

# 12 Reconciliation, land needs and international obligations

**The recommendations in this chapter relate to: conforming with international obligations (328-333); addressing land needs (334-338); and the process of reconciliation (339).**

## Key themes from recommendations (12 recommendations)

- Aboriginal and Torres Strait Islander people are disproportionately represented in Australia’s incarcerated population. Given the differences in cultural practices and customs, there is a need to ensure that guidelines and practices are respectful of the needs of Aboriginal and Torres Strait Islander prisoners.
- States and Territories have a specific responsibility to ensure that legislation regarding correctional services conform to Standard Guidelines for Corrections in Australia, and uphold humane conditions.
- The Commonwealth Government should make a declaration under Article 22 of the *Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* and take all steps necessary to become a party to the *Optional Protocol to the International Convention on Civil and Political Rights* to provide a right of individual petition to the Committee Against Torture and the Human Rights Committee.
- Land plays a central role in the identity of Aboriginal and Torres Strait Islander people, and land rights are vital to ensure that communities can preserve the cultural, historical and traditional integrity of their land.
- Land needs of Aboriginal and Torres Strait Islander communities should be incorporated into legislation, and that such legislation should encompass a process for restoring unalienated Crown land to those Aboriginal and Torres Strait Islander people who claim such land on the basis of ongoing association.

Legend  Complete  Mostly Complete  Partially Complete  Not Implemented  Out of Scope

**Commonwealth | Key actions:** In 1993, the Australasian Police Ministers’ Council endorsed standard guidelines for police custodial facilities. Australia has also adhered to international obligations, including the First Optional Protocol to the International Covenant on Civil and Political Rights, and introduced the *Native Title Act 1993*, which established a national scheme to provide for the recognition and protection of native title. In 1993, Australia lodged declarations with the United Nations under Article 22 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*.

**Remaining gaps:** The Commonwealth has not explicitly outlined land right transfer arrangements for long-term leases. While significant steps have been taken to advance the objectives of reconciliation, this remains an ongoing process.

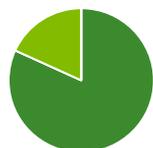
**New South Wales | Key actions:** New South Wales upholds humane prison conditions through a standardised Performance Framework and active systems for monitoring compliance. The *Aboriginal Land Rights Act 1983* was introduced to address Aboriginal land needs.

**Remaining gaps:** Further consideration of entitlements to unalienated crown land is required in order for New South Wales to fully meet the RCIADIC’s objectives. In addition, while the NSW Reconciliation Council has received ongoing funding, further work is required to advance the reconciliation agenda in New South Wales.

**Victoria | Key actions:** The Victorian Government has decommissioned a number of older prisons, and updated facilities. In addition, protections for Aboriginal and Torres Strait Islander heritage and cultural sites are enshrined in the *Mineral Resources Development Act 1990*.

**Remaining gaps:** Victoria has not implemented accelerated processes for granting freehold title over appropriate public lands to Aboriginal and Torres Strait Islander communities and elements of its land title legislation are not aligned with the RCIADIC recommendations.

**Queensland | Key actions:** The Queensland Government has complied with the Standard Guidelines for Corrections in Australia by establishing a program for the rebuilding of correctional facilities, including capital works. Provisions for the addressing of land related needs have been included in the *Aboriginal Land Act 1991* and the *Torres Strait Islander Land Act 1991*.



**Remaining gaps:** The Queensland Government has not fully addressed the process of claiming unalienated crown land by Aboriginal and Torres Strait Islander people. While Queensland has enacted initiatives such as the Wages and Savings Reparations scheme, further work is needed to advance reconciliation.

**South Australia | Key actions:** South Australia has installed an Aboriginal and Torres Strait Islander person on the Parole Board and improved representation on the Prisoner Assessment Committee. The *Native Title (South Australia) Act 1994* has also been enacted to bring State laws in line with Commonwealth native title legislation.



**Remaining gaps:** The South Australian Government has supported the provision of freehold title over appropriate public lands to local Aboriginal and Torres Strait Islander communities, however, further consideration of an accelerated process is required. While South Australia has developed a new tiered approach to relationship building, further work is needed to progress reconciliation.

**Western Australia | Key actions:** Western Australia has implemented all recommendations related to international obligations, including adopting standard Guidelines for corrections. Western Australia has also made significant progress on addressing land needs through implemented native title legislation.



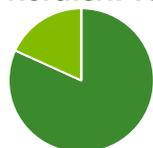
**Remaining gaps:** Western Australia has not implemented a process to accelerate the granting of freehold land to local Aboriginal and Torres Strait Islander communities and current legislation does not allow the granting of inalienable freehold title.

**Tasmania | Key actions:** Tasmania has incorporated the Standard Guidelines for Corrections in Australia into the practices of Corrective Services, and is currently participating a further review to ensure comprehensive compliance. The *Aboriginal Lands Act 1995* was introduced to address the absence of native title in Tasmania, and the Aboriginal Land Council of Tasmania is the democratically elected body that manages land returned under the Act.



**Remaining gaps:** Further consideration of legislative measures relating to the lease of pastoral land is required. Furthermore, while Tasmania has expressed a commitment to the reconciliation process through its Reset Agenda and through provisions in the *Aboriginal Lands Act 1995*, further action is required to fully meet the RCIADIC recommendation.

**Northern Territory | Key actions:** The Northern Territory Government has ensured that prison practices are compliant with the Standard Guidelines and has been actively involved in their most recent review. In addition, the Northern Territory has taken actions to control entry to Aboriginal and Torres Strait Islander land through the issue of permits, and approval processes.



**Remaining gaps:** The Northern Territory Government has not fully addressed the development of an accelerated process for the granting of land title based on need. In addition, while the Northern Territory has expressed its agreement to participate in reconciliation, further significant action is required.

**Australian Capital Territory | Key actions:** The Australian Capital Territory Government has incorporated the principles of the Standard Guidelines into ACT Corrective Services policy development and planning, and has also cooperated with the Commonwealth's National Standards Body in the development of the Standard Guidelines.



**Remaining gaps:** The ACT Government has not enacted a legislative response to implement the granting of land title to Aboriginal and Torres Strait Islander people. While the ACT Government has demonstrated its commitment to reconciliation through the establishment of ATSIC and relevant legislative reform, further actions will need to be considered.

## 12.1 Conforming with international obligations (328-333)

### Recommendation 328

*That as Commonwealth, State and Territory Governments have adopted Standard Guidelines for Corrections in Australia which express commitment to principles for the maintenance of humane prison conditions embodying respect for the human rights of prisoners, sufficient resources should be made available to translate those principles into practice.*

#### Background information

The RCIADIC found that the treatment of incarcerated Aboriginal and Torres Strait Islander people was sub-standard, and the Commissioner provided evidence that the human rights of prisoners had not been adequately maintained. However, the RCIADIC recognised that additional resources were needed to implement the Standard Guidelines.

#### Responsibility

The recommendation is the responsibility of the State and Territory Governments. Recommendation 328 is the responsibility of the States and Territories as they provide funding for prisons.

#### Key actions taken and status of implementation

In 1993, the **New South Wales** Government introduced a new case management system for juvenile justice based on the United Nations Rules and Principles for juveniles in custody. This included casework and support intervention, contact with families, and health in ensuring that juveniles in custody were able to maintain links with the community.

Corrective Services NSW (CSNSW) ensures that NSW correctional centres are maintained to provide for humane prison conditions. CSNSW has developed a standardised Performance Framework to monitor the operations of both public and privately operated prisons. This Framework includes Service Specifications that govern the operation of both public and privately operated prisons and a KPI regime that measures the performance of all prisons against 17 key indicators.

The CSNSW Governance and Continuous Improvement Division has established systems for monitoring compliance through the Operational Performance Review Branch. Operational reviews aim to ensure compliance and ensure performance that informs continuous improvement strategies to achieve best practice in custodial and community standards. Standards are based on the *(National) Standard Guidelines for Corrections in Australia*. In addition, an Inspector of Custodial Services is appointed to inspect adult correctional facilities and juvenile justice centres, and report to Parliament on the findings of these inspections.

 *New South Wales has addressed Recommendation 328, as evidenced by the strict monitoring and maintenance procedures applied to the conditions and operations of NSW correctional centres and prisons.*

The **Victorian** 1993 implementation report notes that the Victorian Government decommissioned a number of older prisons, established three new prisons, and upgraded facilities at Bendigo and Beechworth including the installation of sewerage to each cell. Additionally, the Victorian Government noted in AJA 3 that efforts would be made to ensure the transparency of Aboriginal and Torres Strait Islander conditions in detention through visitor programs.

Since this time, Corrections Victoria has been a part of the development, and is a signatory to, the Corrective Services Administrators Council (CSAC) - Indigenous Strategic Framework. The Indigenous Strategic Framework guides the management of Aboriginal and Torres Strait Islander prisoners and offenders in Corrections across Australia and New Zealand. This framework was developed by the Corrective Services Administrators Council (CSAC) Indigenous Issues Working Group and endorsed by the Corrective Services Ministerial Council (CSMC) in July 2016.

 *Victoria has addressed Recommendation 328, as evidenced by the upgrades to prisons following the RCIADIC and adoption of Standard Guidelines for Corrections in Australia.*

In **Queensland's** 1993 implementation report, it was noted that Standard Guidelines were recognised by the Queensland Corrective Services Commission and that the Queensland Government had established a program for the rebuilding of correctional facilities, including capital works. It was also provided that juvenile justice practices met the United Nations Minimum Rules for Administration of Juvenile Justice.

More recently, the Standard Guidelines for Corrections in Australia (2004) provide basic standards and entitlements for offenders in Queensland and are currently under review. Queensland complies with these Standards and in most cases, provides higher standards than those stipulated.

 *Queensland has addressed Recommendation 328, as evidenced by capital works involved with rebuilding correctional facilities following the RCIADIC.*

The **South Australian** Government noted in 1993 that the Standard Guidelines for Corrections in Australia were referred to in policy generation and as a benchmark for performance measurement. More recently, the South Australian Government has implemented initiatives in response to the Department for Correctional Services' Service Principles, including the instalment of an Aboriginal and Torres Strait Islander person on the Parole Board, improved support to funeral leave, prisoner access to Elders, affirmative action in recruitment, and improved representation on the Prisoner Assessment Committee. The Corrective Services Administrators Council (CSAC) Indigenous Strategic Framework for Managing Indigenous Offenders was also endorsed in 2016 and will be promoted by the CSAC Senior Officers Indigenous Issues Working Group throughout their jurisdictions, including Aboriginal and Torres Strait Islander Legal Services and Organisations.

 *South Australia has addressed Recommendation 328, as evidenced by initiatives implemented by the Department for Correctional Services.*

The **Western Australia** Government provided in their 1994 implementation report that guidelines had been implemented and that all standards from the Guidelines were met in Western Australia prisons. The Western Australian Government has also noted its commitment to the national standards set out in the Standard Guidelines for Corrections in Australia (Corrective Services Administrators Council, 2012) and noted that the Department of Justice has developed a Healthy Prisons Standard based on internationally recognised tools for achieving consistency of delivery, analysis and outcomes for all offenders. The concept was developed by the World Health Organization and is now widely accepted as a benchmark for what should be provided in any custodial environment.

 *Western Australia has addressed Recommendation 328 by adopting Standard Guidelines for Corrections in Australia.*

**Tasmania** supports the Standard Guidelines for Corrections in Australia last issued in 2012. Tasmania is currently participating in a further review to ensure the Guidelines reflect contemporary custodial and community corrections practices. The Standard Guidelines are incorporated into Corrective Services practices in Tasmania.

 *Tasmania has addressed Recommendation 328 by incorporating the Standard Guidelines into Corrective Services practices and is currently reviewing their appropriateness for contemporary corrections practices.*

In their 1993-94 implementation report, the **Northern Territory** Government provided that prison practices were compliant with Standard Guidelines, including in the design of the Alice Springs Prison. The Northern Territory Correctional Services is a signatory to the Standard Guidelines, which were updated in 2012. Northern Territory Correctional Services was represented on the working group that reviewed the Standard Guidelines for Corrections in Australia.

 *The Northern Territory has addressed Recommendation 328 by ensuring that prison practices are compliant with the Standard Guidelines.*

The **Australian Capital Territory** Government commented in their 1993-94 implementation report that the principles of Recommendation 328 had been incorporated in ACT Corrective Services policy

development and planning, and that practices related to ACT Juvenile Justice Services were in conformity to international principles.

In drafting the *Corrections Management Act 2007*, the ACT Government incorporated humane treatment of detainees as one of the four key objectives of the Act. Section 7 requires that the Act promotes 'public safety and the maintenance of a just society, particularly by ensuring that detainees are treated in a decent, humane and just way'. Consistent with this requirement, the Alexander Maconochie Centre is the first prison in Australia to be specifically designed and managed to be compliant with human rights principles.

ACT Correctional Services and the ACT Health Directorate operate the Alexander Maconochie Centre and the Hume Health Centre consistent with the Standard Guidelines for Corrections in Australia. These guidelines were revised in 1992 with regard to the recommendations of the RCIADIC. The prison is designed to operate consistent with human rights principles and with the World Health Organisation Healthy Prison Concept. This concept provides that:

- everyone is and feels safe;
- everyone is treated with respect and as a fellow human being;
- everyone is encouraged to improve him or herself and is given every opportunity to do so through the provision of purposeful activity; and
- everyone is enabled to maintain contact with their families, and is prepared for release.

ACT Correctional Services and the Alexander Maconochie Centre are subject to scrutiny by the ACT Human Rights Commissioner (as well as other external bodies such as the Ombudsman) and considerable resources are utilised to facilitate and respond to that scrutiny.

 *The Australian Capital Territory has addressed Recommendation 328 by incorporating the guidelines into ACT Corrective Services policy.*

## Recommendation 329

*That the National Standards Body comprising Ministers responsible for corrections throughout Australia give consideration to the drafting and introduction of legislation embodying the Standard Guidelines and in drafting such legislation give consideration to prisoners' rights contained in Division 4 of the Victorian Corrections Act 1986.*

### Background information

The RCIADIC called for the introduction of legislation to protect the minimum entitlements of Aboriginal and Torres Strait Islander people in prisons. The RCIADIC highlighted the example of Division 4 of the *Corrections Act 1986* (Vic), which provided for prisoner rights such as the right of daily access to the open air, the right to adequate food, medical and psychiatric care, the right to annual review of classification.

### Responsibility

The recommendation is the responsibility of the State and Territory Governments. Recommendation 329 is the responsibility of the States and Territories as they enact legislation to provide prisoners' rights.

### Key actions taken and status of implementation

In 1993, the **New South Wales** Government amended the *Standard Guidelines for the Management of Offenders* to ensure adequate recognition was given to the needs and rights of Aboriginal people. Additionally, the *Crimes (Administration of Sentences) Act 1999* (NSW) and the *Crimes (Administration of Sentences) Regulation 2014* (NSW) provide for similar rights as are set out in the *Corrections Act 1986* (Vic). The *Standard Guidelines for Corrections in Australia* was revised in 1992 to reflect recommendations of the RCIADIC. The current 2012 *Standard Guidelines* are guided by principles which recognise the specific needs and cultural backgrounds of Aboriginal people.

 *The New South Wales Government has addressed the principles of Recommendation 329 through existing legislation, including the Crimes (Administration of Sentences) Act 1999 (NSW) and the Crimes (Administration of Sentences) Regulation 2014 (NSW).*

**Victorian** legislation already provided for the protection of Aboriginal and Torres Strait Islander people's rights in prison. The *Corrections Act 1986* (Vic) provides for a prisoner's rights to be outdoors, have adequate food and clothing, have medical care or special care where required, to practise religion, to make complaints, to receive visits, to have annual reviews of classification, and to have access to education.

 *The Victorian Government had already incorporated the principles of Recommendation 329 into legislation at the time of the RCIADIC.*

**Queensland's** *Corrective Services Act 2006* (Qld) provides prisoners a general right for basic human rights, including humane treatment, dignity, and a consideration of the offender's age, sex, cultural background, or disability. Under this Act, prisoners have rights to access religious and educational programs, to make complaints and benefit from similar rights in relation to letters and visits. Special provisions are also made for Aboriginal and Torres Strait Islander prisoners, including the provision to be incarcerated as close as is practicable to the offender's family.

 *The Queensland Government has addressed the principles of Recommendation 329 through the Corrective Services Act 2006 (Qld).*

In **South Australia**, the *Correctional Services Act 1982* (SA) extends the right to education, to receive and send letters, to have visitors, to have access to legal aid, to make a complaint, to access education, and for prisoners to have their classifications reviewed. However, there is no provision to be outdoors or to access certain medical treatments. The CSAC Senior Officers Indigenous Issues Working Group also developed an Indigenous Framework for Managing Indigenous Offenders in 2016, which was endorsed by the Corrective Services Ministers Conference.

 *The South Australian Government has addressed the principles of Recommendation 329 through the Correctional Services Act 1982 (SA).*

The **Western Australia** Government provides in the *Prison Act 1981* (WA) and the *Prisons Regulations 1982* a prescription to rights for prisoners, including Aboriginal and Torres Strait Islander prisoners. These rights include the right to send letters, the right to medical care and treatment, the right to practise religion, the right to wear clothing other than prison clothing when on an authorised absence from prison, the right to receive visits, the right to make a request or complaint, and the right to clean food and water.

 *The Western Australian Government has addressed the principles of Recommendation 329 through the Prison Act 1981 (WA).*

**Tasmanian** legislation provides a set of rights for prisoners in the *Corrections Act 1997* (Tas), which incorporates the rights provided by Victorian legislation.

 *Tasmania has addressed the principles of Recommendation 329 through the Corrections Act 1997.*

In the **Northern Territory**, prisoner rights are provided in the *Correctional Services Act 2014* (NT). The rights included in this legislation include the right to receive visitors, the right to send and receive letters, the right to access a medical officer, the right to make a complaint, the right to attend religious services, the right to access education, the right to access outdoor space, and the right to food, clothing, personal hygiene facilities and exercise. However, the *Change the Record* report notes that this set of rights is not as comprehensive as those prescribed under the relevant Victorian legislation.

 *The Northern Territory Government has addressed the principles of Recommendation 329 through the Correctional Services Act 2014 (NT).*

In 1994, the **Australian Capital Territory** Government contributed to the revision of the National Standard Guidelines for Corrections to make specific reference to the needs of Aboriginal and Torres Strait Islander offenders. More recently, the *Corrections Management Act 2007* (ACT) provides detainees with the following rights: access to sufficient food and drink; access to suitable clothing;

access to facilities for personal hygiene; suitable accommodation and bedding; access to open air and exercise; access to telephone, mail and other communication methods; the right to receive visits; access to news and education; access to health services and facilities; and the right to practice religion.

 *The Australian Capital Territory Government has addressed the principles of Recommendation 329 through the Corrections Management Act 2007 (ACT).*

### **Additional commentary**

There is a current review of the *Standard Guidelines for Corrections in Australia*. The current review was commissioned by the Corrections Services Administrators' Council in December 2016 to ensure that contemporary custodial and community corrections practices are reflected in the Guidelines. An inter-jurisdictional Working Group has been established to undertake the review and report on progress. The Working Group will be reviewing key principles for the management of Aboriginal and Torres Strait Islander offenders for incorporation into the Guidelines.

## **Recommendation 330**

*That the National Standards Body establish and maintain direct consultation with relevant Aboriginal organisations including Aboriginal Legal and Health Services.*

### **Background information**

The RCIADIC report noted an absence of express consideration given to the particular needs of Aboriginal and Torres Strait Islander people in the Australian Guidelines. The Commonwealth of Australia and all States and Territories agreed to the Guidelines in 1989 as setting standards for the conduct of prisons throughout Australia. This was attributed to the absence of consultation with any Aboriginal and Torres Strait Islander organisation in the drafting or adoption of the Guidelines.

### **Responsibility**

The recommendation is the responsibility of the State and Territory Governments. Recommendation 330 is the responsibility of the States and Territories as they enact legislation to provide prisoners' rights.

### **Key actions taken and status of implementation**

It was resolved at the 1992 annual meeting of the Corrective Services Ministers that it was not practicable for the Ministerial Council, which meets only once annually, to maintain direct consultation with relevant Aboriginal and Torres Strait Islander organisations. As such, it was agreed that this responsibility would be devolved to the States and Territories. Since then, all States and Territories have noted in their implementation reports that Recommendation 330 is not their responsibility.

The Corrective Services Ministerial Council and the Corrective Services Administrators Council established the Corrective Services Administrators Council Indigenous Working Group to assist in addressing the overrepresentation of Aboriginal and Torres Strait Islander people in the criminal justice system.

All **States and Territories** are party to the Indigenous Working Group. As part of their work, the Indigenous Working Group produced an *Indigenous Strategic Framework* in 2016, recommending building links to Aboriginal and Torres Strait Islander organisations, including health organisations. The Indigenous Working Group members undertake consultation as a group and within their jurisdictions in order to inform their work. The Indigenous Working Group reports to both Corrective Services Administrators and Ministers on a regular basis.

 *New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory have addressed Recommendation 330 through their contributions to the Corrective Services Administrators Council Indigenous Working Group.*

## Recommendation 331

*That the National Standards Body consider the formulation and adoption of guidelines specifically directed to the needs of Aboriginal prisoners. In that process the findings and recommendations of this Commission relating to custodial conditions and the treatment of Aboriginal persons in custody should be taken into account.*

### Background information

Aboriginal and Torres Strait Islander people are disproportionately represented in Australia's incarcerated population. Given the differences in cultural practices and customs, there is a need to ensure that guidelines are respectful of the needs of Aboriginal and Torres Strait Islander prisoners.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. Recommendation 331 concerns both Commonwealth, and State and Territory governments. The National Standards Body, under leadership of the Commonwealth, requires a cooperative approach from States and Territories to guide implementation.

### Key actions taken and status of implementation

The **Commonwealth** Government assigned responsibility to the National Standards Body to arrange for the preparation of the guidelines through a Corrective Services Administrators Working Party. In 1992, administrators were directed by the Corrective Services Ministers to review the Standard Guidelines in accordance with Recommendation 331 and to submit their recommendations for changes. These amendments were endorsed at the 1994 meeting and the amended Guidelines subsequently published and distributed.

 *Recommendation 331 is complete as the Commonwealth Government has met its obligations by devolving responsibility to the National Standards Body to review and amend the relevant guidelines.*

All **States and Territories** have noted their support of the role of the National Standards Body and have assisted the Commonwealth Government in the development of Standard Guidelines in line with Recommendation 331. The 2012 Standard Guidelines are guided by principles which recognise the specific needs and cultural backgrounds of Aboriginal and Torres Strait Islander people. This includes a provision for interpreters, accommodation in a supportive environment, access to community elders, consideration for the spiritual beliefs of Aboriginal and Torres Strait Islander prisoners, the establishment of programs in consultation with community groups, and cultural sensitivity relating to visitation.

 *New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory have implemented Recommendation 331 through ongoing cooperation with the Commonwealth's National Standards Body and agreement to the 2012 Standard Guidelines.*

## Recommendation 332

*That the Commonwealth, State and Territory Ministers for Police should formulate and adopt standard guidelines for police custodial facilities throughout Australia.*

### Background information

It is in the interest of the welfare of Aboriginal and Torres Strait Islander prisoners that police custodial facilities be held to consistent standards nation-wide.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. Recommendation 332 concerns Ministers for Police at both a Commonwealth, and State and Territory level.

### Key actions taken and status of implementation

In 1993, the Australasian Police Ministers' Council considered and endorsed standard guidelines for police custodial facilities, which were developed in consultation with all jurisdictions. A commitment

was made to ensure that new cells at Jervis Bay Territory would comply with accepted design standards.

 *The Commonwealth, New South Wales, Victorian, Queensland, South Australian, Western Australian, Tasmanian, Northern Territory and Australian Capital Territory Governments have implemented Recommendation 332 through the Australasian Police Ministers' Council's standard guidelines.*

### **Recommendation 333**

*While noting that in no case did the Commission find a breach of the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, it is recommended that the Commonwealth Government should make a declaration under Article 22 of the Convention and take all steps necessary to become a party to the Optional Protocol to the International Convention on Civil and Political Rights in order to provide a right of individual petition to the Committee Against Torture and the Human Rights Committee, respectively.*

#### **Background information**

The International Convention on Civil and Political Rights is a multilateral treaty adopted by the United Nations that commits its parties to respect the civil and political rights of individuals. The right of individual petition allows any person, non-governmental organisation or group of individuals to make a claim to be a victim of a violation of the rights set forward in the convention to the Committee Against Torture and the Human Rights Committee.

#### **Responsibility**

The recommendation is solely the responsibility of the Commonwealth Government. Recommendation 333 is addressed to the Commonwealth Government.

#### **Key actions taken and status of implementation**

In 1991, Australia acceded to the First Optional Protocol to the International Covenant on Civil and Political Rights. The Protocol came into effect on 25 December 1991. The **Commonwealth** Government has announced its commitment to ratify the Optional Protocol to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment by December 2017, after which time the Government will fund the Office of the Commonwealth Ombudsman to coordinate the network of Australian inspectorates. This will facilitate improved oversight of places of detention in Australia.

In 1993, Australia lodged declarations with the United Nations under Article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and Article 14 of the Convention on the Elimination of all forms of Racial Discrimination.

 *Recommendation 333 has been implemented, as the Commonwealth Government has fulfilled its responsibilities to the recommendation by becoming a party to the Protocol.*

## **12.2 Addressing land needs (334-338)**

### **Recommendation 334**

*That in all jurisdictions legislation should be introduced, where this has not already occurred, to provide a comprehensive means to address land needs of Aboriginal people. Such legislation should encompass a process for restoring unalienated Crown land to those Aboriginal people who claim such land on the basis of cultural, historical and/or traditional association.*

#### **Background information**

The RCIADIC Report recognised that land needs of Aboriginal and Torres Strait Islander people often go beyond housing to include recreational, cultural, historical, traditional, and community land use. Recommendation 334 calls for the land needs of Aboriginal and Torres Strait Islander communities to

be incorporated into legislation, and for land to be made available where unalienated Crown land is available and appropriate.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. This recommendation calls for the involvement of all jurisdictions – States and Territories, and the Commonwealth – in allowing secure title to land to be obtained by Aboriginal and Torres Strait Islander communities.

### Key actions taken and status of implementation

In the *Mabo* case of 1992, the **Commonwealth's** High Court provided the first judicial recognition of native title under Australian common law. The Commonwealth responded by introducing the *Native Title Act 1993* which established a national scheme to provide for the recognition and protection of native title by establishing the National Native Title Tribunal.

In 1998, the Commonwealth enacted the *Native Title Amendment Act 1998* owing to concerns that the *Wik* decision could have significant repercussions for Australian pastoral and suburban land. The *Wik* decision, handed down by the High Court in 1996, ruled that statutory pastoral leases did not bestow exclusive land rights on the leaseholder. This means that native rights could co-exist with pastoral leases. The AGD noted that section 47B of the *Native Title Act* allows in certain circumstances for prior extinguishment of native title to be disregarded over crown land not currently in use.

PM&C noted that about 40% of Australia has been returned or recognised to Aboriginal and Torres Strait Islander interests under native title and various state and territory based statutory Aboriginal and Torres Strait Islander land schemes. A further 35-40% is available for claim. The Australian Government has committed through the *White Paper on Developing Northern Australia* to finalising native title claims within a decade and has committed to finalise claims under the *Aboriginal Land Rights (Northern Territory) Act 1976* within three years.

 *The Commonwealth has implemented its responsibilities for Recommendation 334. Legislation has been enacted to establish processes for land claims based on native title.*

In **New South Wales**, the *Aboriginal Land Rights Act 1983* (NSW) provides for the constitution of Aboriginal Land Councils which are able to make claims for Crown Land. However, the *Change the Record* report notes that this legislation has little regard for cultural, historical, or traditional association with claimed land.

Currently, native title legislation provides the framework for access to land on the basis of cultural association. The Aboriginal cultural heritage reforms currently on public consultation propose a more contemporary concept of cultural heritage in legislation and better interaction with the *Aboriginal Land Rights Act 1983*. The *NSW National Parks and Wildlife Act 1974* provides for Aboriginal ownership and lease back of national parks in NSW. Six parks are owned or leased by Aboriginal people. Negotiations are currently underway to transfer ownership of a seventh park.

 *The New South Wales Government has implemented Recommendation 334 by meeting its requirements in the *Aboriginal Land Rights Act 1983* and the *NSW National Parks and Wildlife Act 1974*.*

The **Victorian** Government noted in their 1993 implementation report that the *Capital Projects Program* provided funding for the acquisition of land for a variety of purposes, including for reasons of significance to Aboriginal and Torres Strait Islander people. Crown land and properties were leased to Aboriginal and Torres Strait Islander organisations.

Victoria's *Traditional Owner Settlement Act 2010* provides for agreements for Crown land transfers to traditional owner corporations. Grants of land in freehold title can be for cultural or economic purposes; grants of Aboriginal title can also be jointly managed in partnership with the State.

 *The Victorian Government has implemented Recommendation 334 through the *Traditional Owner Settlement Act 2010* and funding provided for the acquisition of land for a variety of purposes.*

In **Queensland**, the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld) provides for land to be granted as inalienable freehold to Aboriginal and Torres Strait Islander people. This includes a right for owners of freehold title to control entry onto their land, and to control mining upon their land subject only to a contrary decision by the Governor in Council. This legislation included provisions to make vacant Crown land claimable by Aboriginal and Torres Strait Islander people on the basis of historical, traditional and economic and cultural viability grounds.

Currently, legislation no longer requires land to be claimed but does provide a process whereby Aboriginal and Torres Strait Islander people may make formal application to have certain categories of land declared transferable under the Acts. Transferable land must be granted as soon as practicable under the Acts, subject to legislated considerations and approvals.

 *The Queensland Government has implemented Recommendation 334 by meeting its requirements in the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld).*

The **South Australian** Government enacted the *Native Title (South Australia) Act 1994 (SA)* to bring State laws into consistency with the Commonwealth's native title legislation. Additionally, the 1994 South Australian implementation report noted that provision was made for the Aboriginal Lands Trust to hold freehold inalienable titles to land on behalf of all Aboriginal and Torres Strait Islander people. At the time, 20% of South Australia's land was under Aboriginal and Torres Strait Islander freehold ownership.

Currently, there exist legislation which provide a comprehensive means to address the land needs of Aboriginal and Torres Strait Islander people, namely the *APY Land Rights Act 1981* and the *Aboriginal Lands Trust Act 2013*. Native title has also been determined over approximately 58% of South Australia.

 *The South Australian Government has implemented Recommendation 334 by meeting its requirements in the APY Land Rights Act 1981, and the Aboriginal Lands Trust Act 2013.*

The **Western Australia** Government introduced the *Land Act 1993 (WA)*, the *Aboriginal Affairs Planning Authority (AAPA) Act 1972 (WA)*, and the *Land (Titles and Traditional Usage) Act 1993 (WA)* to meet the land needs of Aboriginal and Torres Strait Islander people. Provision was made for the Aboriginal Lands Trust to acquire land through purchase or creation of reserves on Crown land and through excisions from pastoral leases. The Western Australia Government is also able to grant land title to Aboriginal and Torres Strait Islander people on the basis of traditional usage. The Western Australian Government noted that it supports the ongoing divestment of the Aboriginal Lands Trust estate to Aboriginal and Torres Strait Islander people.

 *The Western Australian Government has implemented Recommendation 334 by meeting its requirements in the Land Act 1993 (WA), the Aboriginal Affairs Planning Authority (AAPA) Act 1972 (WA), and the Land (Titles and Traditional Usage) Act 1993 (WA).*

Following the RCIADIC, the **Tasmanian** Government introduced mechanisms to allow for the grant of unallocated Crown land on the basis of significant sites. The Tasmanian *Aboriginal Lands Act 1995* created the Aboriginal Land Council of Tasmania and vested in them twelve parcels of culturally significant Crown land, held on an inalienable freehold title. Such land is "Aboriginal land". There is provision for management by local communities and individuals.

The Act has since been amended to return further parcels (including the Crown land comprising almost all of the large and significant Cape Barren Island), and to provide for land acquired other than by Parliamentary process to be also declared Aboriginal land. The ALCT is a body of elected community representatives, providing Tasmanian Aboriginal and Torres Strait Islander people with a direct role in the ongoing management of both natural and cultural heritage on Aboriginal and Torres Strait Islander land. Its operational funding is provided by the State Government.

 *The Tasmanian Government has implemented Recommendation 334 by meeting its requirements in provisions outlined in the Aboriginal Lands Act 1995.*

The **Northern Territory** Government provided in their 1993-94 implementation report that Commonwealth Aboriginal Land Rights had been in place since 1976, enabling Aboriginal and Torres Strait Islander people to claim unalienated Crown land on the basis of traditional and cultural association.

 *The Northern Territory Government has implemented Recommendation 334 by meeting its requirements through existing Commonwealth Aboriginal Land Rights.*

The **Australian Capital Territory** Government established a consultation process with Aboriginal and Torres Strait Islander community groups to ensure that areas of cultural significance and heritage value are identified in any development of land.

The ACT *Human Rights Act 2004* recognises the unique and distinct cultural rights of Aboriginal and Torres Strait Islander people, including their right to have their material and economic relationships with the land and waters and other resources with which they have a connection under traditional laws and customs recognised and valued. The ACT does not currently have any law on this subject and is subject to Commonwealth law in the form of the Native Title Act 1993.

 *The Australian Capital Territory Government has not implemented Recommendation 334. While there exists a consultation process to ensure that areas of cultural significance and heritage value are identified in any development of land, there has been no legislative response to implement the granting of land title to Aboriginal and Torres Strait Islander people.*

## Recommendation 335

*That in recognising that improvement in the living standards of many Aboriginal communities (especially for those people living in inadequate housing and environmental circumstances on the fringes of towns and on other discrete areas of Aboriginal occupation of land) cannot be ensured without the security of land title, governments provide, by legislation and/or administrative direction, an accelerated process for the granting of land title based on need.*

### Background information

The RCIADIC Report noted that land needs for Aboriginal and Torres Strait Islander people often go beyond housing to include community life, recreational, and other purposes. As such, land rights should be granted on the basis of need to address this consideration and to contribute to the improvement in the living standards of Aboriginal and Torres Strait Islander communities.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. The States and Territories support the implementation of Recommendation 335 through supporting the Commonwealth's national leadership position, and by contributing funding for the purchase of land.

### Key actions taken and status of implementation

The **Commonwealth** introduced the *Native Title Act 1993* which established a national scheme to provide for the recognition and protection of native title. In 1995, the Commonwealth established the Indigenous Land Corporation (ILC) as a statutory authority controlled by Aboriginal and Torres Strait Islander people. The ILC was tasked with assisting Aboriginal and Torres Strait Islander people to acquire and manage land. Initially, the Commonwealth also supported the ILC through funding provision.

The *Stronger Futures in the Northern Territory Act 2012* also provides for the granting of rights and interests and the promotion of economic development for town camps and community living areas in the Northern Territory.

 *Recommendation 335 has been implemented, as the Commonwealth Government has provided administrative direction and support to the States and Territories in their respective changes to land rights management.*

As at 2018, 2,778 claims in New South Wales had been granted by Crown Lands since the commencement of the *Aboriginal Land Rights Act 1983 (NSW)*. Additionally, the NSW Government provided funding for the NSW Aboriginal Land Councils to purchase property. The *Aboriginal Land Rights Act 1983* was amended in 2015 to facilitate negotiated settlements or Aboriginal Land Agreements of outstanding land claims to accelerate the return of land to Aboriginal communities.

 *The New South Wales Government has fully implemented Recommendation 335 by facilitating accelerated return of land through amendments to the Aboriginal Land Rights Act 1983.*

The **Victorian** Government provided in their 1993 implementation report that support had been provided for the provision of freehold title over appropriate public lands to local Aboriginal and Torres Strait Islander communities where justified by historical significance.

 *The Victorian Government partially implemented Recommendation 335 through providing support for the provision of freehold title over appropriate public lands to local Aboriginal and Torres Strait Islander communities. However, no legislative support or administrative direction has been provided, and there is no evidence of an accelerated process being developed in response to this recommendation.*

**Queensland's** *Aboriginal Land Act 1991 (Qld)* and *Torres Strait Islander Land Act 1991 (Qld)* provide for the granting of certain lands to Aboriginal and Torres Strait Islander people without a claim being made for such land. This includes existing Aboriginal Deeds of Grant in Trust communities and reserves and the Aurukun and Mornington Island Shire Leases. The Queensland Government in their 1993 implementation report provided that the claims process, including the issuing of title to successfully claimed land, was intended to be as simple as possible while also accounting for Aboriginal and Torres Strait Islander relationships with land.

Currently, representations and requests by Aboriginal and Torres Strait Islander trustees, individuals and representative bodies to the Department of National Resources and Mining in respect of pursuing and/or accelerating these opportunities are, where possible, taken into account in making decisions, including consideration of available resources and interagency and native title considerations.

 *The Queensland Government has fully implemented Recommendation 335 by providing for granting of certain lands without need for claim as part of its legislation and by taking into account requests for acceleration of land grants in native title considerations.*

The **South Australian** Government provided for the transfer of Crown land to the Aboriginal Lands Trust. As at 1994, the Trust had power to lease the land to an organisation, a Community Council, or an individual for up to 99 years.

Currently, the *Aboriginal Lands Trust Act* allows for land to be vested in the Trust and held on behalf of Aboriginal and Torres Strait Islander people. Crown land may also be transferred to Aboriginal and Torres Strait Islander communities as a result of and as part of the settlement of native title claims by negotiation.

 *The South Australian Government partially implemented Recommendation 335 through providing support for the provision of freehold title over appropriate public lands to local Aboriginal and Torres Strait Islander communities. However, there is no evidence of an accelerated process being developed in response to this recommendation.*

The **Western Australia** Government introduced the *Land (Titles and Traditional Usage) Act 1993 (WA)* and supported the activities of the Aboriginal Lands Trust to provide greater security of land tenure for Aboriginal and Torres Strait Islander communities. In 1994, the Aboriginal Affairs Department's *Land Program* sought to acquire land through the purchase or creation of reserves on Crown land and through excisions from pastoral leases.

The Western Australian Government has also increased its focus on providing secure land tenure to Aboriginal and Torres Strait Islander people and organisations through land tenure improvements on the Aboriginal Lands Trust estate. Using provisions available under the *Aboriginal Affairs Planning*

*Authority Act 1972*, the Aboriginal Lands Trust is issuing leases to Aboriginal and Torres Strait Islander corporations and approving land use development applications that:

- support economic development opportunities for Aboriginal and Torres Strait Islander people;
- attract investment (private and government);
- support improved service delivery to Aboriginal and Torres Strait Islander communities; and
- enable residential development in Aboriginal Town Based Reserves.

 *Western Australia has partially implemented Recommendation 335 through providing support for the provision of freehold title over appropriate public lands to local Aboriginal and Torres Strait Islander communities. However, there is no evidence of an accelerated process being developed in response to this recommendation.*

In their 1993 implementation report, the **Tasmanian** Government provided that they were prepared to negotiate land ownership, but only on the basis of need and only in respect to unallocated Crown land. More recently, the Tasmanian Government has noted that the only community in Tasmania to which this recommendation is relevant is Cape Barren Island, where all former Crown land is now Aboriginal land.

 *Recommendation 335 is out of scope for the Tasmanian Government.*

In 1994, the **Northern Territory** Government had a policy of providing title to Aboriginal Associations for housing development in or on the fringes of urban development. The Northern Territory Government also supported Town Camps, including through the provision of \$30.3 million over the years 1988/89 to 1991/92.

 *The Northern Territory Government partially implemented Recommendation 335 through providing title to local Aboriginal and Torres Strait Islander communities for housing developments in or on the fringes of urban development. However, there is no evidence of an accelerated process being developed in response to this recommendation.*

The **Australian Capital Territory** participates in the national scheme for the recognition and protection of native title and its coexistence with existing land management schemes. This is provided in the 1994 ACT implementation report.

 *The Australian Capital Territory Government partially implemented Recommendation 335 through participation in the national scheme for the recognition and protection of native title, however there is no evidence of other action being taken to implement this recommendation.*

### **Additional commentary**

The **Commonwealth** PM&C noted that the key principle underpinning initiatives in land reform is increasing the capacity of Aboriginal and Torres Strait Islander land owners to operate autonomously and have options to use their rights in land and water. The Northern Australia White Paper, for example, provides a number of Aboriginal and Torres Strait Islander specific measures. This includes funding to build capacity (\$20.4 million), land tenure reforms pilots that will broaden land use and economic opportunity (\$8.6 million) and township leasing and land administration funding to support the negotiation of township leases and improved land administration in the Northern Territory (\$17.1 million). In addition, the Commonwealth Government is driving the establishment of a self-sufficient Prescribed Bodies Corporate sector by investing in capacity building and supporting Aboriginal and Torres Strait Islander people to acquire and manage land.

### **Recommendation 336**

*That unalienated Crown land granted on the basis of cultural, historical and/or traditional association of Aboriginal people should be granted under inalienable freehold title and should carry with it the right of the Aboriginal owners to, inter alia:*

- a. *Determine who may enter the land and the terms of such entry; and*

- b. *Control the impact of development on the land in so far as such development may threaten the cultural and/or social values of the Aboriginal owners and their communities.*

### Background information

Land plays a central role in the identity of Aboriginal and Torres Strait Islander people, and land rights are vitally important to ensuring that Aboriginal and Torres Strait Islander communities can preserve the cultural, historical and traditional integrity of their land. Recommendation 336 calls for granted land rights to be inalienable.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. The States and Territories support the implementation of Recommendation 335 through supporting the Commonwealth's national leadership position, and by contributing funding for the purchase of land.

### Key actions taken and status of implementation

The **Commonwealth** has contributed to negotiations for long-term land leases over land held by Aboriginal and Torres Strait Islander people. These leases are purposed to allow the Commonwealth to retain ultimate control of the land, while underlying ownership remains with the traditional owners. PM&C advised that the policy change to community entity township leases has been welcomed as empowering local traditional owners and communities.

PM&C noted that about 40% of Australia has been returned to Aboriginal and Torres Strait Islander interests under native title and various state and territory based statutory Indigenous land schemes. A further 35-40% is available for claim. The AGD noted that section 47B of the *Native Title Act* allows in certain circumstances for prior extinguishment of native title to be disregarded over crown land not currently in use.

- *Recommendation 336 is complete given the return of land to Aboriginal and Torres Strait Islander interests alongside implementation of Section 47B of the Native Title Act.*

In **New South Wales**, unalienated crown land may be claimed by Aboriginal Land Councils constituted under the *NSW Aboriginal Land Rights Act 1983* if the land is not lawfully being used or occupied by Government or required for essential Government purposes at the date of the claim. Title under the *Aboriginal Land Rights Act* is not claimed or transferred on the basis of cultural, historical and/or traditional associations, however once transferred is managed in accordance with those associations held by the ALC's members. Membership can be based on residence in, or association with, the ALC area. Land successfully claimed is transferred to the Aboriginal Land Council in freehold title meaning the Aboriginal Land Council has the absolute right as property owner to determine who may enter the land and the terms of such entry.

Title or access to land based on traditional association can be claimed under the Commonwealth *Native Title Act 1993*. The terms of a determination of native title under the *Native Title Act* can provide rights to enter and determine who may enter land, particularly if freehold title to land is part of the determination of native title. The terms of any Indigenous Land Use Agreement under the *Native Title Act*, whether related to a determination of native title or not, can set out the terms for the terms of entry to land for cultural purposes, and may provide rights to determine who may enter the land. In New South Wales, land of cultural and traditional significance is being returned, in small quantities, to native titleholders through Indigenous Land Use Agreements, as part of the settlement of native title claims.

- *New South Wales has mostly implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal communities. However, land title is not granted on the basis of cultural, traditional or historical associations to land.*

In 1993, **Victorian** Government policy provided the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities on the basis of historical or cultural ties. This included the grant of freehold title, subject to the same rights and responsibilities of ownership as generally apply

in Victoria. The *Mineral Resources Development Act 1990* (Vic) also provides protection for Aboriginal and Torres Strait Islander heritage and cultural sites.

 *The Victorian Government has implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities, and by the protections afforded in the Mineral Resources Development Act 1990 (Vic).*

In **Queensland**, the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) include the provision to make vacant Crown land claimable by Aboriginal and Torres Strait Islander people on the basis of historical, traditional, and economic and cultural viability grounds. This includes a right for owners of freehold title to control entry onto their land, and to control mining upon their land subject only to a contrary decision by the Governor in Council.

Currently, there is now the option within discrete Aboriginal and Torres Strait Islander communities for a trustee to make available some land for alienable freehold, with the support of the community and native titleholders.

 *The Queensland Government has implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities, and by the protections afforded in the Aboriginal Land Act 1991 (Qld) and the Torres Strait Islander Land Act 1991 (Qld).*

**South Australia's** response to Recommendation 335 is also relevant to Recommendation 336. The resolution of native title claims has resulted in unalienated Crown land being granted to Aboriginal and Torres Strait Islander people. To date, there have been 11 Indigenous Land Use Agreements that have provided for the transfer of over 80 freehold titles in land to Aboriginal and Torres Strait Islander groups. The *Aboriginal Lands Trust Act 1966* also provides for land to be granted or transferred to the Trust. Once land is held under freehold title by the Aboriginal Lands Trust or by Aboriginal and Torres Strait Islander groups, they are able to determine who enters the land, the terms of entry and the impact of any development on the land.

 *The South Australian Government has implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities, and by the protections afforded in the Aboriginal Lands Trust Act 1966 (SA).*

The **Western Australia** Government provided in their 1994 implementation report that Aboriginal and Torres Strait Islander organisations and traditional owners were consulted and provided with opportunity to participate in the planning of all developments affecting land where traditional usage rights exist. Entry to Aboriginal and Torres Strait Islander land requires a permit to be issued under the *Aboriginal Affairs Planning Authority Act 1972* (WA), after consultation with the Aboriginal Lands Trust and local communities.

Inalienable freehold title is not an available tenure under current legislation in Western Australia. However, Aboriginal and Torres Strait Islander organisations who hold a crown lease or a lease of an Aboriginal Lands Trust property can determine who enters the land and the terms of entry.

Control of the impact of development on the cultural values of land is managed through compliance with the *Aboriginal Heritage Act 1972*. Western Australia also has a Land Use and Development policy which requires development of the Aboriginal Land Trust estate to be considered and approved by the Aboriginal Land Trust Board, and comply with relevant statutory authority regulations and native title future act provisions under the *Native Title Act 1993* (Cth).

 *Western Australia has partially implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal communities, including determining the right of entry to the land and control of development on the land. However, Inalienable freehold title is not available under current legislation in Western Australia.*

**Tasmania's** response to Recommendation 334 is also relevant to Recommendation 336. In addition, the Tasmanian *Aboriginal Lands Act 1995* preserves some pre-existing access rights to some parcels

of Aboriginal land, but the Aboriginal Land Council of Tasmania otherwise has the powers of any freehold landowner.

 *The Tasmanian Government has implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities, and by the protections afforded in the Aboriginal Lands Act 1995.*

The **Northern Territory** Government included actions towards the implementation of this recommendation in their response to Recommendation 334. Additionally, entry to Aboriginal and Torres Strait Islander land is controlled by the issue of permits, and development cannot occur without the owner's consent and other necessary approvals.

 *The Northern Territory Government has implemented Recommendation 336 through the provision of appropriate public lands to Aboriginal and Torres Strait Islander communities, and by protections afforded by the issue of permits regarding Aboriginal and Torres Strait Islander land use and development.*

The **Australian Capital Territory** Government provided in the 1997-98 implementation report that the ACT had no legal right to grant estates in freehold or to grant a lease that exceeds the permitted period.

 *Recommendation 336 is out of scope for the Australian Capital Territory Government.*

### **Recommendation 337**

*That governments recognise that where appropriate unalienated crown land is unavailable to be claimed on grounds of cultural, historical or traditional association with the land or where, due to the processes of the history of colonisation, Aboriginal people are no longer able to, nor seek to, make claims to particular areas of unalienated crown land on the basis of cultural, historical or traditional association there remain land needs of Aboriginal people which should be met by governments. These needs should be accommodated by a process which:*

- a. Enables Aboriginal communities or groups to obtain secure title to unalienated crown land or to purchase land for social, recreational and community purposes (including the obtaining of additional land in circumstances in which an Aboriginal community is on Aboriginal land but where the area of that land is established as being too small to accommodate the community);*
- b. Enables Aboriginal communities or groups to obtain secure title to land so as to improve the environmental circumstances in which they live;*
- c. Provides adequate funding in order that land may be purchased on the open market in pursuance of the needs identified in paragraphs (a) and (b); and*
- d. Where pastoral land is held on lease from the Crown, permits Aboriginal communities traditionally or historically associated with the land to have priority when leases come up for renewal.*

#### **Background information**

The RCIADIC Report noted that the land needs of Aboriginal and Torres Strait Islander people should be incorporated into legislation and processes pertaining to the securing of land based on native title, in the event that appropriate land is unavailable, should be established.

#### **Responsibility**

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. The States and Territories support the implementation of Recommendation 335 through supporting the Commonwealth's national leadership position, and by contributing funding for the purchase of land.

### Key actions taken and status of implementation

The **Commonwealth** enacted the *Native Title Act 1993*, and the *Native Title Act Amendment 1998*, which contribute to the implementation of this recommendation. However, the determination of native title under this legislation is complex and involves a long timeframe.

Where unalienated Crown land is unavailable, the Commonwealth has provided financial support towards land purchase for Aboriginal and Torres Strait Islander people on the open market. In the 1990s, this function was implemented by ATSIC and the ILC. PM&C noted that the ILC was established to assist Aboriginal and Torres Strait Islander people to acquire and manage land under mainstream title.

 *Recommendation 337 has been implemented, as the Commonwealth has provided support for land claims on the basis of native title. Where unalienated Crown land has been unavailable, funds have been provided for the purchase of land on the open market.*

**New South Wales** legislation acknowledges the relationship of Aboriginal people to lands and water in NSW and acknowledges the dispossession of their land by Aboriginal people by successive governments without compensation.

In relation to part a) of this recommendation, in New South Wales Aboriginal Land Councils can claim unalienated Crown land not legally used or occupied, or required for essential public purposes at the date of claim. Land transferred to an Aboriginal Land Council under the ALRA is transferred in freehold title but subject to native title rights and interests. In 2015, the *NSW Aboriginal Land Rights Act 1983* was amended to enable Aboriginal Land Councils to negotiate land swaps or transfers, or forego certain lands they own, or forego land claims, in return for transfers to them of land of greater environmental, cultural, or economic value.

In relation to part b) of this recommendation Aboriginal Land Councils in New South Wales may use and develop land as determined by their members, including the management of land and investments for economic purposes.

In relation to part c) of this recommendation, the NSW Aboriginal Land Council manages an investment fund established by the diversion of 7.5% of land tax collected in NSW between 1983 and 1998. The Council can use this fund to oversee, support and fund the network of 120 Local Aboriginal Land Councils (LALCs). Its elected Council may set policy and budget to use income from the fund to acquire land on behalf of Aboriginal land councils, and councils individually may use their assets to acquire land.

In relation to part d) of this recommendation, no specific provision exists for priority Aboriginal access to pastoral land.

 *The New South Wales Government has mostly implemented Recommendation 337 through the *Aboriginal Land Rights Act 1983* but has not addressed elements of part (d) of this recommendation.*

The **Victorian** Government has taken steps to address Recommendation 337 through the Capital Projects Program (outlined in Recommendation 334) and the Victorian Traditional Owner Settlement Act 2010.

In relation to part a) of this recommendation, Victoria's *Traditional Owner Settlement Act 2010* provides for agreements which enable traditional owner groups to obtain secure title to unalienated crown land for cultural or economic purposes.

In relation to part b) of this recommendation, the Act provides for funding agreements for economic development opportunities as determined by the group.

In relation to part c) of this recommendation, settlements under the Act include funding to enable the traditional owner corporation to meet its settlement obligations and provide 'seed capital' to enable economic development opportunities, including the purchase of land. In addition, traditional owner

corporations receive ongoing compensation for high-impact activities that may have an impact on their recognised rights.

Part d) of this recommendation is not directly relevant to Victoria as Victoria has negligible pastoral lease land.

 *The Victorian Government has implemented Recommendation 337 through the Capital Projects Program and the Victorian Traditional Owner Settlement Act 2010.*

In **Queensland**, the *Aboriginal Land Act 1991* (Qld) and the *Torres Strait Islander Land Act 1991* (Qld) enable Aboriginal and Torres Strait Islander people to claim vacant Crown land on grounds of economic or cultural viability. Aboriginal and Torres Strait Islander people were provided with title and control over all lands that were transferred. As at 2015, no acquisition fund was currently provided for the purchase of land for Aboriginal and Torres Strait Islander people, nor is there a provision for priority tenure rights to Aboriginal and Torres Strait Islander people upon expiry of a pastoral lease expiry. However, these components of the recommendation can be met through native title determinations and/or Indigenous Land Use Agreements under the *Native Title Act 1993* (Cth).

The Queensland Government has noted that there are currently no proposal to address parts c) and d) of this recommendation, but rather to focus on increasing the Aboriginal and Torres Strait Islander land estate through the *Aboriginal Land Act* and the *Torres Strait Islander Land Act*. It was also noted that to date, approximately 6,000,000 ha of land has been granted under these Acts.

 *The Queensland Government has partially implemented Recommendation 337 through legislation but has not addressed parts (c) and (d) of this recommendation.*

The **South Australian** Government responded to Recommendation 337 in their response to Recommendation 334. The South Australian Government did not provide funds to purchase land on the open market, however the Aboriginal Lands Trust was provided with power to do so. Additionally, provisions were made in accordance with part (d) of Recommendation 337 through the Department of Lands and the Department of Environment and Planning.

 *The South Australian Government has fully implemented Recommendation 337.*

In **Western Australia**, the land needs of dispossessed Aboriginal and Torres Strait Islander people who cannot claim land through traditional association was addressed through the *Land (Titles and Usage) Act 1993* (WA). This legislation conferred power to the Minister for Aboriginal Affairs to grant Aboriginal and Torres Strait Islander people title to land for the purposes of advancing the interests of Aboriginal and Torres Strait Islander people. The Western Australia Government provided funds to assist Aboriginal and Torres Strait Islander groups in the purchase of properties. Preferential treatment was not provided to Aboriginal and Torres Strait Islander people in the acquisition of pastoral leases.

The Western Australian Government also supports the ongoing divestment of the Aboriginal Lands Trust estate to Aboriginal and Torres Strait Islander people. Currently, the Aboriginal Land Trust estate comprises approximately 24 million hectares, or 9.54 per cent of the state's land mass. The ALT's Land Transfer Program focuses on divestment of land to Aboriginal and Torres Strait Islander organisations that have sound governance and financial practices. Since 1987, the trust has transferred 81 parcels of land to Aboriginal and Torres Strait Islander ownership or control. Aboriginal and Torres Strait Islander people or organisations can also secure title to land such as freehold or leasehold through the provisions of the *Land Administration Act 1997*.

 *The Western Australian Government has fully implemented Recommendation 337.*

In 1993, the **Tasmanian** Government's policy was to negotiate land management or ownership of specific sites or unalienated Crown land. Currently, Tasmania's response to Recommendation 334 is also relevant to Recommendation 337. The Tasmanian *Aboriginal Lands Act 1995* meets points (a) and (b) of this recommendation. With regards to part (c), the Aboriginal Land Council of Tasmania has been able to access external funds for the purchase of some land. With regards to part (d), the Tasmanian government does not consider pastoral leasehold to be relevant to Tasmania.

- *The Tasmanian Government has implemented Recommendation 337, noting that part (d) of this recommendation is not relevant in Tasmania.*

The **Northern Territory** Government provided in their 1993-94 implementation report that legislative and administrative processes already applied to address Recommendation 337.

- *The Northern Territory Government has fully implemented Recommendation 337.*

As at 1997, the **Australian Capital Territory** Government had no legal right to grant estates in freehold.

- *Recommendation 337 is out of scope for the Australian Capital Territory Government.*

## Recommendation 338

*That as an interim step all land held under leasehold, being former Aboriginal reserve or mission land and being now held for or on behalf of Aboriginal people, be forthwith transferred under inalienable freehold title to the present leaseholder(s) pending further consideration by Aboriginal people as to the appropriate Aboriginal body which should thereafter hold the title to such land.*

### Background information

The RCIADIC Report commented that Aboriginal and Torres Strait Islander people have not been awarded justice with regards to their land needs. Legitimate acknowledgement of Aboriginal and Torres Strait Islander land needs should encompass the granting of inalienable freehold title which provides protection and recognition of land ownership.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. While the RCIADIC Report noted that this recommendation was predominantly addressed to Western Australia, all jurisdictions are responsible for its implementation.

### Key actions taken and status of implementation

The **Commonwealth** has contributed to negotiations for long-term land leases over land held by Aboriginal and Torres Strait Islander people. These leases are purposed to allow the Commonwealth to retain control of the land, while underlying ownership remains with the traditional owners. PM&C advised that this change to community entity township leases has been welcomed as empowering local traditional owners and communities.

The AGD noted that Section 47A of the Native Title Act allows in certain circumstances for prior extinguishment of native title to be disregarded over land the subject of a grant of freehold or leasehold under legislation for the benefit of Aboriginal and Torres Strait Islander people, or land held in trust or reserved for Aboriginal and Torres Strait Islander people.

- *Recommendation 338 is considered to be mostly complete, as the available evidence suggests that the Commonwealth's policy of long-term leases has not fully addressed the issue of land ownership or the granting of freehold title for Aboriginal and Torres Strait Islander people.*

The **New South Wales** Government noted in their 1995-96 implementation report that all land of the former Aboriginal Land Trust has been transferred to the appropriate local Aboriginal Land Council in freehold title on the passing of the *Aboriginal Land Rights Act 1983*.

- *The New South Wales Government has fully implemented Recommendation 338.*

In their 1993 implementation report, the **Victorian** Government provided that Recommendation 338 did not apply to any land in Victoria. In 1992, land at Manatunga was transferred to the Murray Valley Aboriginal Cooperative Ltd through the *Aboriginal Lands (Manatunga Land) Act 1992* (Vic).

- *The Victorian Government has indicated that Recommendation 338 is not relevant to their State.*

**Queensland's** *Aboriginal Land Act 1991* (Qld) and *Torres Strait Islander Land Act 1991* (Qld) provide for existing Aboriginal and Torres Strait Islander reserves and Deeds of Grant in Trust to be granted

without a claim being made. The Acts require consultation with the people concerned prior to the appointment of trustees, which must be in accordance with any Aboriginal and Torres Strait Islander tradition applicable to the land.

 *The Queensland Government has fully implemented Recommendation 338.*

The **South Australian** Government provided in their 1994 implementation report that Recommendation 338 was covered by existing legislation, including Part IV of the *Aboriginal Lands Trust Act 1966* (SA). Yalata, Davenport, Umoona, Gerard, Raukkan, Point Pearce, and Nepabunna have been transferred to the Aboriginal Lands Trust, as former mission sites, together with other smaller areas. While the freehold is held by the Aboriginal Lands Trust, there are long term leases to communities that were entered into in the 1980s and run for terms of 99 years with rights of renewal for the same period.

 *The South Australian Government has fully implemented Recommendation 338.*

In **Western Australia**, the land needs of Aboriginal and Torres Strait Islander people have been met through the provisions of the *Land Act 1993* (WA) and the *Aboriginal Affairs Planning Authority Act 1972* (WA). Land was reserved through this process, vested in the Aboriginal Lands Trust and leased to the appropriate Aboriginal and Torres Strait Islander incorporated body for 99 years. This arrangement has many of the same features of security as inalienable freehold title. Aboriginal and Torres Strait Islander groups also have the option of applying for freehold title to land they hold through leasing arrangements.

All of the Aboriginal Lands Trust estate is held by the trust on behalf of Aboriginal and Torres Strait Islander people. The land estate is comprised of freehold properties, pastoral leases, general-purpose leases, and reserves for the use and benefit of Aboriginal and Torres Strait Islander people. Western Australia supports the ongoing divestment of the trust estate to Aboriginal and Torres Strait Islander people. The trust estate comprises approximately 24 million hectares or 9.54 per cent of the state's land mass.

 *The Western Australian Government has fully implemented Recommendation 338.*

In **Tasmania**, lands of this sort do not exist, with the former exception of Cape Barren Island, where all former Crown land is now Aboriginal land.

 *The Tasmanian Government has indicated that Recommendation 338 is not relevant.*

As at 1994, all relevant areas in the **Northern Territory** had been scheduled as Aboriginal Freehold under the *Aboriginal Land Rights (Northern Territory) Act 1976* (NT). Title to these reserve areas were issued as inalienable freehold.

 *The Northern Territory Government has fully implemented Recommendation 338.*

The **Australian Capital Territory** Government noted in their 1997 implementation report that Recommendation 338 was not applicable.

 *Recommendation 338 is out of scope for the Australian Capital Territory Government.*

### Additional commentary

The **Commonwealth** PM&C noted that transferring lands from trust type or leasehold arrangements to ownership enabling economic development has progressed in Queensland and to an extent in South Australia and that the progress in Western Australia has been slower.

## 12.3 The process of reconciliation (339)

### Recommendation 339

*That all political leaders and their parties recognise that reconciliation between the Aboriginal and non-Aboriginal communities in Australia must be achieved if community division, discord and injustice*

*to Aboriginal people are to be avoided. To this end the Commission recommends that political leaders use their best endeavours to ensure bi-partisan public support for the process of reconciliation and that the urgency and necessity of the process be acknowledged.*

### Background information

Reconciliation represents an important process for the recognition and healing of injustices experienced by the Aboriginal and Torres Strait Islander people of Australia. Given the magnitude of this legacy of suffering and the significant disadvantages still experienced today by the Aboriginal and Torres Strait Islander people, it is important that political leaders actively demonstrate long-term and bi-partisan support for the concept of reconciliation, to ensure its successful passage.

### Responsibility

The Commonwealth, and all State and Territory governments have responsibility for this recommendation. Recommendation 339 is addressed to all political leaders and their parties.

### Key actions taken and status of implementation

In 1991, the **Commonwealth's** Council for Aboriginal Reconciliation (CAR) was established under the *Council for Aboriginal Reconciliation Act 1991*. The CAR has since been superseded by a non-government, not-for-profit foundation known as Reconciliation Australia, which promotes a continuing national focus for reconciliation.

In 1992, the High Court provided judicial recognition of native title under Australian common law with the decision for *Mabo & Ors v Queensland (No 2)*. In 1996, National Reconciliation Week was launched to celebrate and mark the milestones made in Australia's reconciliation journey.

In 2008, Prime Minister Kevin Rudd delivered an Apology to the Stolen Generations to the Australian Parliament in recognition of the harmful policies of past governments. Over the past decade there have been repeated attempts to hold a referendum on constitutional recognition of Aboriginal and Torres Strait Islander people as First Australians and the complete abolition of Section 25 which allows the States to prevent people from voting based on their race and Section 51(xxvi) of the Australian Constitution which permits the Federal Parliament to make laws for classes of citizens based on their race.

PM&C noted that in 2015, the sunset provision in the *Aboriginal and Torres Strait Islander People Recognition Act 2013* was extended to 28 March 2018 to ensure that the Act of Recognition continues until a referendum can be held. In addition, the Joint Select Committee recommended options for Constitutional change and further consultations with Aboriginal and Torres Strait Islander people as well as the broader community to build support for a referendum.

 *The Commonwealth Government has taken many significant steps, both symbolic and legislative, to advance the objectives of reconciliation. Recommendation 339 remains partially complete as reconciliation remains an ongoing process and there are next steps to be taken to address the issue of constitutional recognition.*

The **New South Wales** Government worked in cooperation with the strategies developed by the Council for Aboriginal Reconciliation. In 1996, Premier Carr affirmed the support and commitment of the NSW Government to the goals and processes of Aboriginal reconciliation, and extended an apology to Aboriginal people. Additionally, NSW formed an Aboriginal reference group as a consultative and advisory body. In 2010, the NSW Government recognised Aboriginal people in the NSW Constitution. Ongoing funding has also been provided to the NSW Reconciliation Council since its formation.

The **Victorian** Government has supported the process of reconciliation and worked in conjunction with the Council for Aboriginal Reconciliation. The work of Aboriginal Affairs Victoria aimed to promote reconciliation and to assist Aboriginal and Torres Strait Islander communities to become self-managing.

The **Queensland** Government, in 1992, formed an Aboriginal Deaths in Custody Interdepartmental Committee which had the purpose of working closely with the Aboriginal and Torres Strait Islander

Commission State Advisory Council to ensure a consideration of Aboriginal and Torres Strait Islander views on reconciliation.

The Queensland Government indicated its support for reconciliation through the 2009-12 Reconciliation Action Plan and the Aboriginal and Torres Strait Islander Cultural Capability Framework, which requires all departments to develop Cultural Capability Action Plans. Initiatives such as the inclusion of an acknowledgement of Aboriginal and Torres Strait Islander contributions in the preamble to the Constitution of Queensland and the Wages and Savings Reparations scheme support this process.

In their 1994 implementation report, the **South Australian** Government provided bipartisan support for reconciliation and improvement of Aboriginal and Torres Strait Islander affairs. All Aboriginal and Torres Strait Islander landholding Acts incorporate a role for Parliamentary Committees which are comprised of bipartisan members.

In 2013, the Parliament of SA passed the *Constitution (Recognition of Aboriginal Peoples) Amendment Bill 2012*, which was assented by the Governor on 28 March 2013, and which formally and constitutionally recognises Aboriginal and Torres Strait Islander South Australians. The SA Government became a partner of the national RECOGNISE Campaign in 2016 and has recently announced a new tiered approach to relationship building, which is intended to enable all South Australian Aboriginal and Torres Strait Islander groups to form a relationship with government, with a clear pathway towards Treaty.

In 1994, the **Western Australia** Government provided support for the concept of constructive reconciliation between Aboriginal and Torres Strait Islander people and wider Australian communities and to adopt the vision of the Council for Aboriginal Reconciliation. This was paired with the implementation of policies to deal with inadequate health, housing, education and employment options for Aboriginal and Torres Strait Islander people.

Since the previous implementation report, Western Australia has legislated for the recognition of Aboriginal and Torres Strait Islander people in the state's Constitution. This amendment recognises Aboriginal people as the First People of Western Australia and that they are the traditional custodians of the land.

The Western Australian Government also passed the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Bill 2015*, which acknowledges that the Noongar people are the traditional owners of the lands in the south-west of the state.

The **Tasmanian** Government provided a commitment in 1993 to reconciling the differences between Aboriginal and Torres Strait Islander communities and the wider Tasmanian community. This included a recognition of land, culture, education, welfare, and health issues as they concerned Aboriginal and Torres Strait Islander people. The Tasmanian Government enacted the *Aboriginal Lands Act 1995* to "promote reconciliation with the Tasmanian Aboriginal community by granting to Aboriginal people certain parcels of land of historic or cultural significance". Since 2015, the Tasmanian Government's Reset Agenda is underpinned by a reconciliation theme, noting the further recognition of "Tasmanian Aboriginal people's deep and continuous historical connection to the land and sea of Tasmania".

In 1993, the **Northern Territory** Government noted in their implementation report an agreement to participate in the reconciliation process.

The **Australian Capital Territory** implementation reports note that the ACT Government established ATSIC as a consultative mechanism between the Government and the ACT Aboriginal and Torres Strait Islander community. ATSIC participated in legislative reform and the implementation of policies and programs related to health, education, training, and the administration of justice. The ACT Government also took receipt of Aboriginal and Torres Strait Islander artwork for the Legislative Assembly during NAIDOC week, and staged a number of other community initiatives to pay recognition to Aboriginal and Torres Strait Islander people.

In 2018, the first Reconciliation Day Public Holiday was held on Monday 28 May 2018. The ACT has been recognised as the first Australian State or Territory to gazette Reconciliation Day as a Public

Holiday. On 10 May 2018 the ACT Legislative Assembly also agreed to recognise traditional custodians each sitting day, instead of just at the beginning of each session.

 *New South Wales, Victoria, Queensland, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory have taken many significant steps, both symbolic and legislative, to advance the objectives of reconciliation. Recommendation 339 remains partially complete as reconciliation remains an ongoing process and there are next steps to be taken to address the issue of constitutional recognition.*