

Submission to the Australian Law Reform Commission on the Review of the *Native Title Act 1993 (Cth)*

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Introduction

This submission draws on almost 18 years of experience working with the *Native Title Act 1993 (Cth)* (hereafter NTA). Over that period I have worked in various capacities in the non-government and private sectors, principally for the Australian Local Government Association (ALGA) producing resource materials and conducting information seminars and training workshops for local communities around Australia, as a consultant in my own practice and with a medium sized national consultancy firm, and in the tertiary education sector as a visiting lecturer for three universities.

As a consultant, my clients included native title representative bodies and native title service providers, registered native title bodies corporate, other Indigenous organisations, the National Native Title Tribunal, various Federal and State Government departments in WA, Qld, SA and NSW, several local councils in key locations and State/Territory local government associations. I still hold a watching brief on native title matters for the ALGA on a pro-bono basis. I am a Fellow of the Planning Institute of Australia (PIA), a Visiting Fellow at the Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS), and I am currently undertaking my doctoral studies on native title matters at the National Centre for Indigenous Studies (NCIS) at the Australian National University. My research topic is '*Land Justice for Indigenous Australians: Accommodating Customary Land Rights in Conventional Land Tenure Systems*'.

I have authored and published several research papers, academic journal articles, academic book chapters, specialist consultancy reports and conference papers on native title matters, especially in relation to the need to consider Indigenous customary land rights in contemporary land use and environmental planning. A selection of these can be found under my profile on the NCIS website <<http://ncis.anu.edu.au/people/wensing.php>>.

The purpose of this submission is to share my insights on some of the issues raised in Australian Law Reform Commission's Issues Paper on the Review of the NTA and to make some observations and recommendations.

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² As a PhD Scholar I have to be mindful of the fact that I am unable to publish aspects of my research prior to submitting my thesis for examination. Hence, parts of this submission are very short and to the point to avoid pre-publishing any material that I may end up using for my PhD.

Lessons about major legislative changes

I worked for the ALGA in various capacities from 1997 to 2003. During a significant part of that period I was employed as the Native Title Project Manager and in that capacity was responsible for the production of a number of resource materials aimed at assisting local government to understand its obligations and responsibilities arising from the 1998 amendments to the *Native Title Act 1993* (Cth).

The approach that ALGA adopted was to:

- conduct information seminars for elected members, senior officials and community leaders;
- develop information resources and guides for working with native title and developing agreements (i.e. Wensing and Macmillan 1999); and
- conduct training seminars for practitioners, native title holders/organisations and community members.

The development of these resources and the training initiatives were made possible by a partnership between ALGA, ATSIC, the NNTT and the Legal Aid Branch of the Federal Attorney-General's Department and in-kind contributions from State Local Government Associations and local Councils in providing facilities for these events.

The modus operandi I adopted for the training workshops was to insist that the relevant Native Title Representative Body and/or the local native title claimants or their representatives be invited to attend and participate. I also ensured all participants were provided with an opportunity to tell their story on how they came to live in their local community, what is special about their community, what they aspire for their community, what motivated them to come to the workshop and what they hoped to get out of it. Invariably, participants left these workshops with new hopes for their communities, new perspectives about other people in their own communities and a basis for building new relationships, and a solid understanding how to address the native title issues constructively through mediation and negotiation and not necessarily through litigation.

The feedback was very positive and there is little doubt this project made a significant contribution to raising the level of understanding about native title and the high number of local agreements struck between local councils and Aboriginal and Torres Strait Islander organisations. While these agreements were precipitated by a native title claim, they often dealt with a wide range of outstanding issues in addition to the native title matters and were aimed at improving relations between local government and Aboriginal and Torres Strait Islander people and communities. Local Councils in all localities embraced these ideas, not only in remote and regional Australia, but also in metropolitan and regional towns and cities. Some of the agreements are simple statements of acknowledgement and included commitments to working better together with Aboriginal and Torres Strait Islander people and organisations in their respective communities, while others are far more complex and detailed with several significant commitments to things like employment and better provision of local government services. Several of these are entered on the Agreements, Treaties

and Negotiated Settlements (ATNS) data base compiled and maintained by the University of Melbourne. (www.atns.net.au)

I make these observations on the basis that I learnt some significant lessons about how to educate Australians about something that challenged many entrenched values and paradigms. Especially about how Australia came to be a sovereign nation, how our forebears failed to take account of the pre-existing Indigenous occupation and ownership of the land, and how we have to now deal with that legacy in a constructive manner and avoid repeating the mistakes of the past.

What this exercise demonstrates is that:

- there is considerable value in developing targeted information resources and following this up with information seminars aimed at local community leaders and training workshops for practitioners, despite the high up-front costs; and
- there is strong value in developing partnerships between key agencies to assist local communities to come to terms with new paradigms and legal responsibilities.

These lessons are something that the ALRC might want to be mindful of if significant changes to the NTA are to be enacted following this review.

The remainder of this submission responds to some of the issues raised in the ALRC's Issues Paper.

Intersection between two legal systems

I agree with the ALRC's comment on page 13 of the Issues Paper that native title sits at the intersection of two legal systems and that there are indeed two sets of laws and customs:

- one deriving from colonisation;
- the other deriving from the prior traditional ownership of Australia by its First Nations peoples.

I have long held the view that there are two elements to the High Court's decision in *Mabo (No. 2)* (Wensing 2006, 2007).

The first element was about the substance of the decision: the High Court in *Mabo (No. 2)* recognised that Eddie Mabo and others on behalf of the Meriam People of Murray Islands in the Torres Strait had prior and continuing occupation and ownership of the Murray Islands under the traditional laws and customs of the Meriam People.

The Commonwealth government of the day responded to the first element by enacting the NTA, establishing the Indigenous Land Corporation to assist Aboriginal and Torres Strait Islander people that are unable to regain their native title rights and interests to acquire land and to manage Indigenous-held land, and foreshadowed a social justice package which never eventuated.

The second element was about the essence of the decision: the High Court recognised Aboriginal and Torres Strait Islander customary law as another source of law in Australia and that the common

law of Australia is capable of recognising this fact. This was a return to the position that British common law and policy had held since before the colonisation of Australia in 1788 (Ritter 2006: 43).

The implications of the second element of the decision however, have not yet permeated into the wider Australian consciousness, governance and public policy.

Mabo (No. 2) should therefore be seen, not only in terms of the details that the High Court was asked to adjudicate on, but also in the wider context of how governments make decisions and exercise their executive powers, how they explain their decisions to the public and how these actions condition legal interpretation and governmental practice (Webber 2000: 60).

One of the difficulties that native title claimants are encountering is that native title determinations are increasingly being determined within a very narrow interpretation of the law.

I therefore think it is time to re-think some of the fundamentals including the extinguishment and non-extinguishment principles embodied in the *Native Title Act 1993* (Cth)

Recommendation 1:

That the 'extinguishment by-grant doctrine' be abandoned in favour of a presumption of continuity of Aboriginal and Torres Strait Islander peoples customary rights to land as suggested by French J (2008) and contained in the *Native Title Amendment (Reform) Bill 2011*; the *Native Title Amendment (Reform) Bill (No 1) 2012*, and the *Native Title Amendment (Reform) Bill 2014*.

The myth of 'Certainty'!

The comment on Page 16 of the ALRC's Issues Paper that non-native title stakeholders are stressing the need for 'certainty' in the native title processes warrants closer examination.

Based on my 40 years of experience as a land use and environmental planner, this cry for 'certainty' is something planners hear constantly from property owners and the development industry. I am not surprised therefore to see this statement surface in the native title context.

There are two issues here. Firstly, there is a hierarchy of procedural rights in the NTA that does not include a right of veto over any developments or resource extractions. Secondly, the cry for 'certainty' is nothing more than a clique that proponents of development use to undermine the legitimate independent assessment processes that governments establish to regulate all kinds of development activities. Each of these are discussed in more detail.

The existing procedural rights in the *Native Title Act 1993* (Cth) are well known and there is no need for me to expand on them, suffice to say that the Federal Court in *Harris v the Great Barrier Reef Marine Park Authority* [2000] FCA 603 expressed its views about what each of the different types of procedural rights entailed.

The native title future act processes are just another legitimate part of the processes that non-native title stakeholders, including mining and exploration companies, are required to comply with in circumstances where native title either exists or may exist. The future act processes in the NTA could not be more certain because there is no right of veto over any future acts, including mining, exploration or any other types of future acts. The strongest power that native title holders or registered claimants have is the right to negotiate.

In over 40 years of experience as a land use and environmental planner, I constantly hear calls for 'certainty' from the development industry. The cry for 'certainty' is nothing but a metaphor for unimpeded and unconditional approvals for the developers' proposals on the developers' terms and timeframes. What these stakeholders often misunderstand or conveniently ignore, is that most statutory planning and development assessment processes give Ministers a discretionary power to approve a development proposal, to approve with conditions or to refuse a development proposal.

The process is an *assessment* process, not an automatic approval process. The same applies to applications for mining and exploration licences and permits. Relevant Minister can either: approve, approve with conditions, or refuse an application. Native title holders / registered claimants don't have these discretionary powers, they only have the right to negotiate which equates to 'a right to participate in the validation process'. It is not a right of veto. What more 'certainty' do non-native title stakeholders need?

The call for 'certainty' begs the question: Don't these stakeholders get the fact that the pre-*Mabo* days of getting approvals by ignoring the pre-existing Aboriginal and Torres Strait Islander rights and interests to land and resources are a thing of the past? A return to the pre-*Mabo* era is not possible and the calls for 'certainty' should therefore be treated with the same contempt that any advertising jingle deserves.

The compelling nature of emerging international human rights standards

The Issues Paper rightly notes on page 20 that the NTA was enacted against the backdrop of significant developments in international law. Indeed, international human rights standards have evolved a long way since *Mabo (No. 2)* in 1992.

I am unable to expand on this in my written submission as this is one aspect that I am currently researching in much greater detail as part of my PhD research. And we discussed these matters in some detail in our meeting on 6 May in Canberra.

What I can say is that as a member of the organising committee for the Planning Institute of Australia's 2013 National Congress in Canberra, I invited Bryan Wyatt, the CEO of the National Native Title Council to address the Congress on planning and native title issues. In his address, Brian Wyatt gave the Congress a very clear message that the principles of free, prior and informed consent in Article 19 of the UN Declaration on the Rights of Indigenous Peoples have as much relevance to planning processes and decision making as they do to decisions in the resources industries.

Brian Wyatt also commented that:

“Success on projects, or at least a smooth process from inception to conclusion, depends for a large part on how you build relationships with people along the way. It is critical that you engage Aboriginal people early in the piece. People are keen to be involved – they are very determined to protect their country and sacred sites, but they do not want to stifle development. People want to participate – it’s as simple as that. Sure you may have some challenges through the process, but they are never insurmountable and if you treat people with respect – that includes affording people the right to their free, prior and informed consent – and listen to what they are saying, you will get things done. “

These comments also dispel the myths about ‘certainty’ discussed above.

In his address, Brian Wyatt also took the opportunity to make some pertinent observations about the future act provisions in the *Native Title Act 1993* (Cth), as follows:

- There are some procedures that require **no engagement** with native title holders. They include the “procedures that indicate an absence of native title”, that is the provisions of Subdivision F and the low impact future acts of Subdivision L.
- There are some procedures that require **merely notification** of native title parties and an opportunity for them to comment. These include the “primary production” provisions of Subdivision G; the “management of water and airspace” provisions of Subdivision H; and the “facilities for the public” provisions of Subdivision K.
- There are provisions requiring satisfaction of the **right to negotiate** procedures. These include the provisions relating to acts that pass the freehold test in Subdivision M; and the grant of mining titles and compulsory acquisitions in Subdivision P.³

Brian Wyatt noted that:

- For native title groups none of the future act procedures under the *Native Title Act 1993* (Cth) satisfy the ‘free, prior and informed consent’ requirements of the provisions of the United Nations Declaration on the Rights of Indigenous People;
- The right to negotiate does not allow for the right to veto for access to land as is implied by the principle of free, prior and informed consent.
- But the ILUA processes under the NTA do provide for opportunities to be included in land management outcomes.

What this suggests is that the future act provisions of the NTA are in need of a substantial overhaul if the NTA is to be brought into line with the principles of free, prior and informed consent in the UN Declaration of the Rights of Indigenous Peoples.

The procedural rights under the future acts provisions may in some instances bring Indigenous people with native title rights to the table of decision making for certain types of future acts on their ancestral lands, but they do so ‘within the confines of the existing legal-technical and social order’ (Porter 2014: 15) and ‘simply boils down to the right to participate in the processes of one’s own dispossession’ (Porter 2014: 13). These procedural rights are nothing more than a

³ M. Storey, 2012, *The Declaration and Implementing Indigenous Land Justice*, Speech to the Symposium on Australia’s Implementation of the UN Declaration of the Rights of Indigenous Peoples, Castan Centre for Human Rights Law.

‘compensatory mechanism for the processes of dispossession’ and ‘are offered up in lieu of the transgression of all sorts of other rights’ (Porter 2014: 13), namely, the right of veto over future acts that impact adversely on the native title holders’ customary rights and interests and the ‘right to stay put’ (Hartman 1982). The future act procedural rights are in most cases so weak and meaningless that Traditional Owners have to rely on State/Territory Aboriginal heritage protection laws, which in many cases are also quite weak and meaningless in their ability to prevent yet further destruction and dispossession of Indigenous people’s customary rights and interests. As Porter (2014: 15) rightly observes, dispossession is never the subject of the terms of engagement, but ‘merely the rights around how it will be materialised, who will do it and whether the conditions will be more or less benevolent’.

Recommendation 2.

That the future act processes be overhauled to satisfy the principles of free, prior and informed consent provisions of the United Nations Declaration on the Rights of Indigenous People and Articles 3, 19, 23, 26 and 32 .

Native Title rights and interests of a commercial nature

The ALRC Issues Paper states that the Commission has been directed to inquire into whether there should be a clarification that ‘native title rights and interests’ can include rights and interests of a commercial nature. As the Issues Paper points out, this relates to the content of native title rights and interests, the right to take resources for any purpose, non-exclusive native title rights and inconsistency, and extinguishment, and that this discussion also relates to the debate about whether native title has characteristics of a proprietary nature.

We discussed these issues in our meeting of 6 May. I am investigating this question as part of my PhD research. Maybe I can have some answers for you by the time I hand my thesis in for examination and assessment in 2017!

Other issues discussed at our meeting on 6 May

The other issues we discussed at some length in our meeting were the issue of ‘connection’ and ‘continuity’, and the meaning of ‘Traditional’.

In relation to the meaning of the term ‘Traditional’, I suggest you might find David Edelman’s paper that he presented to the Native Title Conference in 2009 very useful as a starting point.

<http://www.aiatsis.gov.au/ntru/nativetitleconference/conf2009/papers/DavidEdelman.pdf>

You may also find Kado Muir’s paper of 1998 very useful.

<http://www.aiatsis.gov.au/files/ntru/publications/issues/ip98n23.pdf>

On the issue of ‘connection’, you asked what I thought of appointing an independent tribunal or arbiter that could assist the Federal Court, and if I recall correctly, I responded that I think those interpretations should be a matter for the Indigenous people themselves and not something for non-

Indigenous people to adjudicate on. I also hastened to add that as far as I understand, it is often difficult for Aboriginal people to speak for someone else's country as that is not part of their custom. It is my firm view that matters to do with connection are for Aboriginal and Torres Strait Islander people to decide, not other people.

On the issue of continuity, I would draw your attention to a paper that Professor Mick Dodson gave to the 13th Australian Legal Convention in 1997 in which he states that Aboriginal customary law will not go away, no matter how hard the colonisers tried. I also draw your Attention to comments made by Di Smith from the ANU and Graeme Neate from the National Native title tribunal about the term 'extinguishment' being just another metaphor for 'terra nullius'.

Again, non-Indigenous people and governments need to be more careful about how native title rights are able to continue. Again, this is an issue I am researching as part of my PhD studies, so I am unable to go into the details of what I have written on this so far, suffice to say, as I stated in the first part of this submission, that native title rights and interests are being determined and defined in an increasingly narrow framework that suits the non-native title parties at the expense of the native title holders. It is time to turn this around, otherwise Australia is in danger of extinguishing the world's oldest and continually surviving form of land tenure.