Australian Human Rights Commission
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Native Title Amendment (Reform) Bill 2011

Australian Human Rights Commission Submission to the Senate Legal and Constitutional Affairs Committee

12 August 2011

Human Rights and Equal Opportunity Commission
ABN 47 996 232 602

Level 8 Piccadilly Tower
133 Castlereagh Street
Sydney NSW 2001

GPO Box 5218
Sydney NSW 2001

General enquiries 1300 369 711
Complaints infoline 1300 656 419
TTY 1800 620 241
www.humanrights.gov.au

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1 Introduction

1. The Australian Human Rights Commission welcomes the opportunity to comment on the proposed changes to the *Native Title Act 1993* (Cth) in the Native Title Amendment (Reform) Bill 2011.

2. The Commission is Australia's national human rights institution and is established by the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act).

3. The Commission has responsibilities under the AHRC Act to examine the enjoyment and exercise of human rights by Aboriginal and Torres Strait Islander peoples. The Commission also has responsibilities to report annually on the effect of the Native Title Act on the exercise and enjoyment of human rights of Aboriginal people and Torres Strait Islanders.[i]

4. The Commission congratulates Senator Siewert for moving the Reform Bill; particularly to the extent the proposed amendments implement the Aboriginal and Torres Strait Islander Social Justice Commissioner's Native Title Report 2009.

5. This submission outlines the Commission's support for the stated intention of the Reform Bill. As the Commission has consistently urged, native title reform is required to address current inequalities in the law. However, the Commission cautions against making amendments to the Native Title Act without comprehensive consultation with Aboriginal and Torres Strait Islander peoples.

2 Summary

6. The Native Title Act does not create a fair process for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.[ii]

7. Within the native title system there are significant obstacles to the full realisation of Aboriginal and Torres Strait Islander rights, including, for example, the onerous burden of proof, the injustices of extinguishment, and the weakness of the good faith requirements.[iii]

8. The Commission welcomes reforms which aim to address the barriers to creating a just and fair native title system and broadly supports the intent of the following reforms:

    - inserting additional objects into the objects clause (item 1)
    - reverting to the original wording of s 24MD(2)(c) (item 3)
    - enabling prior extinguishment of native title rights and interests to be disregarded (item 11)
    - repealing s 26(3) of the Native Title Act to recognise procedural rights over offshore areas (item 4)

- strengthening the good faith requirements under the right to negotiate provisions (items 5-9)
- shifting the onus of proof to the respondent to rebut presumptions that support native title interests (item 12)
- amending the definitions of 'traditional laws acknowledged', 'traditional customs observed' and 'connection with the land or waters' in s 223(1) of the Native Title Act (item 13)
- amending s 223(2) of the Native Title Act to clarify that native title rights and interests can include commercial rights and interests (item 14)

9. However, the Commission believes that these reforms should be addressed through an independent inquiry on possible law reform options.

3 Recommendations

10. The Australian Human Rights Commission recommends that:

Recommendation 1: The Committee endorse the stated intention of the Reform Bill.

Recommendation 2: The Committee recommend the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the *United Nations Declaration on the Rights of Indigenous Peoples*.

Recommendation 3: A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.

Recommendation 4: The Committee recommend the Australian Government give full consideration to items 5-9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.

4 Creating a just and fair native title system

11. The *United Nations Declaration on the Rights of Indigenous Peoples* (Declaration) provides that States are to establish and implement 'a fair, independent, impartial, open and transparent process … to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources'.[iv] The Australian Government has formally supported the Declaration.

12. However, international human rights mechanisms have noted with concern the inability of Aboriginal and Torres Strait Islander peoples to fully exercise and enjoy their rights to their lands, territories and resources.[v] For example,

the Committee on the Elimination of Racial Discrimination expressed regret that as a result of 'the persisting high standards of proof required for recognition of the relationship between indigenous peoples and their traditional lands, ...many are unable to obtain recognition of their relationship to land (art. 5)'.[vi]

13. While the Australian Government has introduced some reforms to the native title system in recent years, they have been minor and have failed to address the most significant obstacles within the native title system to the full realisation of Aboriginal and Torres Strait Islander peoples' land rights. These obstacles include the onerous burden of proving native title, and the injustices of extinguishment.[vii]

14. Accordingly, it is the Commission's view that the Native Title Act does not currently create a fair process for recognising and adjudicating the rights of Aboriginal and Torres Strait Islander peoples.

15. The Commission notes that the objects of the Reform Bill are to:

    a) Refer to the United Nations Declaration on the Rights of Indigenous Peoples and provide for principles of the Declaration to be applied in decision-making under the *Native Title Act 1993*; and

    b) To implement reforms to the *Native Title Act 1993* to improve the effectiveness of the native title system for Aboriginal peoples and Torres Strait Islanders.

16. The Commission strongly supports the stated objects of the Reform Bill. The Commission further recommends an independent inquiry to review the operation of the native title system to explore options for native title reform.

17. The terms of reference for this review should be developed in full consultation with all relevant stakeholders, particularly Aboriginal and Torres Strait Islander peoples.

Recommendation 1: That the Committee endorse the stated intention of the Reform Bill.

Recommendation 2: That the Committee recommend that the Australian Government commission an independent inquiry to review the operation of the native title system and explore options for native title law reform, with a view to aligning the system with international human rights standards, including the Declaration.

5 The Native Title Amendment (Reform) Bill 2011

18. The Reform Bill proposes a number of amendments to the Native Title Act which the Social Justice Commissioner and the Commission have been recommending for a number of years.[viii]

19. The Reform Bill aims to 'enhance the effectiveness of the native title system for Aboriginal and Torres Strait Islander peoples'[ix] by addressing:

a. the barriers claimants face in making the case for a determination of native title rights and interests and

b. procedural issues relating to the future act regime.[x]

5.1 Consistency with the Declaration

20. Proposed s 3A of the Reform Bill, if passed, will insert three additional objects into the objects clause of the Native Title Act:

    a. that governments in Australia take all necessary steps to implement specific principles set out in the Declaration[xi]

    b. that the provisions of the Native Title Act are to be interpreted and applied consistently with the Declaration[xii]

    c. that the specific principles set out in the Declaration are applied by each person exercising a power or performing a function under the Native Title Act.[xiii]

21. Explicit support for some of the principles of the Declaration in the Native Title Act is a positive step towards the implementation of the Declaration into all Australian laws and policies that affect the rights of Aboriginal and Torres Strait Islander peoples.

22. To the extent that an objects clause can provide interpretative guidance to courts applying the Native Title Act,[xiv] the Commission broadly supports the intention of this proposed amendment.

23. However, courts will ascertain the intention of the Native Title Act with reference to all of its provisions. Therefore, the Commission notes that this step alone will not substitute for amending the Native Title Act to ensure the substance of its provisions are consistent with the Declaration.

24. In the Commission's view, all laws and policies, especially the Native Title Act, should be aligned with the Declaration. [xv]

5.2 Extinguishment

(a) Compulsory acquisition and extinguishment

25. Section 24MD(2)(c) of the Native Title Act currently states that 'compulsory acquisition extinguishes the whole or the part of the native title rights and interests'.

26. Item 3 of the Reform Bill proposes to revert s 24MD(2)(c) of the Native Title Act to its original wording.[xvi] As originally enacted, this section stated that 'acquisition itself does not extinguish native title, only the act done in giving effect to the purpose of the acquisition that led to extinguishment'.[xvii]

27. There appears to be no policy justification for the current position. The Commission therefore welcomes item 3 of the Reform Bill.

(b) Agreements to disregard prior extinguishment

28. Item 11 of the Reform Bill proposes to insert a new s 47C. The new s 47C is intended to enable an applicant and a government party to make an agreement, at any time prior to a determination, that the extinguishment of native title rights and interests is to be disregarded.[xviii]

29. Following his visit to Australia in August 2009, the Special Rapporteur observed that the extinguishment of Indigenous rights in land by unilateral uncompensated acts is incompatible with the Declaration and other international instruments.[xix]

30. The Commission therefore supports expanding the range of circumstances in which extinguishment can be disregarded.[xx]

31. The Commission notes that proposed s 47C(1)(b) of the Reform Bill requires the agreement of the parties to disregard the extinguishment of native title rights. Accordingly, if passed, the impact of the proposed amendment will be limited to situations where government parties are prepared to be flexible and approach agreement-making processes in good faith.

32. The Commission therefore recommends that the Government work with Native Title Representative Bodies and Native Title Service Providers to develop proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.[xxi]

Recommendation 3: A working group which includes members from Native Title Representative Bodies and Native Title Service Providers be tasked with developing proposals to enable prior extinguishment to be disregarded in a broad range of circumstances.

5.3 Procedural rights over offshore areas

33. Item 4 of the Reform Bill proposes to repeal s 26(3) of the Native Title Act. Section 26(3) of the Native Title Act limits the right to negotiate to acts that relate 'to a place that is on the landward side of the mean high-water mark of the sea'.

34. The Commission supports the repeal of s 26(3) of the Native Title Act. The Australian Government has recognised that native title can exist up to 12 nautical miles out to sea.[xxii]

35. The lack of procedural rights in relation to offshore areas in the Native Title Act is therefore inconsistent with the Government's recognition that native title can exist in offshore areas. The Commission therefore supports repealing s 26(3) of the Native Title Act which should improve this situation.

5.4 Negotiating in good faith

36. Items 5 to 9 of the Reform Bill propose amendments to strengthen the requirements to negotiate in good faith. These amendments include:

- requiring parties to negotiate 'for a period of at least 6 months'[xxiii]
- requiring parties to negotiate in good faith 'using all reasonable efforts'[xxiv]
- outlining explicit criteria to guide what constitutes negotiating 'in good faith using all reasonable efforts'[xxv]
- providing that the onus of proving negotiation has been in good faith is on the party asserting good faith[xxvi]
- requiring a party to negotiate in good faith using all reasonable efforts before applying to the arbitral body.[xxvii]

37. The good faith negotiation requirement is one of the few legal safeguards that native title parties have under the future act regime.[xxviii] In *FMG Pilbara Pty Ltd v Cox* (*FMG*)[xxix], the Federal Court considered the obligation to negotiate in good faith. It found that

> there could only be a conclusion of lack of good faith within the meaning of [s 31]...where the fact that the negotiations had not passed an 'embryonic' stage was, in turn, caused by some breach of or absence of good faith such as deliberate delay, sharp practice, misleading negotiating or other unsatisfactory or unconscionable conduct.[xxx]

38. The Social Justice Commissioner considers that the Federal Court decision in *FMG v Pilbara* has diluted the content of this important procedural right for native title parties.[xxxi] Accordingly, the Commission welcomes reforming the good faith negotiation requirements.

39. The Commission supports the inclusion of explicit criteria as to what constitutes 'good faith' in the Native Title Act. Previously the Commission has submitted that s 228 of the Fair Work Act 2009 (Cth) (the Fair Work Act) could provide a model for developing such 'good faith' criteria within the native title system.[xxxii] Proposed s 31(1A) includes many of these criteria.

40. The Commission therefore broadly supports the intent of items 5-9 of the Reform Bill. However, the Commission considers that a statutory requirement to negotiate for a period of at least 6 months should also allow parties to negotiate in good faith for a period of less than 6 months where circumstances support a shorter negotiation period.

41. Further consideration should also be given to:

- including a statement that it is not necessary that a party engage in misleading, deceptive or unsatisfactory conduct in order to be found to have failed to negotiate in good faith
- inserting a 'reasonable person' test which may be used in assessing the actions of a proponent seeking a determination when negotiations are at a very early stage.[xxxiii]

42. The Commission further submits that the legislative provisions outlining the elements of good faith could be supplemented by a code or framework to guide the parties as to their duty to act in good faith.[xxxiv]

43. The Commission understands that the Government is currently reviewing the good faith requirements and encourages the Government to consider items 5-9 of the Reform Bill as part of this review.[xxxv]

Recommendation 4: The Committee recommend that the Australian Government give full consideration to items 5-9 of the Reform Bill as part of its current review of good faith requirements. The Government should also consider developing a code or framework to guide the parties as to their duty to negotiate in good faith.

5.5 Shifting the burden of proof

44. Chief Justice French AC of the High Court of Australia has suggested that the Native Title Act could be amended to provide for a presumption in favour of native title applicants, which 'could be applied to presume continuity of the relevant society and the acknowledgement of its traditional laws and observance of its customs from sovereignty to the present time'.[xxxvi]

45. Proposed s 61AA establishes a presumption of continuous connection in relation to a native title claim provided that certain circumstances are met.[xxxvii] Under proposed s 61AB, the onus shifts onto the respondent, usually the State, to demonstrate that there is evidence of 'substantial interruption' in the acknowledgment of traditional laws or the observation of traditional customs that sets aside the presumption.

46. If passed, proposed s 61AA and s 61AB will clarify that the onus rests upon the respondent to prove a substantial interruption rather than upon the claimants to prove continuity.

47. This is an important proposal given that the United Nations Committee on the Elimination of Racial Discrimination has expressed concern about the onerous evidential burden on claimants proving native title.[xxxviii]

48. The application of the tests for continuity, derived from *Yorta Yorta v Victoria* (*Yorta Yorta*)[xxxix] has had a detrimental effect on native title claims.[xl] For example, the Larrakia people were unable to prove their native title claim over Darwin because the Federal Court found their connection to their land and their acknowledgement and observance of their traditional laws and customs had been interrupted – even though they were, at the time of the claim, a 'strong, vibrant and dynamic society'.[xli]

49. The Commission therefore supports the intent of proposed s 61AA and s 61AB. However, the Commission prefers the model recommended by the Social Justice Commissioner in the *Native Title Report 2009* whereby the burden of proof shifts to the respondent once native title claimants have met the registration test.[xlii]

50. Proposed s 61AB(2) provides that, in considering the primary reason for the interruption, the Court must treat as relevant whether the primary reason for

the interruption is the action of 'a State or a Territory or a person who is not an Aboriginal person or a Torres Strait Islander'.[xliii] This proposal is broadly consistent with the recommendations of the Social Justice Commissioner in the Native Title Report 2009[xliv] and the Commission therefore supports the intent of proposed s 61AB(2).

(a) Clarifying the definitions of 'traditional' and 'connection'

(i) Clarify the definition of 'traditional'

51. Proposed s 223(1A) and s 223(1B), if passed, will define 'traditional laws acknowledged' and 'traditional customs observed' to encompass laws and customs that 'remain identifiable through time'.

52. The interpretation of 'traditional' under the Native Title Act sets too high a test and may not allow for traditional laws and customs to develop and progress over time in the way that all cultures adapt and change over time. Further, the proposed presumption of continuity would be undermined if respondents could rebut the presumption simply by establishing that a law or custom is not practised as it was at the date of sovereignty.[xlv]

53. The Commission submits that an approach that allows for 'traditional' laws and customs to change over time provided they remain 'identifiable' is consistent with the recognition of Aboriginal and Torres Strait Islander peoples' rights to culture and would clarify the level of adaptation allowable under the law.[xlvi]

(ii) Clarify the definition of 'connection'

54. If passed, proposed s 223(1C) will clarify that claimants are not required to have a physical connection with the land or waters.[xlvii] Section 223 of the Native Title Act currently requires that claimants 'have a connection with the land or waters' that is the subject of the claim, and have such a connection by virtue of their traditional law and customs.

55. Requiring evidence of a physical connection sets a standard that may prevent claimants who can demonstrate a continuing spiritual connection to the land from having their native title rights protected and recognised.[xlviii]

56. Since the Full Federal Court decision in De Rose,[xlix] the courts have rejected the need for the claimants to demonstrate an ongoing physical connection with the land.[l] If passed, proposed s 223 will clarify that the required connection may be spiritual.

5.6 Commercial rights and interests

57. If passed, item 14 will amend section 223(2) of the Native Title Act to specify that native title rights and interests include 'the right to trade and other rights and interests of a commercial nature'. Currently, the Native Title Act does not clearly specify that native title rights and interests can be of a commercial nature.

58. The Declaration affirms the right of Aboriginal and Torres Strait Islander peoples to self-determination. By virtue of that right, Aboriginal and Torres Strait Islander peoples 'freely determine their political status and freely pursue their economic, social and cultural development'.[li]

59. The Commission notes the recent Federal Court decision of *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)*[lii] in which Justice Finn found that in some cases native title rights may include the right to access, take and use resources for trading or commercial purposes.[liii]

60. The Commission welcomes this interpretation and submits that the Native Title Act should be amended to clarify that native title rights and interests can include commercial rights and interests.

61. The Commission therefore supports item 14 of the Reform Bill.

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[i] Native Title Act 1993 (Cth), s 209.
[ii] See for example, M Gooda, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2010,* Australian Human Rights Commission (2011), pp 12-14. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport10/index.html (viewed 18 July 2011); T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009,* Australian Human Rights Commission (2010), ch 3. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).
[iii] See further discussion in T Calma, Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2009,* Australian Human Rights Commission (2010), ch 3. At: http://www.humanrights.gov.au/social_justice/nt_report/ntreport09/index.html (viewed 18 July 2011).
[iv] *United Nations Declaration on the Rights of Indigenous Peoples,* GA Resolution 61/295 (Annex), UN Doc A/RES/61/295 (2007), art 27. At: http://www.un.org/esa/socdev/unpfii/en/drip.html (viewed 12 July 2011).
[v] See, for example, Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/14 (2005), para 16. At http://www2.ohchr.org/english/bodies/cerd/cerds66.htm (viewed 18 July 2011); Human Rights Committee, *Concluding observations of the Human Rights Committee: Australia*, UN Doc CCPR/C/AUS/CO/5 (2009), para 16. At http://www2.ohchr.org/english/bodies/hrc/hrcs95.htm (viewed 18 July 2011).
[vi] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), para 18. At http://www2.ohchr.org/english/bodies/cerd/cerds77.htm (viewed 18 July 2011).
[vii] Native Title Report 2010*,* p 13.
[viii] See, for example, Native Title Report 2009*,* ch 3.
[ix] Explanatory Memorandum, Native Title Amendment (Reform) Bill 2011 (Cth), p 2.
[x] Explanatory Memorandum, p 2.
[xi] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(1).
[xii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(2).
[xiii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 1, proposed s 3A(3).
[xiv] *Re Credit Tribunal; Ex parte General Motors Acceptance Corp, Australia* (1977) 14 ALR 257, 260.
[xv] Native Title Report 2010, rec 2.1.
[xvi] Formerly s 23(3) of the Native Title Act 1993 (Cth).
[xvii]See: Native Title Report 2009, p 106.
[xviii] Explanatory Memorandum, note 7, p 6.
[xix] J Anaya, *Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya: Addendum: Situation of indigenous peoples in*

Australia, Report to the Human Rights Council, 15th session, UN Doc A/HRC/15/37/Add.4 (2010), para 29. At http://www2.ohchr.org/english/bodies/hrcouncil/15session/reports.htm (viewed 18 July 2011).

[xx] For further discussion see Native Title Report 2010, pp 39 - 41.

[xxi] See Native Title Report 2010, p 39.

[xxii] The Australian Government has recognised that native title can exist up to 12 nautical miles out to sea: See, for example, R McClelland (Attorney-General), *3rd Negotiating Native Title Forum* (Speech delivered at the Third Negotiating Native Title Forum, Melbourne, 20 February 2009), para 30. At http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_FirstQuarter_20February2009-3rdNegotiatingNativeTitleForum (viewed 18 July 2011).

[xxiii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 5, proposed s 31(1)(b).

[xxiv] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 5, proposed s 31(1)(b).

[xxv] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 6, proposed s 31(1A).

[xxvi] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 7, proposed s 31(2A).

[xxvii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 9, proposed s 35(1A).

[xxviii] Native Title Report 2009, p34.

[xxix] (2009) 175 FCR 141. This decision was discussed in Native Title Report 2009, pp 31–35.

[xxx] *FMG Pilbara Pty Ltd v Cox* [2009] FCAFC 49 [27].

[xxxi] Native Title Report 2009, p 34.

[xxxii] See Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), paras 72 – 74. At: http://www.humanrights.gov.au/legal/submissions/sj_submissions/20101130_leading_practice.html (viewed 18 July 2011).

[xxxiii] For further information on these options, see Native Title Report 2009, pp 31–35, 104–107; S Burnside, 'Negotiation in Good Faith under the Native Title Act: A Critical Analysis' (2009) 4(3) *Land, Rights, Laws: Issues of Native Title*, p 15. At www.aiatsis.gov.au/ntru/docs/publications/issues/ip09v4n3.pdf (viewed 18 July 2011). See also: Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [76].

[xxxiv] This could also guide the National Native Title Tribunal. For further discussion see: Australian Human Rights Commission, *Submission to Attorney-General and the Minister for Families, Housing, Community Services and Indigenous Affairs Discussion paper: Leading practice agreements: maximising outcomes from native title benefits* (30 November 2010), [75].

[xxxv] In July 2010 the Government released *Leading practice agreements: maximising outcomes from native title benefits* which proposed a review of the good faith requirements: Department of Families, Housing, Community Services and Indigenous Affairs, *Leading practice agreements: maximising outcomes from native title benefits,* http://www.fahcsia.gov.au/sa/indigenous/pubs/land/Pages/leading_practice_agreements.aspx (viewed 18 July 2011).

[xxxvi] Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008), [29]. At http://www.fedCourt.gov.au/aboutct/judges_papers/speeches_frenchj35.rtf (viewed 18 July 2011).

[xxxvii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AA.

[xxxviii] Committee on the Elimination of Racial Discrimination, *Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, UN Doc CERD/C/AUS/CO/15-17 (2010), [18].

[xxxix] *Yorta Yorta v Victoria* (2002) 214 CLR 422.

[xl] Native Title Report 2009, p 84.

[xli] *Risk v Northern Territory* [2006] FCA 404, para 839. The decision was upheld on appeal to the Full Federal Court: *Risk v Northern Territory* (2007) 240 ALR 75.

[xlii] Native Title Report 2009, pp 82-83.

[xliii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 12, proposed s 61AB(2).

[xliv] See Native Title Report 2009, p 87.

[xlv] This is discussed further in Native Title Report 2009, p 85.

[xlvi] For a discussion of the rights of Indigenous peoples to culture, including adaptation and revitalisation of culture, see T Calma, Aboriginal and Torres Strait Islander Social Justice

Commissioner, *Native Title Report 2008*, Australian Human Rights Commission (2009), pp 87-88. At http://www.humanrights.gov.au/social_Justice/nt_report/ntreport08/index.html (viewed 18 July 2011).
[xlvii] Native Title Amendment (Reform) Bill 2011 (Cth), sch 1, item 13, proposed s 223(1C).
[xlviii] See Native Title Report 2009, p 86.
[xlix] *De Rose v South Australia No 2* (2005) 145 FCR 290, 319.
[l] Native Title Report 2009, p 86.
[li] *United Nations Declaration on the Rights of Indigenous Peoples*, art 3. Indigenous peoples also have the right to 'determine and develop priorities and strategies for exercising their right to development': art 32.
[lii] [2010] FCA 643 (2 July 2010).
[liii] [2010] FCA 643, 752-757 (2 July 2010).