14._org_The National Farmers' Federation

15 May 2014

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
SYDNEY NSW 2001

via online submission portal

Dear Ms Wynn

Re: Review of the *Native Title Act* 1993– Response to the Issues Paper

The National Farmers' Federation (NFF) welcomes the opportunity to provide a formal submission to the Issues Paper released by the Australian Law Reform Commission to support the Commission's current review of the *Native Title Act* 1993.

NFF is the peak national body representing farmers and agriculture across Australia. On issues related to Native Title, NFF represents the views and interests of pastoralists, as respondents to Native Title claims. NFF's member organisations are among those that, with Federal Government Funding, provide information, advice and support to Native Title Respondents.

NFF's submission is based on the experiences of our members in negotiating the current Native Title system. We do not seek to comment on issues that relate specifically to Indigenous applicants. From a respondent's perspective, we recognise that where native title co-exists with pastoral leases, it does not diminish the rights of the leaseholder.

NFF recognises and respects the legal foundations of Native Title, established by decisions of the Federal and High Courts over time. In NFF's view, the common law established by past decisions provides clarity and certainty for the resolution of native title claims. The case law provides adequate guidance on a number of areas identified in the Issues Paper, particularly those questions relating to the definition of traditional laws and customs and those related to physical occupation, continued or recent use.

NFF opposes the introduction of a presumption of continuity. Reversing the onus of proof in native title claims would shift the financial burden of claim resolution to respondents and encourage the lodgement of overlapping claims.

NFF is concerned that the issues paper does not address the very real problem of overlapping claims which continue to frustrate timely resolution of native title claims.

While cognisant of the terms of reference for the ALRC's review, NFF takes this opportunity to reiterate our views on reforms that would provide greater certainty to pastoralists. Currently, uncertainty for pastoralist respondents is chiefly the result of:

- The lengthy timeframe between when pastoralists are joined to a native title claim and when claims are determined.
- Late applicant joinders when negotiations for consent determinations are significantly progressed.
- Not all parties to negotiations having adequate understanding of the law, and what is and is not negotiable when seeking to reach consent.

In NFF's view certainty for pastoralist respondents can be improved by:

- Ensuring that respondents enter into negotiations with a single claimant. Adjusting the time at which pastoralists are joined as a party to the claim may remove the angst associated with the timeframe that is required to establish and clarify the applicants to the claim.
- Providing a structured and supported environment in which claimants and respondents can negotiate and reach agreement over access. Encouraging consent determinations should be a priority.
- Providing clear timeframes for negotiations, resorting only to the courts to resolve those points of difference.

In NFF's view, these improvements are likely to encourage efficiency in the determination process and remove some of the cost associated for Government in supporting Native Title determinations.

Government funding to support respondent participation in Native Title matters has diminished over time. In our view, equitable access to legal support is essential for better and more efficient resolution of claims. Commitment from government to adequately fund respondent participation in the Native Title process is critical to facilitating practical and timely determinations.

In addition to the key points outlined in this letter, I attach a more detailed response to each of the questions posed in the Issues Paper for the Commission's consideration.

Should you wish to discuss NFF's submission further, please do not hesitate to Ms Jack Knowles, Manager Natural Resources Policy by telephoning 02 6269 5666 or by email jknowles@nff.org.au.

Yours sincerely

MATT LINNEGAR
Chief Executive

Attachment One

NFF response to ARLC Questions

DEFINING THE SCOPE OF THE INQUIRY

Question 1.

The Preamble and Objects of the *Native Title Act 1993* (Cth) provide guidance for the Inquiry. The ALRC has identified five other guiding principles to inform this review of native title law.

Will these guiding principles best inform the review process?

Are there any other principles that should be included?

The preamble to the *Native Title Act* acknowledges "that many Aboriginal peoples and Torres Strait Islanders, because they have been dispossessed of their traditional lands, will be unable to assert native title rights and interests".

The Parliament set up a remedy for that situation – the land fund. Until there is a detailed analysis of the efficacy and efficiency of that remedy attempts to modify/transform native title are premature.

Question 2.

The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last five years?

How are they relevant to connection requirements for the recognition and scope of native title rights and interests?

How are they relevant to the authorisation and joinder provisions of the *Native Title Act*?

There has been an increase in the resolution of claims by consent.

Of the claims that remain unresolved a substantial number involve disputes with overlapping claims or the composition of the claim group. The delay in

resolution is, in NFF's view, not caused by issues of continuity or the presence of non-government respondents.

Claims over highly urbanised areas continue to raise significant tenure related issues.

In NFF's view, some of the proposals put forward in the Issues Paper would compound the problems created by these disputes.

Question 3.

What variations are there in the operation of the *Native Title Act* across Australia?

What are the consequences for connection requirements, authorisation, and joinder?

No comment.

Question 4.

The ALRC is interested in learning from comparative jurisdictions.

What models from other countries in relation to connection requirements, authorisation and joinder may be relevant to the Inquiry?

Within Australia, what law and practice from Australian states and territories in relation to connection requirements, authorisation, and joinder, may be relevant to the Inquiry?

No comment.

CONNECTION AND RECOGNITION CONCEPTS IN NATIVE TITLE LAW

Question 5.

Does s 223 of the *Native Title Act* adequately reflect how Aboriginal and Torres Strait Islander people understand 'connection' to land and waters?

If not, how is it deficient?

No comment.

PRESUMPTION OF CONTINUITY

Question 6.

Should a rebuttable 'presumption of continuity' be introduced into the *Native Title Act*?

If so, how should it be formulated:

(a) What, if any, basic fact or facts should be proved before the presumption will operate?

(b) What should be the presumed fact or facts?

(c) How could the presumption be rebutted?

In NFF's view a rebuttal 'presumption of continuity' should not be introduced.

Question 7.

If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings?

The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

As the onus would shift to respondents so would the major financial burden of native title claim resolution.

The presumption could operate as encouragement for groups to take an expansive view of the geographical extent of their country, which in turn could lead to more overlapping claims.

Question 8.

What, if any, procedure should there be for dealing with the operation of a presumption of continuity where there are overlapping native title claims?

The existence of overlapping claims and internal disputes within the claim group are reasons why, in NFF's view, a presumption of continuity should not be introduced.

Question 9.

Are there circumstances where a presumption of continuity should not operate?

If so, what are they?

See above.

The meaning of 'traditional'

Question 10.

What, if any, problems are associated with the need to establish that native title rights and interests are possessed under the traditional laws acknowledged and traditional customs observed by the relevant Aboriginal or Torres Strait Islander people?

For example, what problems are associated with:

- **the need to demonstrate the existence of a normative society 'united in and by its acknowledgment and observance' of traditional laws and customs?**
- **the extent to which evolution and adaptation of traditional laws and customs can occur?**

How could these problems be addressed?

It is acknowledged that this presents evidentiary problems.

However, removing the "traditional" element means that any group of indigenous people can bind together and form a claim group and apply any contemporary membership criteria they wish to adopt.

Question 11.

Should there be a definition of traditional or traditional laws and customs in s 223 of the *Native Title Act*?

If so, what should this definition contain?

No.

The case law adequately addresses this issue.

NATIVE TITLE RIGHTS AND INTERESTS OF A COMMERCIAL NATURE

Question 12.

Should the *Native Title Act* be amended to state that native title rights and interests can include rights and interests of a commercial nature?

No.

Where native title co-exists with other interests it is difficult to see how commercial rights could be exercised when the rights of the other interest holders take priority.

Government regulation of almost all commercial rights throughout the Commonwealth raises the obvious question as to what this would achieve in reality.

It is acknowledged that the exercise of the bundle of native title rights that have been found to exist on pastoral land has virtually no ability to generate income for the native title holder – as opposed to interference or extinguishment of native title which creates a right to compensation.

Indigenous people require a proprietary interest in land to derive a real economic benefit. Native title does not and cannot deliver that outcome.

If activities done in accordance with traditional law and custom can be exploited commercially (for example, hunting and gathering) that is one thing, but to expand the range of activities to encompass broad commercial rights is not supported by NFF.

Question 13.

What, if any, difficulties in establishing native title rights and interests of a commercial nature are raised by the requirement that native title rights and interests are sourced in traditional law and custom?

Apart from the commercial exploitation of traditional activities, the creation of general commercial rights would have no source in traditional law and custom.

Question 14.

If the *Native Title Act* were to define 'native title rights and interests of a commercial nature', what should the definition contain?

No comment.

Question 15.

What models or other approaches from comparative jurisdictions or international law may be useful in clarifying whether native title rights and interests can include rights and interests of a commercial nature?

No comment.

PHYSICAL OCCUPATION, CONTINUED OR RECENT USE

Question 16.

What issues, if any, arise concerning physical occupation, or continued or recent use, in native title law and practice? What changes, if any, should be made to native title laws and legal frameworks to address these issues?

The case law provides adequate guidance on this issue.

Question 17.

Should the *Native Title Act* include confirmation that connection with land and waters does not require physical occupation or continued or recent use? If so, how should it be framed? If not, for what reasons?

The case law provides adequate guidance on this issue.

‘SUBSTANTIAL INTERRUPTION’

Question 18.

What, if any, problems are associated with the need for native title claimants to establish continuity of acknowledgment and observance of traditional laws and customs that has been ‘substantially uninterrupted’ since sovereignty?

It is acknowledged that this presents evidentiary problems.

To allow a purely contemporary society to make a claim would encourage the creation of claim groups directed solely towards the making of a claim.

Question 19.

Should there be definition of ‘substantial interruption’ in the *Native Title Act*? If so, what should this definition contain? Should any such definition be exhaustive?

No.

Question 20.

Should the *Native Title Act* be amended to address difficulties in establishing the recognition of native title rights and interests where there has been a ‘substantial interruption’ to, or change in continuity of acknowledgment and observance of traditional laws and customs?

If so, how?

No.

Question 21.

Should courts be empowered 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?

If so, should:

(a) any such power be limited to certain circumstances; and

(b) the term ‘in the interests of justice’ be defined?

If so, how?

No.

OTHER CHANGES?

Question 22.

What, if any, other changes to the law and legal frameworks relating to connection requirements for the recognition and scope of native title should be made?

The *Native Title Act* has to address the issue of overlaps.

In NFF's view, overlapping claims should not be registered.

If traditional law recognises overlapping rights and interests in land, then that traditional law should also provide the mechanism for dealing with the overlap.

There is no incentive for overlapping groups to compromise.

Joint claims require the creation of Prescribed Body Corporates ("PBC") that are effectively joint enterprises. The disparity between the overlapping groups may in turn create problems for the functioning of the PBC. This has significant concerns for pastoralists in managing the future relationship with the native title holders.

AUTHORISATION

Question 23.

What, if any, problems are there with the authorisation provisions for making applications under the *Native Title Act*?

In particular, in what ways do these problems amount to barriers to access to justice for:

- **claimants;**
- **potential claimants; and**
- **respondents?**

The cost of the authorisation process dictates the timing and frequency of authorisation meetings. This leads to delay in implementing any settlement proposals put forward by respondents and necessitates their ongoing participation in the proceedings.

Question 24.

Should the *Native Title Act* be amended to allow the claim group, when authorising an application, to adopt a decision-making process of its choice?

No comment.

Question 25.

What, if any, changes could be made to assist Aboriginal and Torres Strait Islander groups as they identify their claim group membership and the boundaries of the land claimed?

No comment.

Question 26.

What, if any, changes could be made to assist claim groups as they resolve disputes regarding claim group membership and the boundaries of the land claimed?

No comment.

Question 27.

Section 66B of the *Native Title Act* provides that a person who is an applicant can be replaced on the grounds that:

- **the person consents to his or her replacement or removal;**
- **the person has died or become incapacitated;**
- **the person is no longer authorised by the claim group to make the application; or**
- **the person has exceeded the authority given to him or her by the claim group.**

What, if any, changes are needed to this provision?

No comment.

Question 28.

Section 84D of the *Native Title Act* provides that the Federal Court may hear and determine an application, even where it has not been properly authorised.

Has this process provided an effective means of dealing with defects in authorisation? In practice, what, if any, problems remain?

No comment.

Question 29.

Compliance with the authorisation provisions of the *Native Title Act* requires considerable resources to be invested in claim group meetings. Are these costs proportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them?

No comment.

Question 30.

Should the *Native Title Act* be amended to clarify whether:

(a) the claim group can define the scope of the authority of the applicant?

(b) the applicant can act by majority?

No comment.

JOINDER

Question 31.

Do the party provisions of the *Native Title Act* — in particular the joinder provision s 84(5) and the dismissal provisions s 84(8) and (9) — impose barriers in relation to access to justice?

Who is affected and in what ways?

No comment.

Question 32.

How might late joinder of parties constitute a barrier to access to justice?

Who is affected, and in what ways?

This question presumes that the joinder of a party late in the proceeding will frustrate an outcome and therefore operate as a denial of justice to existing parties.

However, the court can only join a person as a party if that party's interests may be affected **and** it is in the interests of justice to do so.

Persons who approach the court late for joinder without an explanation for the delay will on the basis of present case law not be joined.

Question 33.

What principles should guide whether a person may be joined as a party when proceedings are well advanced?

There are claims that have been on foot for 17 years in Queensland.

The age of many of the unresolved claims means that persons who acquired interests post notification may be unaware that proceedings are on foot.

If a person has an interest that might be affected and provided the application for joinder is made promptly after acquisition of the interest it should not matter that the proceedings are “well advanced”.

Question 34.

In what circumstances should any party other than the applicant for a determination of native title and the Crown:

(a) be involved in proceedings?

(b) play a limited role in proceedings?

Native title determinations affect a broad range of interests and once made will affect those interests well into the future.

The existence of native title is another factor pastoralists have to take into account in conducting a pastoral operation. The requirement to address native title on lease conversion is another imposition on pastoral lessees.

The uncertainty as to whether native title does in fact exist has an impact on pastoralists in planning for the future in terms of borrowings, expansion, diversification and long term commitment to the land.

There is no valid reason why persons with interests that might be affected by a determination should be excluded from the claim resolution process.

Question 35.

What, if any, other changes to the party provisions of the *Native Title Act* should be made?

No comment.