



Native Title Services Victoria Ltd

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15 May 2014

Ms Sabina Wynn
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Australian Law Reform Commission
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Dear Ms Wynn

Australian Law Reform Commission - Review of the Native Title Act 1993 - Issues Paper 45

The enclosed submission has been prepared by Native Title Services Victoria (**NTSV**) in response to the Issues Paper prepared for the Review of the Native Title Act 1993 by the Australian Law Reform Commission (**the Inquiry**).

NTSV was registered as a company limited by guarantee in August 2003 for the purpose of providing professional services to native title claimant groups in Victoria. It is funded under s203FE of the *Native Title Act 1993* (Cth) to carry out the functions of a representative body as prescribed in that act. NTSV also receives funding from the Victorian Government to assist Traditional Owners in negotiations under the *Traditional Owner Settlement Act 2010* (Vic). It is governed by a skills-based Board of Victorian Traditional Owners.

NTSV welcomes the opportunity to contribute to the Inquiry and is committed to working with government to develop policy and legislative reforms targeted at improving the operation of the native title system. We hope the Inquiry will provide a foundation for much anticipated reform.

We would be pleased to discuss further any of the issues raised in this submission. My Executive Assistant, Debbie Heeney, can be contacted by telephone (03) 9321 5305.

Yours sincerely

Matthew Storey
Chief Executive Officer

Encl. Review of the Native Title Act 1993 – NTSV Submission on Issues Paper 45

1. Native Title Services Victoria (**NTSV**) has made submissions on previous Bills addressing some of the topics discussed in Issues Paper 45. The submission focuses its comments on four main areas: definition of ‘tradition’, the rebuttable presumption of continuity, commercial rights and interests and authorisation.
2. In making this submission as the native title services provider for Victoria and a member of National Native Title Council (**NNTC**), NTSV supports and adopts the NNTC’s submission on the Issues Paper.

Guiding Principles

3. The five guiding principles outlined in the Issues Paper for the Inquiry are sufficient grounds for the Inquiry to make an evaluation of reform needed to improve the operation of the *Native Title Act 1993* (Cth) (**Act**), and the native title framework. The importance of reform resulting in timely and just outcomes for native title parties cannot be overstated.
4. NTSV submits that, in light of Principle 4, Principle 5 should reference Articles 20 and 23 of the United Nations Declaration on the Rights of Indigenous Peoples and make clear that economic development is understood as Indigenous-led development, not narrowly confined to ‘jobs and training’.

Native Title in Victoria

5. There are four key trends in Victoria over the last five years which have had an impact on the scope and pace of native title settlements:
 - a. The introduction and implementation of the *Traditional Owner Settlement Act 2010* (Vic) (**Settlement Act**);
 - b. Need for maturation in policy settings attending the Settlement Act, particularly in this context, the application of the Threshold Guidelines;
 - c. Ongoing uncertainty about Commonwealth financial contribution to native title settlements; and
 - d. Capacity constraints (financial and human) in state government as much as in the native title service provider, which limit the number of settlement negotiations that can be run concurrently.
6. NTSV and the State of Victoria are committed to resolving native title claims in Victoria by means of comprehensive settlements. The Settlement Act facilitates the recognition of ‘traditional owners of land based on their traditional and cultural associations to certain crown land in Victoria’ by authorising the creation of a suite of agreements between the State of Victoria and Traditional Owner Group Entities

(TOGEs) which represent traditional owner groups¹. The agreements operate as a settlement of all current and future native title and compensation claims and can include any or all of the following:

- a. Recognition and Settlement Agreement to recognise the special relationship of a Traditional Owner group to their traditional land;
 - b. Land Agreement providing grants of freehold title for cultural and economic purposes and grants of Aboriginal title over land that is to be jointly managed with the State;
 - c. Land Use Activity Agreement which provides a simplified processes for providing comment or consent to activities on public land;
 - d. Natural Resource Agreement that recognises customary use of natural resources and provides for consultation and participation of Traditional Owners in managing natural resources;
 - e. Funding Agreement to enable Traditional Owner corporations to undertake their Settlement Agreement responsibilities and engage in economic development activities; and
 - f. Indigenous Land Use Agreement that resolves outstanding native title issues.
7. Before the State will agree to negotiate comprehensive settlements under the Settlement Act, groups are required to satisfy the State on a number of threshold issues including: traditional and cultural association; extent of country and progress toward boundary agreements with neighbouring groups; negotiation readiness and a strategic plan. These requirements are set out in *Victoria's Threshold Guidelines for Victorian traditional owner groups seeking a settlement under the Traditional Owner Settlement Act 2010 (Threshold Guidelines)*. While the Threshold Statement bears some similarity to a Form 1 native title determination application, the evidentiary standards applied in the assessment process are less onerous than those followed in assessing connection pursuant to s223 of the Act. The Threshold Guidelines may therefore provide some useful guidance to the Inquiry and are relevant to the following issues canvassed in the paper:
- a. Definition of 'traditional' (as noted in the Issues Paper);
 - b. Physical occupation (see A2 'Statement of association to country');
 - c. Overlaps (see A4 'Description of proposed agreement area');
 - d. Authorisation (see B1 'Appointment of a traditional owner group entity').

Should there be a definition of 'Traditional'? The unfreezing of 'tradition'

8. NTSV submits that a statutory definition of 'traditional' in the Act should be introduced.

¹ Explanatory Memorandum, Traditional Owner Settlement Bill 2010 (Vic), p 1.

9. The problem with current tests of continuity is not simply that claimants carry the burden of demonstrating continuity of rights and interests under “traditional laws acknowledged” and “traditional customs observed” or in the need to demonstrate the maintenance of connection with lands and waters since colonisation. It is in the constricted jurisprudence which has resulted in the time of colonial contact becoming a baseline beyond which the adaptation and development of cultural practice over time cannot be accommodated. In this respect, current law falls short of recognising the breadth of (adapted) traditional rights and interests held by contemporary native title holders, let alone facilitating the development of new or extended rights and interests to underpin social and economic development.
10. In exploring options for defining tradition in the Act, NTSV refers the Inquiry to the Settlement Act and accompanying Threshold Guidelines. In considering the practicalities of inserting a definition into the Act such factors as intergenerational transmission and decision making processes of a particular group may be useful inferences.
11. In supporting the introduction of a statutory definition of ‘traditional’, NTSV acknowledges there will be case law arising to confirm the interpretation. Nevertheless, the importance of defining ‘traditional’ in the Act is such that case law must be dealt with.

Rebuttable presumption of continuity

12. The introduction of a presumption of continuity is supported as a necessary amendment to the Act. It is well recognised that the evidentiary test for continuity in native title cases has proved to be a significant obstacle to the full realisation of Aboriginal and Torres Strait Island peoples’ land rights, and has had detrimental effects on native title claims.
13. The importance of including a rebuttable presumption of continuity in the Act is highlighted by the injustice in the current burden of proof that those Indigenous peoples that were subject to the most severe acts of dispossession are those that are least likely to be able to achieve recognition under the Act of their native title rights and interests. The current burden of proof in the Act is a significant evidentiary barrier faced by all native title claimants, which has manifestly failed to give weight to the history of injustices to Indigenous peoples.
14. The current burden of proof is also a primary cause of the costly and protracted processes associated with demonstrating connection necessary to achieving consent determinations. NTSV submits that a rebuttable presumption of continuity needs to be introduced into the Act to ensure consistency with its beneficial purposes, to reduce expense and delay in the native title system and to encourage resolution of native title claims by consent.

15. Along with the NNTC, NTSV supports a rebuttable presumption of continuity formulated in line with proposals made by (now) Chief Justice French in 2008.²
16. In the Victorian context, introducing a presumption of continuity would be useful in drawing a positive inference from what is considered at times to be a blank record due to early, widespread dispossession. A rebuttable presumption of continuity in the Act would empower the negotiating position of Victorian Traditional Owners *vis-à-vis* the State, both in the context of negotiations under the Act and, by extension, the Settlement Act.
17. Further to this, NTSV submits that the issue of revitalisation of culture and tradition needs to be expressly acknowledged and dealt with in the Act. In the Victorian context, the evidentiary burden placed on native title claimants to establish continuity of acknowledgement and observance of traditional laws and customs is regarded as antiquated and an excessive detriment on potential native title claims.
18. NTSV submits that the Act should allow the courts, in certain circumstances, to disregard the high hurdle of substantial interruption or change where it is the interests of justice to do so. It may be beneficial to introduce a qualified definition of 'substantial interruption' to the Act, which as suggested by the Aboriginal and Torres Strait Islander Social Justice Commissioner in 2009, could include a 'list of non-exhaustive historical events... to guide courts as to what should be disregarded'.
19. Under no circumstances should it be open to respondents to argue that the actions of a settler or the State can be relied upon to establish an interruption or substantial change in the traditions of native title claimants.

Commercial rights and interests

20. NTSV submits that, as a matter of policy, it is vital for Traditional Owners to be afforded the capacity to derive commercial benefit and socio-economic opportunities from their native title rights and interests. As the native title system matures and moves into a post-determination phase, native title holders through their PBCs must have control over how they exercise their rights and interests in land and waters, and engage in economic activities.
21. The High Court of Australia in *Akiba v Commonwealth*³ in December 2013 stated that the purpose for which a rights holder may exercise a right is simply a 'circumstance attending its exercise'.⁴ NTSV supports explicit clarification in the Act that native title rights and interests recognised can be exercised for commercial benefit. With the NNTC, it supports the proposed draft amendment to s233(2).

² Justice R French, *Lifting the burden of native title – some modest proposals for improvement* (Speech delivered to the Federal Court, Native Title User Group, Adelaide, 9 July 2008) :3.

³ [2013] HCA 33.

⁴ *Akiba v Commonwealth* [2013] HCA 33 at [66].

22. NTSV submits the Act needn't prescribe the rights that are commercial in nature, these will necessarily flow from traditional law and custom. When linked to an 'unfrozen' definition of traditional, rights that are commercial in nature would not then imply a time-bound and stagnated view of the value of the interest. Rather, the Act could recognise such interests as having a changing value depending on shifts in the environment (including factors such as population, technology, climate and markets). Any definition to the Act on this matter should be crafted on the ability to access, manage and use resources, for whatever purpose is desired, at any time, as determined by the holder of the rights and interests.
23. NTSV considers that the Act establishes the mechanism to identify and provide property rights to traditional owners. How the rights are given effect to is a matter for negotiation, which may lie somewhere between the shared ownership of country and preferential access and opportunity. The commerciality of those rights is not intrinsic to this choice. However, it would be beneficial to native title holders if the Act were capable of recognising the complex reality of economy, placing a value on resources, trading in the access or use of the right itself.
24. In support of the policy aim of affording native title holders economic development opportunities, NTSV suggests it is open to the government to amend the Act in ways which privilege Traditional Owner access to rights 'created' through regulatory mechanisms such as licences. This is likely to require unwinding changes made to the future act regime in the 1998 Amendments.

Authorisation

25. NTSV supports the submissions made by the NNTC on the issue of authorisation.
26. Additionally, if the primary function of the 'applicant' in the operation of the Act is to give a legal personality to a claim group that otherwise has no identity at law, then creating a Prescribed Body Corporate prior to determination may obviate the need for an applicant. This is essentially the approach followed under the Settlement Act (see Threshold Guidelines B1 'Appointment of a Traditional Owner Group Entity'), that is, for Traditional Owner groups to commence work on their corporate entity earlier in the settlement process. In addition, encouraging groups to detail their capacity, governance structures and decision making processes earlier greatly assists in negotiations with the State and contributes to the establishment of a viable, sustainable Aboriginal corporation. It should be noted however that the early establishment of a corporate entity is not a universally feasible alternative, particularly for example when constructing claims in tight timeframes in response to s29 notices.

27. NTSV submits that the Act be amended to put the named applicant into a fiduciary relationship to the claim group to overcome the serious if not frequent incidence of the applicant exerting undue control over a claim, rather than simply acting as a legal identity to the claim group. NTSV supports NNTC's submissions in favour of 'conditional authorisation' as a remedy for this issue. In the alternative, it may be desirable to expressly pin the legal identity of a claim on the native title representative body.