National Native Title Council

spirit of Change

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Dear Ms Wynn

Australian Law Reform Commission - Review of the Native Title Act 1993 - Issues Paper

The National Native Title Council (NNTC) is pleased to respond to the Australian Law Reform Commission's call for submissions on the Issues Paper relevant its Review of the Native Title Act 1993.

The NNTC is the peak body of Native Title Representative Bodies (NTRBs) and Native Title Service Providers (NTSPs) from around Australia and was registered as a company limited by guarantee on 23 November 2006. The objects of the NNTC are, amongst other things, to provide a national voice for NTRBs/NTSPs on matters of national significance affecting the native title rights of Aboriginal and Torres Strait Islander people.

The NNTC, as always, is committed to working closely with government to assist in the development of improved policy and legislation to secure socio-economic benefits for Aboriginal and Torres Strait Islander peoples across Australia. We enclose our submission and look forward to further engagement with the ALRC in the context of the review. I would be pleased to discuss any aspect of our submission. If you require further information or have any queries please do not hesitate to contact me on (03) 9326 7822 at your convenience.

Yours sincerely

Brian Wyatt
Chief Executive Officer

NATIONAL NATIVE TITLE COUNCIL

SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION CONCERNING ISSUES PAPER (IP 45)

REVIEW OF NATIVE TITLE ACT 1993

May 2014

Introduction

The National Native Title Council is the national body of native title representative bodies and service providers in Australia.

This submission addresses certain of the subject matters raised in the Issues Paper, those that the Council sees as key issues within the terms of reference.

There are some very broad questions asked that in the Council's view would be better at least initially addressed by the conduct of qualitative research. For example, Question 2 seeks that 'general changes and trends affecting native title over the last five years' in relation to 'connection requirements' and 'authorisation and joinder provisions' be identified. The conduct of focus groups and individual surveys amongst relevant NTRB/NTSP staff for example would provide very valuable information to allow more informed submissions to be made.

It is suggested that the ALRC as an independent organisation conduct this research and include the results in the Discussion Paper due for release in September 2014. This could provide for a more focused discussion in the context of an evidence base.

A similar suggestion is made in relation to Questions 3 and 4. In relation to Question 4 (a) if research was done by the Commission concerning comparative jurisdictions and published as part of the Discussion Paper then again this would assist people in the field of practice and native title holders to make more informed submissions.

There are two other initial points the Council wishes to make concerning the ALRC terms of reference. It is probably too late historically to seek to resurrect much of the constrictive jurisprudence concerning the *Native Title Act, 1993* (NTA) particularly that flowing from the High Court cases of *Yorta Yorta* [1] and *Western Australia v Ward.*[2] Although suitable cases will arise at some stage where it will be appropriate to seek that the High Court review aspects of these decisions. Similarly, the significant diminution of native title rights in the future act provisions of the NTA that came about from the *Native Title Amendment Act 1998* aren't likely to be revisited for some considerable time.

In these circumstances the Council has been consistently advocating for the agreement of and implementation of a Broader Land Settlement framework, where native title is a means to an end, not an end in itself - that is native title should be a tool along with other legislative and administrative tools that assist with recognising Indigenous peoples and redressing indigenous disadvantage.

For some time a Comprehensive Land Claims Settlement policy and legislative package has been needed in Australia. In terms of the ALRC's current reference this would allow Indigenous peoples including government to bypass complex legal proposals to address the inadequacies of the common law and native title jurisprudence to date and address the real issues from an Indigenous perspective. That is having traditional rights to country recognised, agreeing to a fair compensation package whilst being able to facilitate equitable outcomes in the modern economy.

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[1] *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* 214 CLR 422.

[2] *Western Australia v Ward* 213 CLR 1

To some extent this is being achieved in a nascent manner in Victoria with the *Traditional Owner Settlement Act 2010*.

The Council makes the following comments concerning some of the subject matters raised.

Connection and recognition concepts in native title law

Presumption of continuity

As is common knowledge Chief Justice French in a speech in 2008[3] suggested that the NTA be amended to include what has been described as a 'rebuttable presumption of continuity'. He proposed a simple yet significant amendment to the NTA that would: 'lighten some of the burden of making a case for a determination, whether in litigation or mediation, by a change to the law so that some elements of the burden of proof are lifted from applicants'.

His Honour further suggested that: 'It 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.'[4]

This proposal has generated significant discussion, Reports, Parliamentary Committee reports and unsuccessful Bills in the Federal Parliament.

It has the potential to reset the negotiation table between Traditional Owners and respondent parties. The NNTC has advocated for an amendment to effect this proposal over several years and through many submissions.

Given that in many instances (particularly in remote locations) there is little foundation for significant dispute over continuity,[5] the NNTC believes that the adoption of a rebuttable presumption would help reduce the resource burden on the system (especially where continuity is undisputed), helping facilitate the expeditious resolution of native title claims.

Moreover, by reversing the onus of proof, the evidential burden is placed more appropriately on the State, which, by virtue of its 'corporate memory', is in a better position to elucidate on how it colonised or asserted its sovereignty over a claim area. This has the additional benefit of placing responsibility for investigating connection and extinguishment in the lap of the one entity; potentially leading to a more comprehensive understanding of the evidence in a given case.[6]

Importantly, the burden placed on the State by virtue of such a presumption may also result in positive behavioural changes; with the State having little incentive to expend resources in difficult disputes over continuity and connection or to assert, for example, that continuity had effectively been broken because of actions that in our modern human rights climate would be considered abhorrent (e.g., genocide or other breaches of international human rights law). In this respect, the introduction of a rebuttable presumption may act as a significant catalyst for change, facilitating a paradigm shift in the way negotiations are conducted and in the quality and quantity of positive outcomes for claimants.[7]

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[3] French, Justice Robert "Lifting the burden of native title some modest proposals for improvement" (FCA) [2008] Fed J Schol 18.
[4] Ibid [29]
[5] Justice Mansfield. 'Re-Thinking the Procedural Framework'. Paper presented to the Federal Court Native Title User Group (Adelaide, 9 July 2008) p 2.
[6] Smith, K., *Minefields, Minor Amendments and Modest Changes: an outline of the inherent dangers in native title negotiations and the opportunities to sweep them away,* Negotiating Native Title Forum, Melbourne, 19 February 2009
[7] ibid

The Australian Government has previously been criticised by the United Nations Committee on the Elimination of Racial Discrimination (CERD) for its approach to native title since the 1998 amendments. The Committee raised concerns about the high standard of proof required for the Courts to demonstrate continuous observance and acknowledgement of the laws and customs of Indigenous people, resulting in Traditional Owners not being able to obtain recognition of their relationship with their traditional lands.

These concerns have been consistently raised by the NNTC since the 1998 amendments to the Native Title Act. The NNTC believes that this proposal would greatly assist the more expeditious resolution of native title applications and would provide a significant opportunity to address the criticisms of CERD.

In answer to **Question 6** posed in the Issues Paper the NNTC is supportive of the model proposed by Justice French (as he then was) in the aforementioned paper.

In answer to **Question 8** in the context of overlapping claims the presumption should operate as many will be by agreement between the Indigenous parties and are reflective of continuous joint connection to country by neigbouring groups.

To the extent that there will be contested overlapping claims between Indigenous groups the presumption will no doubt be sought to be rebutted and the Court will deal with the evidence presented in the normal manner in contested native title litigation.

The meaning of 'traditional' and 'substantial interruption'.

The NNTC believes that the High Court's *Yorta Yorta* interpretation of section 223 of the NTA should be corrected unambiguously by a clear statement of the Parliament. An express statement needs to be made that the original intention of the Parliament was for section 223 of the NTA to enable the common law to develop in the normal manner to define native title jurisprudence – as has occurred in Canada.

The Council refers the Commission to the submission made by it to the *Senate Inquiry: Native Title Amendment (Reform) Bill 2011.* To quote:

> The NNTC welcomes the insertion of s223 (1)(1A) and (1B), which provide that indigenous laws and customs are "traditional" if they remain identifiable through time, regardless of whether there is a change in those laws or customs or the manner in which they are acknowledged or observed.
>
> The NNTC also welcomes the insertion of s223 (1D), which clarifies that traditional laws, customs or connections to land and waters do not have to be observed, acknowledged or maintained continuously, subject to the "substantial interruption" test in the proposed s61AB.
>
> As the Second Reading Speech acknowledges, there is a wealth of evidence surrounding indigenous customary trade rights and practices.[8] Nevertheless, an approach which takes the indigenous economy as "frozen in time" and does not allow for some degree of change and adaptation in indigenous commercial and trade practices, is clearly incommensurate with indigenous economic development.

Native title and rights and interests of a commercial nature

The NTA provides for commercial outcomes for native title holders and registered claimants via the future act provisions including ILUAs. These provisions have provided for some reasonable financial settlements especially with the mining industry concerning production.

[8] Second Reading Speech, Native Title Amendment (Reform) Bill 2011 (Cth).

The ability to negotiate commercial outcomes was substantively eroded in the *Native Title Amendment Act 1998.* This is because many types of developments and grants were taken out of the right to negotiate provisions and replaced with consultation procedures. These procedural 'rights' are not mandatory in the sense that compliance with the procedures is not necessary to obtain validity of the grant involved.[9] In other words the titles granted are valid whether the procedural rights are complied with or not by government.

It is a 'right' to comment not a right to be involved in decision making in any event.[10] There is an underlying right to compensation on just terms but this must sought by the applicant in separate proceedings and doesn't flow automatically from the grant of the licence, tenement or title concerned.

In addition there have been some financial packages included in native title settlements in a small number of cases with the state. The grant of freehold titles including the utilisation of the *Aboriginal Land Act 1991(Qld)* and *Aboriginal Land Rights (Northern Territory) Act, 1976* as part of native title settlements have successfully provided for fungible titles to facilitate commercial outcomes.

In this context the recognition of native title rights and interests of a commercial nature in a determination of native title continues to be generally hotly contested by all levels of government. All native title consent determinations on mainland Australia recognise native title rights and interests for non-commercial purposes only.

A number of the early consent determinations of native title in the Torres Strait have included a native title right to trade in the natural resources of the determination area.[11]

More recently the High Court[12] has 'confirmed' the trial judges finding in the Torres Strait Regional Seas Claim – *Akiba v Queensland (No2)*[13] that a right to take marine resources for trading or commercial purposes can be recognised as a native title right and interest.

On the mainland the Full Federal Court found in *Alyawar v NT* that as a matter of native title jurisprudence a native title right to trade can be recognised. A right to 'to share, exchange or trade subsistence and other traditional resources obtained on or from the land and waters',[14] but on the evidence in that case the right to trade could not be established.[15] No case on the mainland has yet determined a native title right to trade to exist in a commercial sense at this time.

It is common to recognise non-commercial rights to share and exchange 'traditional' resources.

Clearly the notion that this does not necessarily apply to all natural resources in the determination area but may be limited to those traditionally used is a concern and flows from the way the word traditional has been interpreted, amongst other things.

In answer to **Question 12** it would be useful but not determinative if the NTA stated that native title rights may be of a commercial nature. The proposed draft amendment to s223 (2) is sufficient. It

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[9] Harris v Great Barrier Reef Marine Park Authority [2000] FCA 603.
[10] Perry, Melissa & Lloyd, Stephen "Australian Native Title Law" Lawbook Co. Sydney 2003, 252,253.
[11] See cases such as Kaurareg People v Queensland [2001] FCA 657 and generally commentary in O'Donnell, Michael. *Indigenous Rights in Water in northern Australia*, NAILSMA/ TRaCK, CDU 2011.
[12] *Akiba v Commonwealth of Australia* 87 ALJR 916.
[13] *Akiba v Queensland (No2)* 270 ALR 564 [13].
[14] *The Alyawarr, Kaytetye, Warumungu, Wakay Native Title Claim Group v Northern Territory of Australia* [2004] FCA 472.
[15] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135.

would be far more useful if negotiation rights of a substantial nature were afforded to native title holders and registered claimants in all future act matters.

Further as mentioned earlier the existence of a comprehensive Broader Land Settlement framework is the better way to achieve equitable commercial outcomes for Indigenous peoples then tweaking the NTA to provide that something may exist when the significant constraints of native title jurisprudence are already well known.

Authorisation

The authorisation process is fundamentally important to the integrity of the native title claims process as it appropriately requires that the native title claim group has approved bringing an application for the recognition of native title in the Federal Court pursuant to the *Native title Act, 1993*.[16] The process goes to the integrity of the NTA from an Indigenous point of view.

The requirement for authorisation was introduced as part of the *Native Title Amendment Act, 1998.* It derives from concerns many Indigenous people and Native Title Representative Bodies held concerning native title claims being lodged without the consent of native title holders as a group. This caused dissension within certain native title groups, uncertainty concerning the authority of those representing claimants in relation to future acts and claims lodged that were inconsistent with traditional law and custom. Government and third parties were concerned about certainty in the system.[17]

The process of authorisation effectively involves two distinct decisions. The approval of *the* native title determination application and secondly the authorisation or empowering of the applicant to make *the* application to the Federal Court and to deal with matters arising in relation to it.[18]

A native title application in relation to the recognition of native title includes the pleading of the name and nature of the group, its rules of membership, the rights and interests claimed and the traditional boundaries of the society or group concerned.

This assists in the process of self-determination and facilitates a lessening of internal dissension and disputes with neighbouring groups if properly done.

Authorisation meetings should ensure that an applicant understands that he/she is accountable to the group for the decisions made to progress the claim.

It is also a decision that grants great powers and responsibilities to the applicant as it (the person or persons that comprise the 'applicant') can deal with all matters arising from the claim under the NTA.[19]

It also is a requirement for *registration of a claim*, which provides for access to the procedural rights of the NTA in future act matters including the right to negotiate provisions.

In relation to a *compensation application* the authorisation provisions provide similar powers and responsibilities in bringing, negotiating and possibly settling a compensation claim.

There are separate statutory requirements in relation to *Indigenous Land Use Agreements* (ILUAs)[20], which go to the native title holders authorising an agreement not an applicant.

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[16] Native title holders still have the option to commence a 'common law' claim not pursuant to the NTA. This approach, of course is not funded through the NTA system and no such claims have been progressed for some 20 years.

[17] *Daniel v Western Australia* 194 ALR 278, 283 [11].

[18] ss 61(4), 62(1)(iv),(v).

[19] Section 62A.

Authorisation under the NTA does not require informed consent of the group of native title holders. Decision making is in accord with traditional law and custom or an agreed process of the group.[21]

The authorisation process also ensures that an Indigenous society has the right not to bring a native title claim at a particular point in time if they so choose and seek other means of pursuing legal recognition of their society such as through land rights legislation. Some Indigenous people reject as a matter of principle that they need recognition by Australian law and have to prove their legitimacy and traditional laws and customs to others.

Much of the concern expressed in relation to the identification of the claim group, identifying the correct 'recognition level' as it has been put and understanding the nature of the historical experience of the particular Indigenous group concerned are an inevitable result of the imposition of the external legal requirement of proof associated with the recognition of native title in the NTA.

The High Court noted in *Western Australia v Ward* that the NTA requirement to determine rights and interests necessarily fragments the Indigenous world view. To quote: [22]

> The difficulty of expressing a relationship between a community or group of Aboriginal people and the land in terms of rights and interests is evident. Yet that is required by the NTA. The spiritual or religious is translated into the legal. This requires the fragmentation of an integrated view of the ordering of affairs into rights and interests, which are considered apart from the duties and obligations which go with them.

This is not to say that there are not difficulties in identifying the claim group in some circumstances as identified in the ALRC issues Paper in its reference to Kingsley Palmer's article 'Societies, Communities and Native Title'.[23] The point made by David Lavery in his article *The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective* is worth remembering:[24]

> The real danger is, as Sundberg J realised in *Neowarra*, that any determination which recognises native title at a sub-group level might be disenfranchising persons who have entitlements under the traditional Indigenous law and customs. (fn deleted) This is because the determination may not faithfully replicate the internal traditional entitlements dimension.

This exemplifies why the principle of self determination in the context of the authorisation process is important. This complexity is an example of the need to ensure that the claimant group properly approves the claim that is brought by the approved applicant

Authorisation – the statutory provisions

The main statutory provisions concerning authorisation of the 'applicant' comprise ss 61; 62(1)(a)(IV), (v); 62 A, 66B, 84C, 84D and 251B.

The relevant provisions have been interpreted in a flexible manner to date while underlining the fundamental importance of the authorisation process. As is acknowledged in the Issues Paper, 'Justice French described authorisation as'

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[20] s 251A

[21] Section 251B.

[22] 213 CLR 1, 64[14].

[23] Kingsley Palmer, 'Societies, Communities and Native Title' (2009) 4 *Land, Rights, Laws: Issues of Native Title* 7 a referred to and quoted at page 65 ALRC Issues Paper.

[24] David Lavery, *'The Recognition Level of the Native Title Claim Group: A Legal and Policy Perspective'* 2 *Land, Rights, Laws: Issues of Native Title* 1,7.

> a matter of considerable importance and fundamental to the legitimacy of native title determination applications. The authorisation requirement acknowledges the communal character of traditional law and custom which grounds native title.[25]

Justice Stone in *Lawson on behalf of the 'Pooncarie' Barkandji (Paakantyi) People v Minister for Land and Water Conservation for the State of New South Wales* stated:[26]

> I do not think, however, that the Act requires decisions of native title claim groups to be scrutinised in an overly technical or pedantic way. Unless a practical approach is adopted to such questions the ability of indigenous groups to pursue their entitlements under the Act will be severely compromised.

There is also importantly since the commencement of the *Native Title (Technical Amendments) Act 2007* a judicial discretion to allow for the finalisation of a determination of native title despite any defects in the authorisation process if it is in 'the interests of justice' to do so.[27]

Section 61 – the application

Section 61 relevantly requires that the applicant be 'authorised by all the persons' hold the native title. This has been generally interpreted in a practical manner to mean that not every member of the claimant group must be involved in the decision making process and that both the initial appointment of the applicant and any decision by the native title claim group subsequently to replace or change the applicant should be 'substantially the same' process.[28]

Similarly it has been held that if there is more than one person that comprises the applicant the fact that some are unwilling or unable to continue to act as an applicant with the others does not stop the others from continuing to exercise their responsibilities as the applicant.[29] Section 61(2)(c) states that if the applicant comprises more than one person then 'the persons are jointly' the applicant.

Nonetheless the judiciary has acknowledged in some of the cases concerning authorisation and in particular s66B (replacing the applicant) that the way decisions have been made and meetings notified have been far from perfect or best practice. More strikingly it has been suggested that possibly abuses of power have taken place under the guise of traditional decision making. For example in *Strickland* it was said that:[30]

> The specified grounds in this case constitute an assertion that as elders the two applicants have authority under traditional law and custom acknowledged by the members of the native title claim group to make decisions of this kind. The brevity of the assertion may be criticised and it might be thought consistent with the two applicants merely arrogating authority to themselves without any or any meaningful consultation with the members of the native title claim group. On the other hand, neither the registrar nor this court is in a position to reject the contention that all relevant authority is vested in the elders of the relevant native title claim group and that the applicants fall into that category.

In the experience of the Council this is not common yet it is important to ensure that an applicant is accountable to the native title claimant group. It is to this issue that the submission will make further

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[25] ALRC Issues Paper [215].
[26] [2002] FCA 1517, [28].
[27] Section s84D.
[28] Dr Lisa Strelein 'Authorisation and replacement of applicants: Bolton v WA [2004] FCA 760 (15 June 2004)' 3 Issues Paper No. 1 *Land, Rights, Laws; Native Title Research Unit* AIATSIS March 2005, 5-7.
[29] *Doolan v Native Title Registrar* (2007) 158 FCR 57[59].
[30] *Strickland v Native Title Registrar* (1999) 168 ALR 242, [57][58].

comment after further examining some of the relevant provisions.

Power of 'applicants' – s 62A

This provision provides that the 'applicant may deal with all matters' arising under the NTA in relation to the application to have native title recognised. This obviously gives the applicant and the individuals involved substantial decision making power and responsibilities concerning the progress of the application, any settlement of the claim in a consent determination and any future acts. It does not apply to the authorisation of Indigenous Land Use Agreements.

There is a lack of clarity in the legislation as to the extent this power is subject to any limitations or conditions being placed upon the applicant by the native title claim group. Justice Kiefel stated in *Chapman* that:[31]

> The continuance of authorisation must depend upon the terms of the authorisation, a matter upon which the NTA did not speak. Section 251B recognises that, in some cases, proper authorisation may require the use of traditional customs and laws. Beyond that, the NTA does not contain any reference to the terms upon which persons may be authorised.

It is clear from the cases that the Federal Court has in some instances accepted limitations being placed upon the applicant by the claim group in terms of how it makes decisions. For example, in the case of a dispute amongst the persons comprising the applicant that there may be a majority vote to enable the applicant to make a decision.[32] It has been held in *Anderson on behalf of the Wulli People* that:

> It is entirely reasonable, and consistent with the terms and purpose of the Act to promote progress of a claim, that the claim group should be able to so qualify the decision-making role of the applicant.[33]

In *Roe v State of Western Australia (No 2)* it was noted without adverse comment that the claim group had passed a resolution that no agreement with third parties be entered into by the applicant concerning the land and waters covered by the claim 'unless authorised by the claim group'.[34]

In the context of s66B Justice French stated in *Daniel* that:[35]

> If the original authority conferred upon an applicant for the purpose of making and dealing with matters in relation to a native title determination is subject to the continuing supervision and direction of the native title claim group, then it may be that an applicant whose authority is so limited is not authorised to act inconsistently with a resolution or direction of the claim group. In a case where an applicant does not comply with such a resolution or direction, it is reasonable to say that the applicant has exceeded the authority given to him or her by acting in contravention of the claim group decision.

Further in *Sambo* it was relevantly stated that:[36]

> The cessation of authority conferred upon an applicant requires decision-making on the part

[31] *Chapman and Others v Queensland and Others* 159 FCR 507, 510 [9].
[32] *Anderson v Western Australia* (2003) 204 ALR 522, [48].
[33] *Anderson on behalf of the Wulli Wulli People v State of Queensland* [2011] FCA 1158 [62].
[34] *Roe v State of Western Australia (No 2)* [2011] FCA 102 [141].
[35] *Daniel v Western Australia* 194 ALR 278, 284 [16].
[36] *Sambo v State of Western Australia* [2008] FCA 1575 [31].

> of the native title claimant group unless it can be said that the authority originally conferred was limited in such a way that it ceased upon the happening of some event without any separate decision being required. [31]

Section 66B

This section empowers a member/s of the native title claim group to seek an order from the Federal Court to replace the applicant on the grounds that the person whom is the current applicant consents to replacement or removal, has died or become incapacitated, is no longer authorised, or has exceeded the authority granted by the claim group.

The member of the claim group must be authorised by the claim group to make such an application and deal with matters arising from the application.

This section recognises that a claim group can withdraw the authority of an applicant individually or severally[37] and maintains the 'ultimate authority of the native title claim group'.[38]

It presumably follows from the ground that an applicant may have 'exceeded the authority' given by the claim group that the claim group can originally limit or condition that authority in the first place although this is not explicit from the terms of section 62A or any other provision.

The NNTC has previously submitted that a discretion should remain for the Court to utilise *Federal Court Rule* O 6 r.9 rather than s.66B being the only means of replacing an applicant. To quote from the NNTC submission concerning '*Proposed Minor Native Title Amendments':*

> Siopis J concluded that, since the *Native Title Amendment (Technical Amendments) Act 2007* (Cth), NTA s.66B is the only means by which applicants may be replaced. Given that this requires authorisation in every case (NTA s.66B (1)(b)), native title groups are put to the extraordinary costs of undertaking authorisation before being able to access NTA s.66B. The availability of removal under *Federal Court Rules* O 6 r.9, in parallel with NTA s.66B, should be restored.

Strike out applications (s84C) and defects in Authorisation (s84D).

Section 84C provides for the striking out of an application for the recognition of native title by a party if various provisions of the Act concerning applications are not complied with. This includes the requirement for authorisation.

This provision is tempered by s84D where the Court may decide to hear and determine the application despite any defect in authorisation if it is 'the interests of justice' to do so.[39]

Section 84D (1) and (2) also provides an important mechanism for a member of the native title group (or other party) to seek a Court order to require the applicant to produce evidence of authorisation to make the application or deal with matters arising from the application.

This is an important accountability mechanism for native title claim group members introduced into the NTA as part of the *Native Title Amendment (Technical Amendments) Act 2007.* There is no evidence to date that it has been used by third parties to frustrate the progress of a claim, although the potential remains.

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[37] *Daniel v Western Australia* 194 ALR 278, 283 [13].
[38] *Roe No 2*, [12].
[39] Section 84D(4).

Decision Making - s 251B

Decisions concerning authorisation are to be made either in accordance with 'a process of decision-making that, under the traditional laws and customs' must be complied with or where there is no such process in accordance with an agreed decision making process of the native title claim group.

There have been a range of judicial decisions concerning whether one of other of these decision making processes have been utilised in a particular case exhibiting quite a degree of complexity in determining the facts in certain instances.

It has been suggested that it may be necessary to consider whether the 'informed consent' of the native title claim group has been granted. On the face of the Act as it stands this is not a requirement and introduces potentially novel implications especially in relation to the first limb of the decision making process if it is a traditionally based one.[40]

Authorisation and Applicant accountability - Comment

In broad terms the current authorisation provisions are supported.

There is obviously a balance to be struck. This balance is between ensuring that native title holders can maintain appropriate accountability in relation to the applicant and access to the Court to enforce that accountability. On the other hand ensuring that the process does not become more complex, adversarial and therefore expensive to administer when seeking to prove to a Court that the statutory provisions have been complied with in each case.

As this is an area that is likely to become increasing adversarial as between Indigenous people it may be useful to consider three changes. It is also likely that an increasing number of applications (though still relatively small) or more likely s66B applications will be done without the involvement and assistance of an NTRB.

One clarify that there can be a conditional authorisation to enhance accountability of the applicant to the claimant group. Second standardise the evidencing of authorisation by drafting Guidelines and provide for independent verification. Third mandate mediation in disputed s66B applications prior to any Court hearing.

One could consider drafting Guidelines (possibly incorporated into the Federal Court Rules) with an appropriate form to be verified by an independent person which outlines the steps taken to satisfy the statutory provisions during the initial authorisation required in section 61. (For the avoidance of doubt, Guidelines would not be necessary where the application was certified by the NTRB). Similarly an authorisation meeting conducted for the purposes of replacing an applicant (s66B NTA) could have similar Guidelines and a standard form to be verified by an independent person. This would be especially useful where there is no NTRB or legal assistance. It is probably better being a discretionary process.

This may go some way to minimising the cost and complexity involved in disputed s66 B applications.

Injustice can arise if authorisation meetings are not properly conducted, not properly resourced and claim group members don't have access to advice and representation if the applicant exceeds authority. The claim group needs to be able to remedy this situation in a timely manner.

Overall it is essential that NTRBs /NTSPs have the resources human and financial to ensure that the authorisation process is properly carried out either directly through the NTRB or though funding of independent service providers. If this does not occur then manifestly there can be a denial of justice.

[40] *Bolton v WA* [2004] FCA 760, [46].

Recommendations

- Section 62 A be amended to clarify that conditional authorisation can be made by the claimant group. This could include matters such as when/how often the applicant should report back to the group and in relation to what type of issues or matters, and if all or some of the matters arising from the application can be dealt with by the applicant.
- That Guidelines be drafted that outline a standard process of authorisation including conditional authorisation with a standard form attached that can be utilised at authorisation meetings and verified by an independent person at the discretion of the claim group concerned. (Not needed where applications are certified).
- Mandate mediation in disputed s66B applications prior to any Court hearing.

Other changes

The Council further submits that:

- NTA be amended to put named applicant in fiduciary relationship to claim group in accordance with Recommendation 4 of the Taxation of Native Title and Traditional Owner Benefits and Governance Working Group's July 2013 report to government; and
- Amendments proposed in recent Bills relating to improvements to technical aspects of ILUA registration be progressed in line with previous NNTC submissions; and
- Amendments in recent Bills to disregard historical extinguishment over parks and reserves should apply without the need for government consent given that
  other existing interests will remain and prevail with respect to any native title recognised in any event; and
- the limitation of the proposal to parks and reserves should be expanded to include all Crown land; and
- the proposal by former Justice Wilcox concerning the recognition of traditional owner status be included within the NTA to facilitate broader settlements and agreements outside native title with all traditional owners; and
- the previously proposed technical amendment to section 47 of the Act be enacted 'to ensure that where a body corporate holds a pastoral lease on behalf of, or for the benefit of, a native title group, the fact that the body corporate has members, rather than shareholders, does not prevent historical extinguishment of native title over the area from being disregarded.