

Australian Law Reform Commission Issues Paper 45

Review of the Native Title Act 1993

To
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INTRODUCTION

Reform in the native title system

It has been frequently asserted that there has been a failure of native title to meet expectations. The Aboriginal and Torres Strait Islander Social Justice Commissioner is quoted as saying –

‘the promise of the *Mabo* decision and the *Native Title Act* as drafted in 1993 has not been fully realised’.¹

In an earlier article supporting the proposed 2012 Native Title Amendment (Reform) Bill (which failed to pass)² the Commissioner articulated the nature of that promise as follows:

There is no doubt about it - the *Mabo* decision and the recognition that terra nullius was a myth was a defining moment for Aboriginal and Torres Strait Islander people... Eddie *Mabo*'s victory represented so much more than an argument about land rights. As Professor Mick Dodson, the inaugural Social Justice Commissioner, observed in 1994, the "recognition of native title was more than a recognition of Indigenous property interests, it is also about the recognition of our human rights". Native title was - and is - a promise to recognise Aboriginal and Torres Strait Islander people's traditional connection to, and rights and interests in, their lands, territories and resources. Twenty years on from the *Mabo* decision, we owe it to ourselves to ask what this promise has delivered for Aboriginal and Torres Strait Islander peoples? The Native Title Act, as it was drafted in 1993, tried to balance the realities of the past with a fair way to deal with land in the future, based on contemporary notions of justice. But one of the fundamental flaws of the native title system as we know it is that the concept of native title was based on the unfair principle that the Crown had the power to extinguish traditional Indigenous ownership of land. Although the government had the chance to redress some of the failings of the Native Title Act following the High Court's *Wik* decision, which laid the ground rules for co-existence and reconciliation of shared interests in the land, the opposite happened. What occurred instead was a significant weakening of Aboriginal and Torres Strait Islander people's position and amendments which ensured that the Native Title Act could override one of Australia's most important laws designed to protect human rights, the Racial Discrimination Act. The process of recognising native title itself has also been frustrating from the start for Aboriginal and Torres Strait Islander peoples. While on the one hand, it brings hope and expectation of the return of country, on the other hand it can also be a process fraught with difficulties that opens up tensions and wounds around connections to country, family histories and community relationships. These instances of "lateral violence" fragment our communities as we navigate the native title system and sadly diminish the unique opportunity native title can and should deliver to overcome disadvantage. Despite all this, I am optimistic that the original promise of the *Mabo* decision can still be realised. In February, Senator Rachel Siewert introduced into Parliament the Native Title Amendment (Reform) Bill. The Bill is based in part on the recommendations of many stakeholders over the years, including my predecessor, Dr Tom Calma. But it has also been introduced within the context of the Australian Government's support for the United Nations

¹ See Aboriginal and Torres Strait Islander Social Justice Commissioner, 'Social Justice and Native Title Report' (Australian Human Rights Commission, 2013) 76.

² See M Gooda, *Native Title Reform could go closer to fulfilling Mabo's legacy*, Sydney Morning Herald, 4 June 2012, downloaded 22 April 2014 at : <http://www.smh.com.au/federal-politics/political-opinion/native-title-reform-could-go-closer-to-fulfilling-mabos-legacy-20120603-1zpw2.html#ixzz2zZcrHJii>

Declaration on the Rights of Indigenous Peoples, which provides that States are to establish and implement "a fair, independent, impartial, open and transparent process ... to recognise and adjudicate the rights of Indigenous peoples pertaining to their lands, territories and resources". It's time we addressed the most significant problems faced by Aboriginal and Torres Strait Islander people in their efforts to realise their rights to lands, territories and resources. Senator Siewert's reform Bill addresses the onerous burden of proving native title and goes some way towards addressing the injustices of extinguishment. However, we need to go much further still to ensure that the Native Title Act is consistent with the declaration in upholding the human rights of Aboriginal and Torres Strait Islander people. Many of us who are familiar with the intricacies of the native title system have been calling for years for the onus of proving native title to be reversed. This would mean that native title claimants would be presumed to have a continuous connection to their traditional country unless there is evidence that this connection has been significantly disrupted. Currently, native title claimants have to provide all the information that's required to demonstrate their continuous connection to country. As these reforms sit before the Federal Parliament, I find myself wondering what Eddie Mabo would think now? I'd like to think he'd still hold out hope that the promise Mabo represented really will be fulfilled."

It is likely that there would be much variety in the views of the promise of the *Mabo* decision, and the expectations of the 1993 *Native Title Act*. The preamble to the *Native Title Act 1993 (NTA)* recites that:

The people of Australia intend:

- (a) to rectify the consequences of past injustices by the special measures contained in this Act ... for securing the adequate advancement and protection of Aboriginal peoples and Torres Strait Islanders; and
- (b) to ensure that Aboriginal peoples and Torres Strait Islanders receive the full recognition and status within the Australian nation to which history, their prior rights and interests, and their rich and diverse culture, fully entitle them to aspire.

The NTA formed part of a package of measures designed to achieve the above aims which included the establishment of an Aboriginal and Torres Strait Islander Land Account, which was to partly fund the Indigenous Land Corporation's (ILC) acquisition of land for Aboriginal and Torres Strait Islander groups, and a Social Justice Package. The ILC has come under strident criticism from Aboriginal and Torres Strait Islander groups due to a perceived lack of transparency and increasing constraints on divestments and application procedures³, which has partly fuelled an independent review of the ILC and Indigenous Business Australia by the current Federal Government, the results of which are yet to be published. The Social Justice Package was never implemented.

Whether the 'promise of the *Mabo* decision and the NTA as drafted in 1993' has been achieved must also be seen in this context, and the Australian Law Reform Commission should consider whether the overall package of measures ought to be revisited.

Native title cannot be expected to meet all the 'contemporary worldviews and aspirations of Aboriginal people'.⁴ Neither should it be expected to 'accord with Aboriginal and Torres Strait Islander people's understandings of society, law and custom'.⁵

³ See, for example, Sullivan, P., *Policy Change and the Indigenous Land Corporation*, AIATSIS Research Discussion Paper Number 25 July 2009 downloaded on 22 April 2014 from <http://www.aiatsis.gov.au/files/research/dp/DP25.pdf>

⁴ David Martin, Toni Bauman and Jodi Neale, 'Challenges for Australian Native Title Anthropology: Practice Beyond the Proof of Connection' (Research Discussion Paper 29, AIATSIS, May 2011).

That said, the NTA as originally enacted was intended to be of a more beneficial kind consistent with the *Mabo* decision as the preamble suggests, rather than one which facilitates the extinguishment of those rights.⁶ The amendments to the NTA in 1998 following the *Wik* decision⁷ preferred the latter approach as highlighted by Commissioner Mick Dodson⁸:

“By purporting to ‘confirm’ extinguishment by inconsistent grants, the Commonwealth is purposely pre-empting the development of the common law. For all the need for ‘certainty’ and ‘workability’ there is the balancing objective of allowing sufficient time to integrate the belated recognition of native title into Australia’s land management system. This does not require the obliteration of Indigenous interests so as to favour non-Indigenous interests. It does not require a return to *terra nullius*. Nor does it require endless years of expensive litigation. The proper recognition of co-existent native title can be achieved by modest legislative amendments and a suitable balance of case law and negotiated agreements, undertaken with goodwill and in good faith.”

The criticism of native title law that it is overly complex, however, is justified. A degree of complexity is consistent with its political, social and economic importance. The focus of this review by the Australian Law Reform Commission (**ALRC**) should be on where that complexity is unnecessary for the achievement of any legitimate goal and can be diminished or eliminated by an incisive approach to the achievable outcomes of the native title process.

The complaint about the ‘excessive length of time taken to achieve native title determinations’⁹ does not take into account that claims once lodged and registered have all the benefits of being presumed to be able to be made out and all the same procedural rights, and ability to negotiate benefits to the native title claim group as if they had been determined to be native title holders, without having to undertake any further process of proof of the claim.

Despite this, the social and economic impact of delays to the formal recognition of native title on native title groups cannot be understated, nor the attendant diminishing of the NTA’s beneficial objectives in its preamble. In this context, measures designed to improve the efficiency of making out native title claims, including a presumption of continuity, warrant consideration.

Question 1: Guiding principles

The Law Society of Western Australia is of the view that the five guiding principles identified by the ALRC to inform its review will adequately enable it to conduct a thorough review. In particular the Society would emphasise the importance of adherence to international law, and would urge the ALRC to revisit the impact which the 1998 amendments to the NTA, which purported to dis-apply the *Racial Discrimination Act 1975* to native title, have had on

⁵ Australian Law Reform Commission, *Review of the Native Title Act 1993* Issues Paper 45 March 2014, p 19, [26].

⁶ See, for example, Keating, P “Time to Revisit Native Title Laws”, *The Australian*, 1 June 2011, comprising the full text of the Lowitja O’Donoghue Oration delivered for the Don Dunstan Foundation at the University of Adelaide on 31 May 2011.

⁷ *Wik Peoples and Ors v State of Queensland and Ors* (1996) 187 CLR 1, 23 December 1996

⁸ Native Title Report – July 1996 to June 1997, Report of the Aboriginal and Torres Strait Islander Social Justice Commissioner to the Attorney General as required by section 209 of the *Native Title Act 1993*, Human Rights and Equal Opportunity Commission, 1997

⁹ Australian Law Reform Commission, *Review of the Native Title Act 1993* Issues Paper 45 March 2014, p 28, [59].

the proper and just recognition of native title, and consider how that impact might now be ameliorated.

Question 2: Trends in resolving claims

The Society's view is that what is happening, as a general trend in the resolution of claims, is that a phase has been reached when some of the easier claims to be resolved have been resolved, and some of the claims which have been more difficult to resolve remain unresolved, but are now those which are being attended to.

For example, in the Eastern Goldfields the Madduwongga claim was one of the first 6 claims to be lodged under the NTA in 1994. It was quickly followed by the adjoining Koara and Waljen claims, all following the boundaries for those language groups set out in the Tindale language group map. By 1996 there were 40 claims in the Goldfields, with numerous overlaps of the three original claims. Some resolution of overlaps was achieved by concentrated work by the Goldfields Land and Sea Council and the Wongatha claim was created by the combination of some of those overlapping claims. That claim proceeded to a lengthy trial with some overlapping claims remaining and some being assisted by the GLSC and others being separately represented. In *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 (5 February 2007) Lindgren J came to the conclusion that the 7 claims which he was hearing jointly should be dismissed for want of proper authorisation under the NTA. No finding was made that native title did not exist and so claims in the Eastern Goldfields are now in the process of being re-constituted. The original Maduwongga claim, for example, has been through several reiterations in attempts to pass the registration test, and is currently continuing with that process.

One of the other issues which the Wongatha case illustrates is the paucity of availability of Anthropological experts to assist in the preparation of claims and the presentation of the necessary ethnographic evidence to engage with the State in arriving at a consent determination or to present a case at trial. The Wongatha case effectively engaged all available Anthropological experts in the country. During the trial the expert for the State of Western Australia passed away and was unable to be replaced. Typically today (as has been the case since 1994), if an Anthropological expert is required, then long time periods need to be allowed to await the availability of the small number of experts who are available to perform the task.

Another example of a long-running complex case is the recently determined *Banjima People v State of Western Australia (No 3)* [2014] FCA 201. The determination was the culmination of an application first lodged with the National Native Title Tribunal (**NNTT**) on 4 June 1996. An overlapping claim was lodged on 29 September 1998. The overlapping claimant groups were separately represented and cross-examined each other's witnesses in more than one session of preservation evidence, before the claims were combined in an application filed on 1 June 2011. The process of arriving at that point involved years of mediation by the NNTT and included reaching an agreement to jointly engage an Anthropological expert to provide a report addressing the issues which gave rise to the overlapping of the two claims. A contributing factor to the length of time which it took to resolve this claim was the high level of demand placed on the Native Title Representative Body (**NTRB**) in giving sufficient priority to this claim in competition with the numerous other claims its limited resources were expected to resource. The claim was only able to be resolved in the time it was because the

claim groups were in the fortunate position where they had access to funds obtained by way of benefits from agreements negotiated with major iron ore companies in the region, and were able to make substantial contributions towards the cost of engaging legal counsel and otherwise paying for the substantial costs in pursuing the matter to a trial.

Questions 3 and 4: Jurisdictional variations

The Society wishes to draw the ALRC's attention to its concern about the policy position taken by the State of Western Australia of adopting a 'whole of government approach to native title processes and negotiations'.¹⁰ As part of the whole-of-government approach to native title and Aboriginal heritage, the Department of the Premier and Cabinet's Land Approvals and Native Title Unit and the Department of Indigenous Affairs (**DIA**) sponsor the Inter-Agency Reference Group on Native Title and Aboriginal Heritage. Group membership is from across Government, specifically agencies with a focus on land or resource management.¹¹ There are currently 21 members of the Group. This approach by the State has resulted a substantial slowing of the progress towards arriving at consent determinations of native title. The effect has been that each government agency has sought to resolve all issues it may have with native title in advance of consenting to any determination of native title. Many of those issues relate to potential future acts which may affect the native title. Those are matters which can and should properly be dealt with as and when they arise, and should not be contributing to delays in addressing the possibility of consenting to a determination that native title exists. The delays which have been caused by this approach are leading to claims being progressed to a contested hearing which could have been the subject of a consent determination.

Questions 6 to 9: Presumption of continuity

The Society maintains the argument advanced by the Law Council of Australia that a presumption of continuity is consistent with the beneficial purpose of the NTA.¹²

A rebuttable 'presumption of continuity' incorporating the model suggested by French J in 2008¹³ into the NTA may assist in progressing some claims more expeditiously. It will place the focus on the respondents to claims, particularly State and Territory governments, to make a judgment as to whether resources will be applied to seeking to rebut the presumption.

The Western Australian Government has argued that it could produce a 'counter-productive' effect, by requiring 'State and Territory Governments to place renewed emphasis on identifying the flaws in connection evidence'.¹⁴ However, in some cases it could have been a distinct advantage to have had the State identify the area in contention and focus on what native title had survived extinguishment, and to what extent it was reasonable to contest the

¹⁰ <http://www.dpc.wa.gov.au/lantu/WholeOfGovernment/Pages/Default.aspx>.

¹¹

<http://www.dpc.wa.gov.au/lantu/WholeOfGovernment/Pages/ReferenceGrouponNativeTitleandAboriginalHeritage.aspx>

¹² Law Council of Australia, Submission No 21 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

¹³ French, Justice Robert "Lifting the burden of native title – some modest proposals for improvement" (FCA) [2008] FedJSchool 18, 9 July 2008 comprising the full text of a speech delivered to a Native Title User Group in Adelaide.

¹⁴ Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.

claim. For example in the Single Noongar Claim,¹⁵ if an early step had been for the State to conduct the tenure identification process and ascertain what land, within the external boundaries of the claim had survived extinguishment, the expected conclusion being very little, then the concern of the State (and the broader community) about a successful claim would have been much reduced, and the degree to which the State may have seen a need to oppose the claim may have been significantly reduced.

The facts required for the passage of the registration test by a claim are more than adequate as a basis upon which the presumption could be applied. The NTA now effectively applies such a presumption in according all the same procedural rights to registered claims as apply to determined claims.

Questions 10 and 11: 'Traditional'

The Society is of the view that it would not assist the process of developing the meanings of 'traditional' and 'society', for the legislature to attempt to intervene and add words to the NTA, which in turn would need to be interpreted by the courts in future cases. These concepts have been developing in the case law on native title, based upon the myriad of fact situations which arise with the particular cases and a fixed interpretation by the legislature would be more likely to constrain, rather than assist in the development of those concepts. Equally, the comments below on 'evolution' apply.

Question 10(b): Evolution

The Society is of the view that the allowance for adaptation of traditional law and custom set out in the judgment of Gaudron and Kirby JJ in *Yorta Yorta*,¹⁶ i.e. –

What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.

ought to be sufficient to avoid the approach of laws and customs being 'frozen in time'.¹⁷ The requirement for adaptation from an original source does not require that adaptation to have occurred without the outside influence of European interaction.¹⁸

The amendment proposed by the Native Title Amendment (Reform) Bill 2014 cl 18 is to insert:

(1A) Without limiting subsection (1), **traditional laws acknowledged** in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged.

(1B) Without limiting subsection (1), **traditional customs observed** in that subsection includes such customs as remain identifiable through time, regardless of whether there is a change in those customs or in the manner in which they are observed.

¹⁵ *Bennell v Western Australia* [2006] FCA 1243; *Bodney v Bennell* [2008] FCAFC 63.

¹⁶ *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [114]. See also *Bodney v Bennell* (2008) 167 FCR 84, [74].

¹⁷ Contra Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

¹⁸ Cp Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 361–362.

does not comprise a material addition to the position of the High Court in *Yorta Yorta*. However, in light of the decision of the Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63 which might be relied upon to limit the extent to which changes in traditional laws and customs may be considered not to constitute a ‘substantial interruption’, the Society considers the above clarification may provide useful guidance to courts in this area.

Questions 12 to 15: Commercial rights

In the view of the Society, the High Court in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (*‘Akiba’*)¹⁹ that native title rights and interests could comprise a right to access resources and take for any purpose resources in the native title claim area; and that the right could be exercised for commercial or non-commercial purposes, provides a sufficient statement of the law to deal with the issue of the possibility of native title rights comprising commercial interests, and suggests that there is no need for the legislature to amend the NTA to achieve that purpose. It should not seek to define ‘native title rights and interests of a commercial nature’.

Questions 5, 16, 17: Connection, physical occupation, continued or recent use

The Courts have made it clear since the first court determination of native title under the NTA that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use.²⁰

There is, in the view of the Society, no need for any change to the law in this regard. The comments provided elsewhere in this submission concerning ‘substantial interruption’, ‘traditional’ and ‘evolution’ are also relevant in relation to this issue.

Questions 18 to 21: Substantial interruption

It is difficult to take issue with the ultimate conclusion from the High Court’s decision in *Yorta Yorta* that if the normative society from which the native title is derived has ceased to exist, then the native title must also be incapable of recognition.

If that analysis leads to a conclusion that native no longer exists, some have argued that it was a matter contemplated by the Government when the NTA was first introduced, and the solution to the prospect that some native title claims would not succeed was the Aboriginal and Torres Strait Islander Land Account and the Social Justice Package. The Society’s comments concerning the efficacy of those other ‘compensating’ measures are noted above.

Whether a substantial interruption has occurred, without causing the normative society to cease to exist entirely, raises the prospect of, for example, traditional laws and customs being revived by descendants of such a society at a later date. It would appear reasonable for the courts to disregard such interruption if, as a matter of evidence, there is a relationship or commonality between the practices exercised before and after that interruption. It would also be consistent with the notion of a society and its traditional laws and customs as being dynamic and evolving, rather than frozen in time, and the notion of connection as being

¹⁹ *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

²⁰ *Western Australia v Ward* (2000) 99 FCR 316; *Western Australia v Ward* (2002) 213 CLR 1, [14], [65]; see also *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [62].

exercised through a variety of means, which may or may not be physical and which may or may not be the same form of connection as was exercised at sovereignty.

It would be most surprising if a society currently existing could not be found to have evolved from the antecedent members of that society. It is arguable that the cases, such as *Yorta Yorta* and *Risk v Northern Territory*²¹ reflect either a disproportionate focus on some evidence over other available evidence²², or a gap in the **evidence** of observable acknowledgement and observance of laws and customs, rather than an abandonment of that acknowledgment and observance.²³

The suggested amendment, to empower courts to ‘disregard ‘substantial interruption’ or change in continuity of acknowledgment and observance of traditional laws and customs where it is in the interests of justice to do so’, is consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by circumstances outside the control or intent of the relevant members of the relevant society. The Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63 which rejected arguments that white settlement mitigated the existence of substantial interruption is not consistent with the beneficial objects of the NTA, and highlights the need for the NTA to require consideration of why the interruption has occurred and the broader interests of justice in the matter.

Having regard to the above, the Society supports the alternative to section 61AB(2) of the NTA advanced by the Law Council, with minor additions emphasised, as follows:

“A court may determine that the requirements of s 223(1) of the NTA have been satisfied, notwithstanding that it finds that there has been:

- (1) A substantial interruption in the acknowledgment of traditional laws and customs;
- (2) A significant change to traditional laws acknowledged or traditional customs observed,

including where the primary reason for such substantial interruption or significant change is the action of a State or Territory or a person who is not an Aboriginal person or a Torres Strait Islander, **or where it is otherwise in the interests of justice to do so.**”

Questions 23 to 25 and 29: Authorisation, claim group and resources

As the Issues Paper identifies, at [219]-[224], the identification of a claim group may often be a complex task, deeply embedded in the local traditional laws and customs of the society. The less that process is prescribed by legislation and the more it is allowed to take place within the evolving understanding of the interaction of traditional law and custom with an evolving common law the more flexibility remains to accommodate differences and subtleties which may emerge over time. The danger of a legislative intervention is that it has a tendency towards a ‘one-size-fits-all’ approach. This is reflected in the statutory definition of ‘traditional Aboriginal owners’ in the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth), section 3, which provides as follows:

²¹ *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [840].

²² Such as historical documentary evidence over oral evidence, in the *Yorta Yorta* case.

²³ As in the *Risk* case.

"traditional Aboriginal owners" , in relation to land, means a local descent group of Aboriginals who:

(a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and for the land; and

(b) are entitled by Aboriginal tradition to forage as of right over that land.

Following the enactment of the legislation, decades were spent in Aboriginal Land Commission hearings expanding the understanding of the meaning and application of that definition to accommodate the communities of Aboriginal people who had historically occupied the land under inquiry in each case.

It would, however, be useful for a claim group, regardless of whether there is a traditional decision making process, to adopt a decision making process of its choice. While traditional decision making processes may remain in place, its adaptation or use for the purpose of authorising a native title claim and applicants under the section 251B of the NTA (or, for that matter, any Indigenous Land Use Agreement (**ILUA**) under section 251A of the NTA) is highly complex, and can be time consuming, costly and open to debate, particularly where issues of the interruption and evolution of decision making process may be in issue, thus creating a barrier to claim groups.

While defects in authorisation may be disregarded under section 84D of the NTA, it:

(a) compromises a claim group's ability to become registered, and receive the benefit of the attendant rights including the right to negotiate; and

(b) leaves the claim group open to attempts by respondent parties to have the claim dismissed under section 190F(6) of the NTA.

The Society therefore supports modifications to authorisation procedures in sections 251A and 251B of the NTA so that claim group or native title holders can adopt a decision making process of their choice. While section 251A is outside the scope of the ALRC's review, the Society agrees that sections 251A and 251B are frequently interpreted consistently by the courts as noted in paragraphs [247-8] of the Issues Paper. Equally, the approach to authorisation under the NTA influences the rule book provisions adopted by registered native title bodies corporate (**RNTBCs**) concerning the making of native title decisions. The flexibility which this modification to the authorisation procedures affords claim groups or native title holders in meeting authorisation requirements, maintains the ultimate authority of the claim group or native title holders, and thus would not compromise the decision-making outcome.

Question 26: Authorisation and dispute resolution

The native title process, including the requirement for authorisation of an applicant is sometimes blamed for disputes arising between and among native title claim groups. The Issues Paper more accurately identifies it as a 'trigger' for conflict. The issue of precisely identifying descent-based connections and acknowledgement and observance of traditional laws and customs which arises when pursuing a native title claim often brings to the surface deeply-held views of individuals as to the legitimacy of claims of others as to ancestry or acknowledgment of law and custom. Those matters in other day-to-day contexts have been able to be ignored or overlooked. A native title claim may bring them to centre stage, and be the flint which inflames relationships between individuals or groups. Such events cannot be avoided. They must be addressed by the full range of dispute resolution processes available and apposite to the dispute in question.

One of the dispute resolution options posed by the NTA is the role of native title representative bodies in ‘mediating’ disputes between constituents. To an extent, this role and other aspects of the functions of this native title organisation are the subject of an inquiry commissioned by the Department of Social Services with the assistance of Deloitte Access Economics. Without wishing to pre-empt that inquiry’s outcome, there is an obvious issue of potential conflict which arises where a representative body which acts for the claim group is also asked to mediate disputes. The Society considers it preferable for dispute resolution processes to be adopted which are independent of NTRBs entirely (for example, a referral to an independent, accredited mediator), and which are the subject of independent government funding, rather than compelling individual ‘constituents’ to pursue costly and difficult relief in the courts if the NTRB process is unsatisfactory or not considered sufficiently independent.

Question 27: Applicant dies or unwilling to act

It would be desirable to amend the NTA to allow the applicant or any member of the claim group where there is only one named applicant to file a notice with the court indicating that a member of the applicant has died or is no longer willing to act; or to allow the claim group to appoint a corporation to represent the claim group.

Question 28: Defects in authorisation

Section 84D of the NTA, which provides that the Federal Court may hear and determine an application, even where it has not been properly authorised, provided an effective means of eliminating alleged defects in authorisation as an issue which arose at the end of a hearing in: *AB (deceased) (on behalf of the Ngarla People) v State of Western Australia (No 4)* [2012] FCA 1268.

Question 29: Cost of authorisation

The Society agrees with the view of John Southalan that, while authorisation proceedings can be ‘time consuming, expensive and logistically challenging’, they may be necessary to ensure that a determination, agreement or other settlement is understood and accepted by a community; and adds that they may be an important process in avoiding the even more time consuming, expensive and challenging process arising from overlapping claims, as illustrated by the *Wongatha* and *Banjima* cases cited above. There ought to be a clear recognition by the relevant authorities, including relevant funding agents and the courts that this is so and sufficient time and resources devoted by them to ensuring that such processes are supported, by allowing for the time required and providing financial and logistic support.

Question 30: Scope of authorisation

The NTA should be amended to confirm that the claim group has authority to define the scope of the authority of the applicant and the process by which those comprising the applicant may make decisions, whether by a majority, unanimously or otherwise. In other words, the ultimate authority of the claim group should be maintained, but it should have the capacity and flexibility to determine the process by which the applicant will act on its behalf.



Konrad de Kerloy
President