Strait Islanders) Corporation (a PBC) in February 2014. The importance of ensuring Indigenous land owning bodies people have the capacity to deal with the advantages from tenure resolution is discussed further in Chapter 5.

The Expert Indigenous Working Group considers land that is beneficially held for Indigenous Australians should be converted to exclusive possession native title.

The Expert Indigenous Working Group considers that where there has been a determination of native title and a PBC has been established, land that is held on trust by governments for Indigenous people (i.e. DOGIT land in Queensland, ALT land in Western Australia, ILC properties) should be transferred or divested to the PBC. Ideally this should occur as part of the settlement of native title claims. Simple and straightforward processes need to be developed to facilitate the divestment of land and to address encumbrances or liabilities that may arise on transfer. The Senior Officers Working Group agrees this should be taken into consideration when engaging in comprehensive settlements, noting that non-native title holders may be directly affected by such a transfer.

Fisheries regulation as an example of a complex legislative environment

The White Paper on Developing Northern Australia recognised that red tape was stifling economic opportunities from northern fisheries. The Investigation heard this from Indigenous stakeholders, in particular those from the Torres Strait.

In the Torres Strait, fishing provides a major economic development opportunity and requires a close relationship between traditional owners, governments and fisheries management agencies. In 2013, the High Court in *Akiba v Commonwealth*,¹¹ recognised for the first time, native title sea rights to include a traditional right to fish commercially. The exercise of these commercial rights is regulated by a combination of the *Torres Strait Fisheries Act 1984* (Cth) and the *Fisheries Act 1994* (Qld). Indigenous stakeholders told the Investigation that the complexity of the regulatory environment prevents them capitalising on these recognised rights.

“Improvements to current laws and systems regulating native title and other sea rights must be improved to enable them to derive economic benefits, fully enable Indigenous economic and commercial advancement and jobs creation.”
(Torres Strait Region PBCs’ submission)

The White Paper on Developing Northern Australia announced that the Commonwealth Government (along with the Queensland, Western Australia and Northern Territory governments) will establish a new fisheries ‘northern shopfront’.

¹¹ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth of Australia* [2013] HCA 33.

This will transition the seven jointly managed fisheries in the north under a single jurisdiction building on the success of the northern prawn fishery.

The Senior Officers Working Group and Expert Indigenous Working Group recommend governments actively involve Indigenous land owners and native title holders in this work.

Cultural heritage laws

The Expert Indigenous Working Group notes complexity is also created through different cultural heritage regimes in each state and territory, and suggests this could be addressed through a set of national standards in respect of cultural heritage.

The Commonwealth Government committed to consult with Indigenous and industry stakeholders on developing a new accreditation system in the White Paper on Developing Northern Australia. These consultations are now underway with the Minister for the Environment's Indigenous Advisory Committee.

Chapter 5. Building capable and accountable land holding and representative bodies

This chapter focuses on what governments can do to build the capacity of land holding and representative bodies to enable them to facilitate and drive economic development on Indigenous land and land subject to native title.

There are a variety of land holding and representative bodies, under native title and statutory land regimes which perform a range of statutory functions (see Attachment B for descriptions across jurisdictions).

Land holding and representative bodies are the primary interface between Indigenous land owners, native title holders and proponents of development. Their capacity to engage with proponents is key to successful economic development on Indigenous land and land subject to native title. Ideally these bodies can both respond to proponents of development and become themselves drivers of development.

“How can development occur on Aboriginal land if the legal entity and trustee of that land is not effectively resourced and functioning to support development?”

(Jabalbina Yalanji PBC submission)

Much of the institutional infrastructure of these bodies has been developed with a focus on achieving successful claims for recognition of native title or Indigenous land. This infrastructure has not yet fully adapted to supporting the use of those rights as part of the mainstream economy.

Healthy corporate governance is key to building the capacity of land holding and representative bodies. This includes having clear objectives and functions, transparent decision-making processes, and being accountable to Indigenous land owners or native title holders on whose behalf they act.

Indigenous and government stakeholders identified the following as affecting the capability and accountability of land holding and representative bodies:

- a lack of effective and transparent decision-making;
- access to financial and human resources;
- the burden created by compliance with regulatory frameworks;
- the ability to access quality external advice;
- the availability of dispute resolution assistance;
- the inclusiveness of decision-making processes; and/or
- the scope of regulators to review and monitor the bodies.

The Expert Indigenous Working Group notes Indigenous land holding bodies are frequently placed under enormous pressure to balance the competing pressures of commercial and legislative timeframes with the need to ensure effective and culturally appropriate consultation with Indigenous land owners, and to manage any disputes in relation to decision-making. Indigenous land holding bodies are often required to carry out these responsibilities with limited resources.

Prescribed Bodies Corporate

Throughout the Investigation both Indigenous and industry stakeholders raised the need for capacity building of PBCs as a key issue.

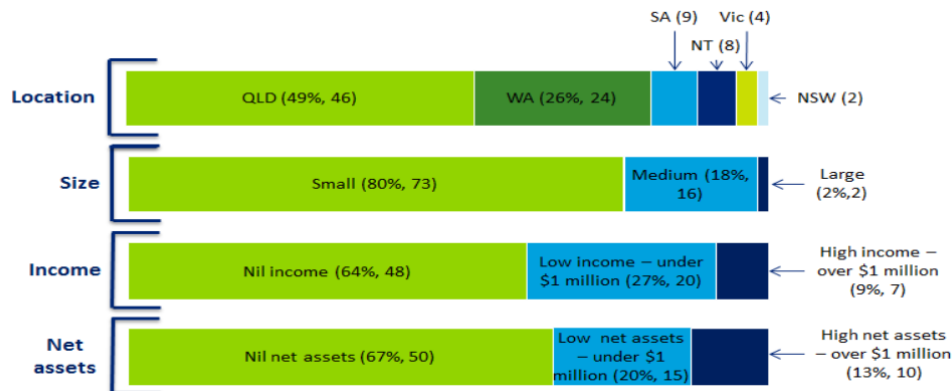
A PBC is a land holding body established to hold or manage native title rights on behalf of native title holders. A PBC is created after a determination recognising native title by the Federal Court. They are also more formally known as Registered Native Title Bodies Corporate (RNTBCs). There are currently around 140 PBCs. This number will increase over time as more claims are resolved.

There is a considerable diversity among existing PBCs in terms of size, location, income and assets. Most PBCs are small with no income or assets. The Deloitte review of native title organisations highlighted significant capacity issues for many of these organisations.

“Currently 137 RNTBCs and 273 claimants groups are responsible for managing the impacts of development on native title rights and heritage over more than 60 per cent of the country. Collectively, they field thousands of future act notices every year, organise and participate in thousands of Indigenous Cultural Heritage surveys, and identify tens of thousands of places whose values potentially collide with those of development.”

(Australian Institute of Aboriginal and Torres Strait Islander Studies submission)

Selected characteristics of PBCs



Source: Deloitte Access Economics, *Review of the Roles and Functions of Native Title Organisations* (March 2014).

What is happening now and what works well?

Resourcing and supporting PBCs

While some PBCs are operating independently, many require support to perform their statutory functions. Given the expected growth in the number of PBCs, it is important that governments efficiently and effectively support and build the capability of these bodies into the future.

The Commonwealth currently funds NTRBs/SPs to assist PBCs. From 2016-17, NTRBs/SPs will apply for funding for PBC support outside their statutory functions through the Indigenous Advancement Strategy.

The Expert Indigenous Working Group notes that where Indigenous land holding and representative bodies (including PBCs) are charged with exercising statutory functions, and it is important that they are resourced accordingly to ensure they are able to operate effectively and efficiently.

The Expert Indigenous Working Group recommends NTRBs/SPs are well placed to provide regional support networks for PBCs and the resources of these organisations should be utilised to support and build the capacity of PBCs, and to provide services that PBCs require.

To an extent this adaptation is already underway. In the Northern Territory, the Top End Default PBC has been established by the Northern Land Council to function as a PBC, but only where requested by the native title holders to carry out this role. The Central Land Council has a system where PBCs voluntarily pay a percentage of their royalty income to support a central corporate support service. This means those with larger income pay more than those with minimal income, but all have access to the services on a needs basis. This is a good model for regionalising support and creating economies of scale for support of PBCs no matter their size.

Procuring employment and contracting opportunities

Employment and supplier quotas for developments can be negotiated outcomes of agreements. This can build the capacity of land holding bodies through opportunities to partner or train with experienced developers, both for the land holding body and for individuals.

Recent examples of where government investment is being leveraged to drive Indigenous employment are the road projects announced in the White Paper on Developing Northern Australia. The Commonwealth will require Indigenous procurement targets for all road projects funded through the White Paper (\$600 million for priority road projects in Northern Australia, and \$100 million to improve cattle supply chains through a Northern Australia beef roads fund). This commitment builds on the Commonwealth's new Indigenous Procurement Policy which is putting Indigenous businesses front and centre in the way the Government does business.

"The experience of Victorian Traditional Owners demonstrates that by building capacity and creating an environment to enable opportunities to be developed through linkages with regional and national economies, that positive economic development outcomes can be achieved and sustained."

(Federation of Victorian Traditional Owner Corporations submission)

The Expert Indigenous Working Group also recommends that Indigenous businesses are given the opportunity to win contracts to develop infrastructure through appropriate procurement policies.

The Expert Indigenous Working Group recommends that all government procurement should have mandatory targets for employment and contracting and government departments should be assessed on the basis of how they are meeting their targets (i.e. through COAG and key performance indicators). It is also recommended that incentives and concessions be provided for industry to implement procurement targets and in terms of how effectively they are providing employment and contracting outcomes for Indigenous people.

Recovering costs for services provided

In order to improve capacity, land holding bodies need to be able to better utilise, and generate income streams. In 2010, the Australian Government amended the PBC Regulations to clarify that PBCs can charge for providing native title services. These provisions can be more widely used to help PBCs establish an income stream which can be invested in improving capacity, provided their services are affordable to proponents.

The Anindilyakwa Land Council, which is the representative body for traditional owners on Groote Eylandt, told the Investigation there is uncertainty about cost recovery under the NT ALRA. The Department of the Prime Minister and Cabinet should work with Northern Territory Land Councils through the forums discussed later in this chapter to clarify any uncertainty.

Negotiating comprehensive settlements

Chapter 1 highlighted the benefits of comprehensive settlements. One of these benefits is settlements which create enduring capability support for the land holding body. This can provide the organisation the tools for successful engagement in economic development opportunities in the future.

For example, in October 2010 Gunaikurnai Land and Waters Aboriginal Corporation (GLaWAC) had no permanent staff, office or assets. It had a volunteer board, supported by Native Title Services Victoria, which held GLaWAC's future act benefits from the mining and energy sector in trust. As a result of the funding provided under the comprehensive settlement the GLaWAC now owns its own office premises and employs 26 full time employees (19 of whom are traditional owners). A Gunaikurnai Traditional Owner Land Management Board has been established for joint management of ten parks and reserves. Gunaikurnai Enterprise Pty Ltd is the corporation's vehicle for commercial development and is winning a range of government and private contracts in natural resource management.

The Expert Indigenous Working Group notes Indigenous land holding bodies need to be supported upon establishment and that seed funding should be provided to allow policies and processes to be established and for a strategic plan and evaluation of assets to take place.

The Expert Indigenous Working Group considers it essential that cultural governance and decision-making processes are undertaken either as part of the claims resolution process or immediately post-determination.

Improving professional governance services, including independent directors

Accessing quality external advice and professional services is key to strengthening the capacity of land holding bodies. The Commonwealth Government currently provides corporate governance training to land holding bodies around the purchasing of professional services.

Independent directors can build the capability of land holding bodies by contributing corporate and other expertise. ORIC recently established a free service called Independent Directory which connects skilled and interested people looking to become an independent director with Aboriginal and Torres Strait Islander corporations, including PBCs.

“Developing the capacity of Indigenous land-holders in relation to the negotiation of future acts and securing mutually-beneficial agreements is a critical component of economic development.”

(Regional Australia Institute submission)

Reducing the burden of compliance

Complying with regulatory frameworks can be burdensome and financially draining on land holding bodies, especially when those bodies have limited human resources. This burden undermines the capability of land holding bodies to maintain healthy governance. Where compliance issues arise, Aboriginal and Torres Strait Islander corporations can apply for exemptions to the reporting and meeting requirements under the CATSI Act. This option has not been widely used to date, however, may be a useful option for corporations with little projected activity.

The Expert Indigenous Working Group considers that Indigenous groups should retain complete autonomy to choose how they set up and structure their PBC (i.e. either under the CATSI Act or *Corporations Act 2001* (Cth), and the default PBC should not be the ILC) or land holding entity.

What more can be done?

All levels of government have a role to play in supporting the capacity and accountability of Indigenous land holding and representative bodies. The Commonwealth has a role to play given its responsibility for the legislative framework and funding. States and territories have a role given their responsibilities for land management, and the significant impact state and territory legislation and policy has on the workload of Indigenous land holding and representative bodies. Local government plays a role because of its responsibilities for land management.

(a) The Commonwealth implement measures that support Prescribed Bodies Corporate access to quality advice and capacity-building services.

The capability of land holding bodies is affected by the quality of the external advice they can access. Indigenous, government and industry stakeholders warned about ‘rogue’ professionals taking advantage of Indigenous groups and individuals regarding development opportunities.

The Expert Indigenous Working Group recommends that the provision of advice and management services to Indigenous land holding bodies needs to be regulated and that newly established Indigenous land holding bodies should be supported to develop their capacity and ensure they are able to make good decisions in relation to engagement of staff and consultants.

“Governance and capacity building, both personal and corporate, are crucial to enabling Indigenous groups to derive benefits from landowning”
(Indigenous Land Corporation submission)

The Financial Services Council (FSC) is a good example of how private sector regulation is addressing these issues. The FSC recently released the FSC Standard, ‘Cultural Capability in Native Title Services’. The purpose of the standard is to “encourage good practice in the provision of tailored, culturally appropriate financial services to assist communities to achieve their goals and aspirations”.

These efforts by the private sector could be supplemented with voluntary training for land rights and native title professionals. Non-mandatory training is suitable to avoid duplication with existing regulatory regimes. The training would increase the expertise of professionals and possibly attract other experts to the area.

On 18 June 2015, the Commonwealth announced additional, ongoing funding of \$20.4 million over four years for PBC support as part of the White Paper on Developing Northern Australia. Funding for PBCs will be provided across Australia, for one-off support with negotiations, and for specialist resources and training to be provided to PBCs through a panel of providers. This additional national funding aims to support and build the capacity of native title holders to effectively engage with potential investors and proponents. The Department of the Prime Minister and Cabinet will seek to monitor good performance outcomes from this funding, and ensure the uptake by PBCs across all relevant states and territories.

The Expert Indigenous Working Group consider it important that, in consultation with the Productivity Commission, governments should investigate introducing a national measure to ensure Indigenous land holding bodies and PBCs are appropriately resourced.

To assist PBCs access expertise in the private market, NTRBs could also publish a list of their preferred consultants.

(b) Where this is not already taking place, state and territory governments better support economic development through building partnerships with Indigenous landowners and native title holders and establishing regular forums to engage Indigenous land owners and native title holders at the regional or state level.

There is potential for real improvements in the economic outcomes for Indigenous land owners and native title holders when working in partnership with government. The Investigation highlighted that there is already productive interaction between Indigenous land owners, native title holders and governments, but more needs to occur.

The Senior Officers Working Group and the Expert Indigenous Working Group support ongoing, permanent forums to foster this engagement. Regular forums at the state or regional level would allow land holding and representative bodies to work with governments to align priorities and better share information. Sharing information is vital to building the capacity of land holding bodies. Regular engagement will also ensure that Indigenous land owners and native title holders are in a position to drive reform to land administration arrangements.

For example, South Australia is currently working with Indigenous communities to enable the recognition of Aboriginal regional governing bodies by government. It is envisaged that an Aboriginal Regional Authority (ARA) will have authority from its community to engage with government. It may be composed of a number of smaller bodies that have evolved to deal with specific government interactions in the past, including PBCs. ARAs will be formed in a way determined by their constituent community. They will provide a clear focal point for the interface with government (and also potentially with other stakeholders) with the object of achieving improved capacity and stronger governance.

The Expert Indigenous Working Group considers it important that state governments better support economic development through building partnerships with Indigenous land owner and NTRBs.

(b.1) Commonwealth and Northern Territory officials commit to a biannual strategic forum with Northern Territory Land Councils to support better and more forward looking engagement.

Northern Territory Government officials and officials from the Department of the Prime Minister and Cabinet will establish a permanent biannual strategic forum with Northern Territory Land Councils. There is great opportunity for more forward-thinking, strategic engagement to support economic development on land held under the NT ALRA.

(b.2) The Commonwealth support the Australian Human Rights Commission to continue the discussion at a national level on land issues with Indigenous leaders and representative bodies to support national dialogue on these important issues.

Many of the issues addressed by the Investigation were canvassed by the AHRC at its recent Indigenous Leaders Roundtable in Broome. An outcome of the Roundtable was a call for ongoing dialogue on a range of issues related to the topic of the Investigation. The Senior Officers Working Group and the Expert Indigenous Working Group consider this would be a valuable forum to discuss these issues at the national level, subject to it being properly constituted and representative.

The AHRC's Aboriginal and Torres Strait Islander Social Justice Commissioner, who co-convened the Indigenous Leaders Roundtable with the Australian Human Rights Commissioner, reports annually on the operation of the Native Title Act and the effect of the Act on the exercise and enjoyment of human rights of Aboriginal and Torres Strait Islander peoples. This report will provide an avenue for broader feedback on this national dialogue as well as reporting on COAG's commitment.

(c) The Commonwealth, in consultation with states, territories and relevant stakeholders, give further consideration to possible amendments to the *Native Title Act 1993* (Cth) outlined in Table 2 to build the capability and strengthen the accountability of Prescribed Bodies Corporate, including a system of low-cost arbitration to adjudicate on Prescribed Bodies Corporate membership matters.

As noted in Chapter 1, the Senior Officers Working Group and Expert Indigenous Working Group considered a range of proposals to amend the Native Title Act from NTMM process and the ALRC report. Some of these proposals aim to strengthen the capability and accountability of PBCs.

These proposals are not supported in principle by the Expert Indigenous Working Group. Detail about these proposals is provided in **Table 2**.

These proposals would support capability and accountability by:

- improving accountability to the native title group regarding the use of benefits from agreements; and
- building dispute resolution capability, including arbitration.

Improved accountability to the native title group regarding the use of benefits from agreements

There is broad agreement that decisions about how land-related benefits are used should be made by Indigenous groups.

There are examples where this is done really well, such as the Central Land Council's Community Development Unit which uses royalty money to fund long-term community projects. Local community members work with the Community Development Unit to decide how to spend their money to get the most benefit for the community in line with their aspirations. This programme has funded a range of community benefit projects, for example infrastructure and outstation improvements, and a general store in Imanpa.

"Effective and transparent regulation and oversight of land-owning corporations is a key role of government, and, as much as tenure, is a key determinant of the success or failure of land-based enterprises."
(Indigenous Land Corporation submission)

However, there are also concerns among Indigenous stakeholders that sometimes funds are not being used accountably, or for the benefit of the whole group.

The Expert Indigenous Working Group considers it important that PBCs and other Indigenous organisations and trusts retain complete autonomy over Indigenous benefits but that initiatives to use funds under Indigenous management to enable economic development be supported and supplemented by government funding and policy measures.

The Forrest Review, supporting the recommendations of the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group Paper, recommended the Commonwealth Government take action in relation to the governance of land-related payments. Similarly, the ALRC also recommends that Government take action to ensure native title benefits are used for the benefit of the native title group.

The PBC Regulations require a PBC to hold native title monies on trust for native title holders, and invest and apply these monies as directed by the native title holders.

However, there is currently no regulator with responsibility for enforcing these Regulations. Native title holders will generally be required to enforce these through the courts.

There is a further regulatory gap in that the accountability provisions contained in the PBC Regulations do not apply to native title monies held outside of PBCs. Given most native title monies are held outside PBCs, this is a significant gap.

The proposals in **Table 2** suggest extending ORIC's mandate to cover the PBC Regulations and for the PBC Regulations to cover monies outside of PBCs, but the Commonwealth should work with states, territories and relevant stakeholders, to consider a range of options to address these gaps.

Building dispute resolution capability, including through arbitration

PBCs receive more complaints about membership than other Indigenous organisations. These internal 'politics' can negatively affect the operation of PBCs. Indigenous stakeholders identified a lack of regulatory clarity or authority on membership as barriers to the accountability of PBCs. Other than seeking redress through the courts, there is no independent arbitrator to make a determination about eligibility.

The Expert Indigenous Working Group recommends that there be further investigation into how PBCs are regulated. One option proposed by the Expert Indigenous Working Group would involve the appointment of a registrar to have regulatory responsibility for PBCs. The registrar would be appointed by NTRBs and work with NTRBs.

The Expert Indigenous Working Group considers ORIC's role as a regulator under the CATSI Act is incompatible with the complex systems of cultural governance and decision-making in PBCs. The Expert Indigenous Working Group are of the view that NTRBs should have primary responsibility for the regulation of PBCs and are well placed to manage dispute resolution scenarios with reference to ethnographic material, decision-making processes and regional context.

Currently, NTRBs have a statutory role to help resolve disputes for PBCs, but their involvement must have the consent of the parties involved. Some NTRBs, including Queensland South Native Title Services and the North Queensland Land Council, are already working with the NNTT to assist with post-determination dispute resolution processes.

The Commonwealth could enable an independent arbitrator to adjudicate on PBC membership matters. This would provide a single source of authority for native title holders and remove the need for them to enforce their native title interests through the courts which is expensive and time consuming. An application to the arbitrator could be made where mediation conducted by an NTRB/SP has not been successful.

The combination of better regulatory coverage and an independent umpire to adjudicate on issues of membership would assist PBCs focus their energies and resources on taking advantage of development opportunities.

CONCLUSION

The COAG Investigation into Indigenous land administration and use identified key barriers and opportunities for Indigenous Australians to be able to leverage their rights and interests in land and waters for economic development.

The Investigation provided an effective vehicle for Commonwealth, state and territory governments to consider what is working and what specific actions can be taken to support economic development on Indigenous land and land subject to native title for the benefit of all parties.

The consultation process, which was driven by the Expert Indigenous Working Group, allowed governments to hear from a wide range of stakeholders about the challenges and solutions across various jurisdictions. This provided a sound base on which to work with Indigenous people and other stakeholders to set a cohesive policy direction going forward.

The Investigation also considered the proposals for Indigenous land and native title reform recently made by Native Title Ministers, the ALRC, the Forrest Review, the Deloitte Review of Native Title Organisations and the White Paper on Developing Northern Australia, and incorporated them where they support the findings of the Investigation.

At the heart of the report is a concern for understanding and respecting Indigenous land and native title so that Indigenous Australians have equal opportunity to realise their economic and social aspirations. The Investigation's consultation process received strong messages about the significance of Indigenous land rights and native title to Indigenous Australians and to the broader economy. Indigenous rights and interests in land and waters must be respected, and rights holders should be able to make choices about how they use their land.

The degree and diversity of economic development activities already occurring on Indigenous land and land subject to native title across Australia is extensive. Indigenous land owners and native title holders have an important role to play in the economy, as both partners and proponents of economic development.

There is no lack of ideas or impetus to address these issues. This report highlights a number of best practice examples already occurring across jurisdictions, as well as new policy and legislative reforms aimed at getting the settings right to support Indigenous land owners and native title holders to use their land to drive economic development.

While this report has outlined some of the key impediments and opportunities it should not be the last word. Stakeholder feedback demonstrates clear momentum to progress these issues nationally and at the state and local level. Some issues identified in this report will require further policy or legislative development, and implementation of the Recommendations must be supported by effective engagement platforms and partnerships between governments, Indigenous stakeholders, and the wide range of industry stakeholders. Through the central involvement of the Expert Indigenous Working Group and significant collaboration between members of the Senior Officers Working Group, the Investigation has provided a strong starting point to take these discussions forward.

LIST OF ABBREVIATIONS

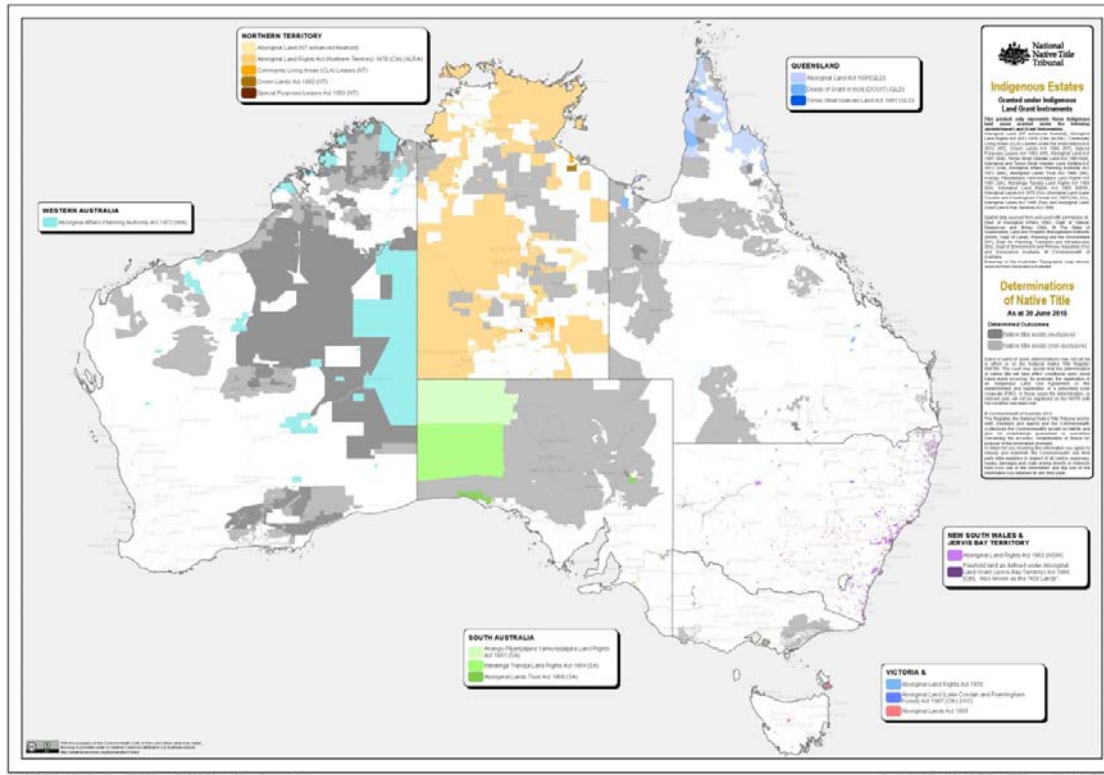
AHRC	Australian Human Rights Commission
ALA	<i>Aboriginal Land Act 1991 (Qld)</i>
ALRC	Australian Law Reform Commission
ALT	Aboriginal Lands Trust – WA and SA only
APY	Anangu Pitjantjatjara Yankunytjatjara
ATSIC	Aboriginal and Torres Strait Islander Commission
CATSI Act	<i>Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth)</i>
COAG	Council of Australian Governments
DOGIT land	Deed of Grant in Trust land – Queensland only
EDTL	Executive Director of Township Leasing
IBA	Indigenous Business Australia
ILC	Indigenous Land Corporation
ILUA	Indigenous Land Use Agreement
LALC	Local Aboriginal Land Council – NSW only
NT ALRA	<i>Aboriginal Land Rights (Northern Territory) Act 1976 (Cth)</i>
Native Title Act	<i>Native Title Act 1993 (Cth)</i>
NTRB	Native Title Representative Body
NTSP	Native Title Service Provider
NSW ALRA	<i>Aboriginal Land Rights Act 1983 (NSW)</i>
NTMM	Native Title Ministers’ Meeting
ORIC	Office of the Registrar of Indigenous Corporations
PBC or RNTBC	Prescribed Bodies Corporate or Registered Native Title Bodies Corporate
PBC Regulations	<i>Native Title (Prescribed Bodies Corporate) Regulations 1999 (Cth)</i>
TSILA	<i>Torres Strait Islander Act 1991 (Qld)</i>

DEFINITIONS

Term	Definition
Bankability	Bankability refers to the measure of a bank's willingness to use an asset as security for a loan.
Cadastre	A cadastre is a register of property titles. The information recorded includes a description of the location and boundaries of a parcel of land and who owns it. It may also record what the land can be used for.
Common law	Common law refers to case law developed in courts. This term is sometimes used to describe all case law or judge-made law.
Comprehensive claim settlement	A comprehensive claim settlement is a full and final resolution of both native title and compensation.
Consent determination	A consent determination is a decision made by the Federal Court of Australia where there is agreement (consent) between the parties about native title rights and interests in relation to land and waters.
Exclusive possession native title right	An exclusive possession native title right is the right to assert possession, occupation, use and enjoyment in relation to particular land or waters. In practice, this means native title holders can control access to land.
Extinguishment	Extinguishment means that all or some native title rights in an area of land or sea are no longer recognised by Australian law.
Freehold title	Freehold title refers to the unrestricted ownership of a parcel of land, where the owner can use the land as they choose (provided they follow the law and comply with planning requirements). There can be special classes of freehold title, such as Aboriginal Freehold Title, which means certain conditions are placed on the title restricting how the land can be used.
Future act	A future act is an act occurring after 1 January 1994 that affects native title by extinguishing or otherwise being inconsistent with the continued existence, enjoyment or exercise of native title rights.
Inalienable land	Inalienable land refers to land that is unable to be alienated i.e. sold, transferred or surrendered.
Indigenous estate	The Indigenous estate refers to areas of land owned or controlled by Indigenous Australians under various statutory land regimes and native title.
Indigenous land	Indigenous land (for the purposes of this report) is land established or granted under statutory land rights regimes.

Term	Definition
Indigenous land owner	Indigenous land owner (for the purposes of this report) is an Aboriginal or Torres Strait Islander person who holds a right in Indigenous land.
Land holding bodies	Land holding bodies refers to the established groups who own or hold the rights and interests to Indigenous land or native title. See Attachment B for further detail.
Land tenure	Land tenure is the term given to the legal regime under which land is owned.
Native title	Native title is the rights and interests in relation to land and waters held by Aboriginal and Torres Strait Islanders under their traditional laws and customs that are recognised by the common law of Australia, in accordance with the <i>Native Title Act 1993</i> (Cth).
Native title holder	A native title holder is person or body who holds native title.
Non-exclusive native title rights	Non-exclusive native title rights are rights that co-exist with other interests in land or waters.
Proponent	A proponent refers to a person or organisation seeking to do development activities.
Representative bodies	Representative bodies refer to established groups who provide support and sometimes represent the rights and interests of Indigenous land owners or native title holders. See Attachment B for further detail.
Statutory land regimes	Statutory land regimes refers to the various legislative schemes which grant land to Aboriginal and Torres Strait Islander people. They vary across jurisdictions.
Torrens title	A Torrens title is a certificate of title for an interest in land. It records all transactions for the parcel of land, such as transfers, mortgages, and leases. With registration, this certificate is guaranteed correct by the state or territory.
Township lease	A township lease is a long-term lease over a township on land under the <i>Aboriginal Land Rights (Northern Territory) Act 1976</i> (Cth).
Traditional owner	Traditional owner is a term which has come to be used in everyday speech to recognise the enduring connection Aboriginal and Torres Strait Islander peoples have to their country. The term traditional owner has a specific legal meaning under certain statutory land rights regimes, and it is in this context that the term traditional owner is used in this report.

LAND TENURE SUMMARY



Australian Capital Territory

In the Australian Capital Territory, the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth) allows for the grant of inalienable freehold title in the Jervis Bay Territory to the Wreck Bay Aboriginal Community Council (WBACC). Under the Act, WBACC is able to lease areas of their land to registered members for domestic purposes (99-year leases) and business purposes (25-year leases), as well as to non-registered members for domestic or business purposes (15-year leases). All leases to non-registered members, as well as any lease above the stated time periods, require approval by the Commonwealth Minister for Indigenous Affairs. Booderee National Park and Botanic Gardens are jointly managed with the Wreck Bay Community Council.

As of July 2015 there had been a total of six native title applications lodged in the Australian Capital Territory. However, these applications are not currently active and none of them have been determined. One of the first native title claims in the Australian Capital Territory was discontinued as a result of an agreement reached in 2001, whereby the Australian Capital Territory granted a Special Aboriginal Lease over Namadgi National Park which involves jointly managing the Park with traditional owners.

Northern Territory

The *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (NT ALRA) provides for the grant of inalienable freehold title to Aboriginal Land Trusts in the Northern Territory. About 50 percent of the land mass and 70 percent of the coastline of the Northern Territory has been granted as Aboriginal freehold under the NT ALRA. The NT ALRA establishes Land Councils which have a statutory role to assist traditional owners acquire and manage their land.

Leasing on Aboriginal land under the NT ALRA is common place. Leases are entered into with the consent of traditional owners, which is obtained by Land Councils. Most government infrastructure, including public housing, is secured by long-term leases.

The NT ALRA provides for township leasing. A township lease is a lease over a whole community for between 40 to 99 years to an approved entity. Current township leases are held by the Executive Director of Township Leasing (EDTL), an independent Commonwealth statutory office holder, on behalf of the Commonwealth. An approved entity could be a Northern Territory entity or community entity. The head lease holder formalises all land use in the community and can issue long-term subleases to support home ownership and business development activities. The EDTL works with traditional owners and community members through a Consultative Forum. There are three township leases over six communities on the Tiwi Islands and Groote Eylandt. There are no township leases on the Northern Territory mainland.

Excisions from pastoral leases can be granted as Community Living Areas to Aboriginal land holding entities under the *Associations Act* (NT). Long-term leasing of these areas is possible, with the relevant Northern Territory Minister's approval required for leases longer than ten years.

Town camps are areas close to urban centres designated (leased-in-perpetuity) for Aboriginal communal living, and are often held under the *Crown Lands Act* (NT) (Crown Lands Act) and *Special Purpose Lease Act* (NT) (SPLA). The SPLA restricts subleases on these camps being issued for longer than 12 years. Any sublease of Crown leases under the Crown Lands Act requires the approval of the relevant Northern Territory Minister.

Native title is not determined on NT ALRA land. Section 210 of the *Native Title Act 1993* (Cth) (Native Title Act) provides that native title does not affect the operation of beneficial land rights laws, including the NT ALRA. Native title claims are made outside NT ALRA land in particular over pastoral leases. As of July 2015 there were 75 native title determinations in the Northern Territory and 167 active claims applications. The Northern Territory Government is negotiating Indigenous Land Use Agreements (ILUAs) on a whole-of-town basis to free-up land for future development and provide appropriate compensation.

New South Wales

In New South Wales, the *Aboriginal Land Rights Act 1983* (NSW) (NSW ALRA) allows for the grant of alienable freehold title to Local Aboriginal Land Councils (LALCs) where the Minister decides that the land is "claimable Crown land" for the purpose of that Act. This includes Crown lands that are not needed or likely to be needed as residential lands or for an essential public purpose, and are not the subject of a claimant application or a positive determination under the Native Title Act.

However, interior land – known as the Western Division – can only be granted as perpetual leasehold (like non-Aboriginal land in the region). The NSW ALRA also allows existing and proposed national parks, sites, and reserves to be granted to LALCs as inalienable freehold, on the condition that the land is immediately leased back to the New South Wales Government. These parks are jointly managed by Aboriginal land owners and the New South Wales Government.

While most NSW ALRA land is granted as unrestricted freehold the Act also allows for long-term leasing of LALC land and in the Western Division lands it allows for leasing-in-perpetuity. Land use approvals processes – including formal subdivision and infrastructure upgrades – must be passed before long-term leases can be granted. Current zoning on most reserves does not allow for long-term leasing for residential purposes. However, LALCs can lease their lands to third parties for a period of less than three years with easier approvals processes.

Grants under the NSW ALRA are made subject to native title rights and interests where the claim is lodged and granted after 28 November 1994. LALCs require non-claimant applications to obtain a determination of native title before they can transfer an interest in that land to third parties (either by sale or lease). As of July 2015 there were 51 native title determinations in New South Wales and 26 active claims applications. In some areas ILUAs allow for grants of land in freehold to native title holders. This happens when the land has been identified for transfer due to native title being extinguished or when the native title holder has agreed to surrender their native title in that parcel of land.

Through the Aboriginal Community Lands and Infrastructure Project, the Department of Aboriginal Affairs and the Department of Planning and Environment is reviewing zonings on Aboriginal lands to enhance economic development potential while still having regard to nature conservation/cultural heritage outcomes.

Queensland

In Queensland, the *Aboriginal Land Act 1991* (Qld) (ALA) and the *Torres Strait Islander Act 1991* (Qld) (TSILA) allow for the grant of inalienable freehold title to Land Trusts and *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) (CATSI Act) bodies for the benefit of a broader Indigenous group. The ALA and TSILA allow for long-term 99-year (renewable) leasing of Indigenous land in a simplified, flexible framework without Ministerial approvals. These leases are transferable. Leases for home ownership can only be granted (or transferred) to non-Indigenous people where the home ownership supports another lease, such as a lease for commercial purposes.

The *Aboriginal and Torres Strait Islander Land (Providing Freehold) Amendment Act 2014* (Qld) amended the ALA and TSILA to provide the option of converting town areas of Aboriginal and Torres Strait Islander communities to ordinary freehold land. Once granted this freehold land can be mortgaged, sold or gifted, used for commercial purposes or home ownership.

Under earlier Land Acts, communal tenure could have been granted as a Deed of Grant in Trust (DOGIT). DOGITs are generally former Indigenous reserves granted as inalienable freehold to Indigenous local governments who hold the land on trust for the benefit of Indigenous inhabitants. A DOGIT may be surrendered, cancelled or be compulsorily acquired. Leasing of DOGITs is governed by the ALA or the TSILA. DOGITs are progressively being transferred under the ALA or TSILA.

Once transferred, the DOGIT tenure will cease and Aboriginal or Torres Strait Islander inalienable freehold will be created with new trustees, which can include a PBC or other CATSI Act corporation.

Native title is managed on a community-by-community basis. It is likely to continue in most communities. As of July 2015 there were 119 native title determinations in Queensland and 83 active claims applications. The Queensland Government is commencing community ILUAs to support future development of native title areas.

South Australia

In South Australia, the *Aboriginal Lands Trust Act 2013 (SA)* (ALT Act) (first enacted in 1966) allows for the grant of freehold title to the Aboriginal Land Trust (ALT) on behalf of the Aboriginal people of South Australia. That land can be alienated in some circumstances.

Under the ALT Act, long-term 99-year leasing is possible with the approval of the ALT and does not require Ministerial consent. The majority of ALT properties are leased by the ALT to Aboriginal community members and organisations who reside on, develop, or manage these properties.

The *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981 (SA)* (APY Act) grants inalienable freehold title over 103,000 square kilometres in the north-west corner of South Australia. The *Maralinga Tjarutja Land Rights Act 1984 (SA)* (MT Act) grants inalienable freehold title over a similar sized area in the west of South Australia. Under both the APY and MT Acts, freehold land is vested in a body corporate bound by statutory functions and powers. Leases of variable periods can be granted under the APY and MT Acts. A traditional owner can be granted a lease for any length of time. The Crown can be granted a lease up to 50 years, and any other party can be granted a lease up to 10 years (APY Act) or five years (MT Act). None of these leases can be mortgaged.

Native title is recognised over significant areas of South Australia. As of July 2015, there were 23 native title determinations in South Australia and 21 active claim applications. Of these, 10 claims have been comprehensively settled via recognition of native title and settlement ILUA that resolves the issue of compensation for past extinguishment.

Prior extinguishment can be disregarded or the non-extinguishment principle applies to ALT Act, APY Act and MT Act land unless connection is not proven.

Tasmania

In Tasmania, the *Aboriginal Lands Act 1995 (Tas)* allows a grant of land to be held in trust for the Aboriginal community in perpetuity by the Aboriginal Land Council of Tasmania (ALCT). Under the Act, the ALCT is not able to mortgage the land or use it as security for any purpose. However, the ALCT is able to lease areas of land provided that a lease extending beyond three-years meets the provisions of the *Land Titles Act 1980 (TAS)*.

The Tasmanian Government introduced the *Native Title (Tasmania) Act 1994 (Tas)* to validate past acts and to preserve certain rights, including the preservation of beneficial reservations or conditions for Aboriginal people. As of July 2015 five native title applications had been lodged within Tasmania, all of which been either struck-out, discontinued or rejected.

Victoria

The *Traditional Owner Settlement Act 2010* (Vic) creates a framework for agreements between traditional owners and the State to resolve issues which may otherwise be dealt with through native title claims. In exchange for a settlement package, a traditional owner group agrees to withdraw any existing native title and compensation applications and agrees not to file any such applications in future. Outcomes are negotiated on a case-by-case basis. As of July 2015 there were seven native title determinations in Victoria and two active claims applications.

In Victoria the *Aboriginal Land Rights Act 1970* (Vic) allows a grant of land to be held in trust for the Aboriginal community in perpetuity by the Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust. Under the Act, these trusts are able to lease areas of land up to a period of 21 years. The trusts can approve longer leases if 75 per cent of voting members approve the lease.

Under the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth), land in the Lake Condah area is vested in the Kerrup-Jmara Elders Aboriginal Corporation, while land in the Framlingham Forest area is vested in the Kirrae Whurrong Aboriginal Corporation. These corporations can grant leases for areas of land for a period of three years. Longer leases are possible if the lease is approved by the Minister, or if the land is leased to the Crown. Under the Act, these corporations can transfer their interest in land to another Aboriginal and Torres Strait Islander corporation, but are not able to sell or mortgage the land.

Western Australia

In Western Australia, the *Aboriginal Affairs Planning Authority Act 1972* (WA) designates reserve land to be held under the “care, control and management” of the Aboriginal Lands Trust (ALT). A number of Crown reserves are also held by Aboriginal corporations. The majority of these reserves were created under the Aboriginal Living Area (Outstation) Programme in cooperation with the State and Commonwealth Governments during the 1980s and 1990s.

The ALT has the power to confer leases over reserves to third parties for a period up to 99 years. These leases must be consistent with the purpose of the reserve, being for the “use and benefit of Aboriginal inhabitants”. A smaller number of leases have been issued to Aboriginal communities for this purpose under the *Land Administration Act 1997* (WA) (LAA). The LAA also provides for pastoral leases for Aboriginal corporations, as well as perpetual leases with the purpose of the advancement of Aboriginal persons. The LAA does not prevent Aboriginal people from holding ordinary freehold title of their land.

The creation of tenure under the LAA is subject to statutory approvals and other due diligence referrals, including compliance with the future act regime under the Native Title Act. As of July 2015 there were 48 native title determinations in Western Australia which include significant areas of exclusive possession in the northern part of the State, and 96 active claims applications.

LAND HOLDING BODIES AND REPRESENTATIVE BODIES

National

Prescribed Bodies Corporate (or Registered Native Title Body Corporate)

Prescribed Bodies Corporate (PBCs) – more formally known as Registered Native Title Bodies Corporate (RNTBCs) – hold and manage native title on behalf of native title holders. A PBC is created for an area of land after the Federal Court makes a determination recognising native title. There are now over 140 PBCs representing native title groups across Australia.

PBCs are registered with the Office of the Registrar of Indigenous Corporations (ORIC) and have prescribed functions under the *Native Title Act 1993* (Native Title Act) to:

- hold, protect and manage determined native title in accordance with the objectives of the native title holding group; and
- ensure certainty for governments and other parties interested in accessing or regulating native title land and waters by providing a legal entity to manage and conduct the affairs of the native title holders.

Native Title Representative Body and Native Title Service Provider

Native Title Representative Bodies (NTRBs) are organisations recognised and funded by the Commonwealth to perform a wide variety of functions to assist native title groups in a specific region under the Native Title Act. Native Title Service Providers (NTSPs) are funded to do the same work as NTRBs in areas where NTRBs have not been recognised.

Indigenous Land Corporation

The Indigenous Land Corporation (ILC) is an independent statutory authority established to provide economic, environmental, social and cultural benefits for Indigenous people by assisting in the acquisition of land and management of Indigenous-held land. The ILC holds a number of pastoral leases and other tenures throughout the states and territories.

Australian Capital Territory

Wreck Bay Aboriginal Community Council

The Wreck Bay Aboriginal Community Council (WBACC) holds land granted under the *Aboriginal Land Grant (Jervis Bay Territory) Act 1986* (Cth). WBACC administers and manages the relevant land within the Jervis Bay Territory, provides some council services and represents community interests.

Special Aboriginal Lease Namadgi National Park

Following negotiations between the Australian Capital Territory (ACT) and ACT Native Title Claimants, the ACT offered to grant a Namadgi Special Aboriginal Lease over Namadgi National Park for a period of 99 years, on the condition that all native title claims be either fully determined or withdrawn. The management arrangement to apply under the Namadgi Special Aboriginal Lease will

be negotiated between the parties, and will include a statutory Board of Management made up of six Aboriginal members and six non-Aboriginal members for a period of three years. The Board will have responsibility for preparing and overseeing the implementation of a Plan of Management for the Park.

New South Wales

Local and Regional Aboriginal Land Councils

Aboriginal Land Councils (ALCs) hold land granted under the *Aboriginal Land Rights Act 1983* (NSW) (NSW ALRA), and collectively manage a range of support services delivered at local level to their communities. These services include housing, legal affairs, employment, training and property acquisition and management. There are 119 Local ALCs (LALCs) and their peak body, the New South Wales ALC (NSWALC). The NSWALC Statutory Fund supports ALC administration.

A significant feature of the NSW ALRA is that it departs from the “traditional owner” model found under other statutory land rights regimes. ALC members and land grant beneficiaries can include Aboriginal residents of an area and those with a recognised “association” with the area, as well as “Aboriginal owners”.

Northern Territory

Aboriginal Land Trusts

Land Trusts established under the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (NT ALRA) hold Aboriginal freehold on behalf of traditional owners. Land Trusts deal with interests in the land at the direction of the relevant Land Council, who can only make a direction after receiving the consent of the relevant traditional owners. Land Trusts cannot hold money, and any land use income received in respect of Aboriginal land is distributed to individuals or incorporated entities by Land Councils.

Land Councils

Land Council functions under the NT ALRA are to assist traditional owners in the Northern Territory to acquire and manage their land. Land Councils receive Commonwealth funding via the Aboriginals Benefit Account, established under the NT ALRA, to perform their statutory functions and, in certain instances, to disburse statutory royalty equivalent payments for mining operations on Aboriginal land. There are four Land Councils – the Anindilyakwa, Central, Northern and Tiwi Land Councils.

Native title is not determined on Aboriginal freehold under the NT ALRA. The Northern and Central Land Councils act as the NTRB for native title holders (outside Aboriginal freehold) in their region.

Town Camp and Community Living Area land holding bodies

The Indigenous land holding bodies who hold title to town camps and community living areas (CLAs) are governed by various pieces of NT legislation including the *Associations Act* (NT). These bodies have variable capacity and assets. They sometimes have a role in service delivery.

In some areas, town camp associations have organised themselves under representative organisations, such as Tangentyere Council for Alice Springs town camps. CLAs are sometimes supported by Land Councils, though it is not within Land Councils' statutory requirements to do so. Some CLAs engage private legal representation.

The Top End (Default PBC/CLA) Aboriginal Corporation RNTBC is a body corporate with functions in relation to CLAs including:

- to be the owner of land (including any estate or interest in land, whether legal or equitable) that is a community living area;
- to perform its functions as the owner of land that is a community living area with due consideration to the interests of the native title holders, and the residents, of that land; and
- to hold any real or personal property received by way of compensation or other consideration payable in relation to the community living area, on trust, and to invest or otherwise apply any money with due consideration to the interests of the native title holders, and the residents, of that land.

Queensland

Land Trusts

Land Trusts were previously established under the *Aboriginal Land Act 1991* (Qld) (ALA) and the *Torres Strait Islander Land Act 1991* (Qld) (TSILA) to hold land for the benefit of Aboriginal and Torres Strait Islander peoples. New land trusts are no longer being established, and land is now granted to corporations registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth) or existing land trusts.

Land Trusts established under the ALA and TSILA are governed by those Acts. No financial support is provided however they can receive rent from leasing.

Local Government Councils

Elected Indigenous local government councils act as trustees of Deed of Grant in Trust (DOGIT) lands on behalf of the community's Indigenous inhabitants. The trustee will change if the land is transferred under the ALA or TSILA. No financial support is provided for their trustee role however they can receive rent from leasing.

South Australia

Aboriginal Land Trust

The Aboriginal Land Trust acquires, holds and deals with land for the continuing benefit of Aboriginal South Australians. The Trust is a body corporate and an instrumentality of the Crown, holding title to 64 properties comprising approximately 990,000 hectares of land.

The Trust has met its responsibilities for acquiring, holding and dealing with land by organising the leasing of land to communities and managing natural resource management programmes to improve conditions on the land.

The Trust leases properties to Indigenous Australians for various reasons. Leases can simply be in order for people to reconnect to the land through camping, for people with cultural and historical connections to the land, or for commercial and economic benefits.

Anangu Pitjantjatjara Yankunytjatjara Body Corporate

Anangu Pitjantjatjara Yankunytjatjara (APY) is established under the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) to hold the freehold title to lands on behalf of its members. The APY lands occupy 103,000 square kilometres in the North West corner of South Australia, ten per cent of the state's land mass.

Maralinga Tjarutja Community Council

The Maralinga Tjarutja (MT) Community Council is constituted by the traditional owners (Yalata and Maralinga people) to administer the lands granted to them under the *Maralinga Tjarutja Land Rights Act 1984* (SA). They also jointly own and administer the Mamungari Conservation Park with the Pila Nguru (or Spinifex people). MT has control over some 80,000 square kilometres of land south of the Pitjantjatjara Lands.

Tasmania

Aboriginal Land Council of Tasmania

The Aboriginal Land Council of Tasmania (ALCT) is a statutory authority, established under the *Aboriginal Lands Act 1995* (Tas) to act as a custodian of parcels of land returned to the Tasmanian Aboriginal community while allowing Aboriginal groups to manage the areas. Around 62,000 hectares of land has been returned to the ALCT since 1996.

Victoria

Traditional owner group entity

The *Traditional Owner Settlement Act 2010* (Vic) provides for an out-of-court settlement of native title. The Act allows the Victorian Government to recognise traditional owners and certain rights in Crown land. In return for entering into a settlement, traditional owners must agree to withdraw any native title claim. Corporations are appointed to represent traditional owner groups under the Act.

Traditional owner groups entering into agreements with the Victorian State Government may be bestowed with a range of rights and responsibilities depending on the settlement, including a grant of freehold land, joint management of public lands or funding to provide the foundation for sustainable economic development.

Kerrup-Jmara Elders Aboriginal Corporation and Kirrae Whurrong Aboriginal Corporation

The Kerrup-Jmara Elders Aboriginal Corporation and Kirrae Whurrong Aboriginal Corporation are Aboriginal and Torres Strait Islander corporations established to hold land in the areas of Lake Condah and Framlingham Forest respectively, under the *Aboriginal Land (Lake Condah and Framlingham Forest) Act 1987* (Cth).

Framlingham Aboriginal Trust and Lake Tyers Aboriginal Trust

The Framlingham Aboriginal Trust and the Lake Tyers Aboriginal Trust are body corporates established by the *Aboriginal Lands Act 1970* (Vic) to hold land at Framlingham and Lake Tyers.

Western Australia

Aboriginal Land Trust

The Aboriginal Land Trust (ALT) is established by the *Aboriginal Affairs Planning Authority Act 1972* (WA) to use and manage reserve land for the benefit of Aboriginal people. The ALT is a significant landholder with responsibility for approximately 24 million hectares or ten per cent of the State's land mass. This land comprises different tenures including, reserves, leases and freehold properties. A significant proportion of this land comprises reserves that have Management Orders with the ALT (generally having the power to lease), with their purposes mostly being for "the use and benefit of Aboriginal inhabitants".

The ALT is responsible for the administration of lands previously held by the Native Welfare Department and a number of other State Government agencies. There are also lands that remain registered in the name of the Aboriginal Affairs Planning Authority. As a part of the effective management of the estate, the ALT undertakes strategic land acquisitions.