GOLDFIELDS LAND AND SEA COUNCIL

Aboriginal Corporation (Representative Body)

ABN: 54 489 243 524
ICN: 364
14 Throssell Street, Kalgoorlie WA 6430
PO Box 10006, Kalgoorlie WA 6433
Telephone: (08) 9091 1661 Fax: (08) 9091 1662
Website: www.glsc.com.au

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001
By email: nativetitle@alrc.gov.au

20 May 2014

Dear Ms Wynn,

Submission to the ALRC Review of the *Native Title Act 1993*

The Goldfields Land and Sea Council ('GLSC') welcomes the opportunity to contribute to the Australian Law Reform Commission's review into the *Native Title Act 1993*.

The GLSC is an association of Aboriginal people from Western Australia's Goldfields region. It was established in 1984 as the peak Aboriginal land and heritage body in the region. The GLSC is recognised by the Commonwealth as the Native Title Representative Body for the Goldfields region. It represents the native title interests of a diverse range of Aboriginal peoples whose traditional country lies between Leinster in the north-west, Esperance in the south and Eucla in the East.

The GLSC has long been involved in law reform activities relating to native title and considers that there are a range of issues demanding attention that have not been included in the terms of reference for the current Review, including extinguishment and the right to negotiate.

In relation to the current Review, GSLC's position is that the *Native Title Act* should be amended to:

- introduce a presumption of continuity;
- confirm that there is no need to identify a single 'society' for any given claim;
- empower courts to disregard a substantial interruption in acknowledgement and observance where it is in the interests of justice to do so.

Details of these proposed changes are contained in the attached submission.

Yours sincerely,

Hans Bokelund
Chief Executive Officer
Goldfields Land and Sea Council

Submission by the Goldfields Land and Sea Council to the Review of the *Native Title Act 1993*

14 May 2014

Overview

The currently high bar for proving native title imposes costs on both governments and claimants that have no rational justification. The current law requires technical and detailed inquiries into matters that are irrelevant to the policy issues affected by native title. The current law wastes the resources of respondent governments, claimants and the courts – all of which receive resources from the Commonwealth. It creates unnecessary delays in resolving claims, it brings injustice for unsuccessful claimants, and it damages important relationships between government and Indigenous peoples. And it delivers no benefit to any party.

GSLC supports the amendment of the *Native Title Act 1993* to:

- introduce a presumption of continuity;
- confirm that there is no need to identify a single 'society' for any given claim;
- empower courts to disregard a substantial interruption in acknowledgement and observance where it is in the interests of justice to do so.

Details of these proposed changes are contained in the submission below.

Presumption of continuity

Goldfields Land and Sea Council ('GLSC') supports the introduction of a 'presumption of continuity' into the *Native Title Act.*

The proof of native title under the current law involves three broad enquiries:

i) Establishing the 'right people for country' – this means ascertaining the rules that determine which people hold rights and interests, and the geographical area in which those rights and interests are held.

ii) Establishing the content of those rights and interests.

iii) Assessing cultural change and continuity – this means ascertaining whether the laws and customs acknowledged and observed by the claim group have their origin in pre-colonial culture, and whether their acknowledgement and observance has been 'substantially uninterrupted' since the assertion of British sovereignty.

There are clear policy justifications for the first two enquiries. Justice as between different Indigenous landholding groups requires the accurate identification of traditional owners for each area of country. Further, the success of governance and decision-making arrangements after a determination of native title depends on the development of an anthropologically rigorous and mutually accepted understanding of how different groups and subgroups fit together. Similarly, establishing the content of native title rights and interests is essential for determining how native title will interact with the interests and activities of other land users, and also for delineating the respective rights of neighbouring Indigenous groups in shared or 'mix-up' country.

By contrast, the fine-grained historical enquiries involved in the third enquiry listed above serve no useful purpose in the native title system. To the extent that other land users currently hold rights and interests in an area of claimed land, those rights and interests prevail in any case and therefore are irrelevant to the question of whether native title is to be recognised in the first place. Certainly, *future* users of the land may be affected by the recognition of native title, but the same is true for any prior interests in land whether derived from Indigenous law or Australian law. Either the Indigenous rights exist under Indigenous law and custom or they do not; the question of whether that law and custom has been practised continuously since colonisation is for all policy purposes irrelevant.

The sole function of the continuity enquiry as articulated in *Yorta Yorta*[1] is to ensure that the *Native Title Act* only recognises rights and interests whose origins lie in pre-colonial times, not rights or interests created since the assertion of British sovereignty. That is because Australian courts can only recognise rights and interests created under the Australian legal system or those 'left over' from pre-colonial Indigenous legal systems, but not rights and interests created under some 'parallel' post-sovereignty Indigenous system.[2] Yet the law under *Yorta Yorta* does not take Indigenous rights as they existed at sovereignty and continue to protect them indefinitely; instead it demands evidence that the native title holders have continued to maintain the entirely separate Indigenous legal system that originally gave rise to the rights.

Currently, then, the Australian law denies the existence of a 'parallel [Indigenous] law-making system' but also requires claimants to prove the existence of just such a system in order to establish their native title. The apparent contradiction here puts claimants in an invidious position. The preferable jurisprudential view is that **courts cannot recognise rights and interests that place a *greater burden on the Crown's radical title than existed at sovereignty***.[3] So long as that condition is satisfied there is no logical reason to deny recognition to rights and interests that existed at sovereignty and that are asserted today notwithstanding some temporary period in which traditional cultural practice was unavoidably attenuated.

Accordingly, GLSC considers that questions of continuity should have an absolutely minimal role in the proof of native title. Any legislative change to curtail these requirements would be welcome for the reasons above.

In addition, there are fearsome practical problems in proving what amounts to a negative proposition: the *absence* of a substantial interruption in acknowledgement and observance of

[1] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [43]-[57].
[2] Ibid at [44].
[3] See *Bodney v Bennell* [2008] FCAFC 63 at [98]-[116].

traditional law and custom. In many parts of Australia there is simply a lack of sufficient ethnographic research and other documentary evidence covering the relevant historical periods. And by the time claims come to trial, key witnesses may have died or be otherwise incapable of giving evidence. This means that native title claimants are at an automatic disadvantage in meeting the legal test, for reasons entirely unconnected with the merits of their claim. Inevitably courts will need to make inferences about the continuity of acknowledgement and observance – introducing a presumption of continuity would simply formalise and strengthen such inferences.

An appropriate model for a presumption would be that discussed by Selway J in *Gumana*[4] and endorsed by Weiberg J in *Griffiths.*[5] It is worth quoting Selway J in full:

> Like the evidence called to prove Aboriginal custom, the evidence called to prove the existence of a custom from 'time immemorial' for the purposes of the common law was often oral evidence and it was subject to the same difficulties in relating that evidence back – although not just to the 18th century, but to the 12th and 13th centuries. In practice those difficulties were ameliorated by the readiness of the common law courts to infer from proof of the existence of a current custom that that custom had continued from time immemorial… The inference was a strong one: see Jessell MR in *Hammerton v Honey* (1876) 24 WR 603 at 604:
>
> > *It is impossible to prove the actual usage in all time by living testimony. The usual course taken is this: Persons of middle or old age are called, who state that, in their time, usually at least half a century, the usage has always prevailed. That is considered, in the absence of countervailing evidence, to show that usage has prevailed from all time.*
>
> Indeed, some of the more ancient commentators express the relevant rule in the negative. Coke, for example, defines 'time out of mind' as 'time whereof there is no memory of man to the contrary' (Co Litt 114b. See also 1 Bl Com *76-77)…
>
> There is no obvious reason why the same evidentiary inference is not applicable for the purpose of proving the existence of Aboriginal custom and Aboriginal tradition at the date of settlement and, indeed, the existence of rights and interests arising under that tradition or custom…This does not mean that mere assertion is sufficient to establish the continuity of the tradition back to the date of settlement: contrast *Yorta*. However, in my view where there is a clear claim of the continuous existence of a custom or tradition that has existed at least since settlement supported by creditable evidence from persons who have observed that custom or tradition and evidence of a general reputation that the custom or tradition had 'always' been observed then, in the absence of evidence to the contrary, there is an inference that the tradition or custom has existed at least since the date of settlement. That was not the case in *Yorta*. It is the case here.[6]

[4] *Gumana v Northern Territory of Australia* [2005] FCA 50 at [198]–[201].
[5] *Griffiths v Northern Territory of Australia* [2006] FCA 903 at [580]–[585].
[6] *Gumana v Northern Territory of Australia* [2005] FCA 50 at [198]–[201].

GLSC recommends that the *Native Title Act* be amended to introduce a presumption of continuity as follows:

- If the claimants can establish the existence of the claimed rights and interests under the law and custom they currently acknowledge and observe;
- AND if the claimants can establish (including by inference) that those rights and interests were also enjoyed at the time the British asserted sovereignty;
- THEN those rights and interests will be presumed to be held under *traditional* law and custom for the purpose of s 223(1)(a) *Native Title Act*.
- This presumption will be rebutted only if the respondents can positively prove that acknowledgement and observance ceased so completely and for sufficient time as to justify a finding that the current law and custom is *not traditional.*

GLSC considers that the need to establish the 'right people for country' remains crucial and that the presumption above should play no part in deciding between overlapping claims. Where overlapping claims are considered in contested litigation, the totality of evidence will need to be weighted to decide between the competing claims. However, questions of continuity as such will not be relevant to that enquiry.

Traditional

The problems discussed above are, in essence, problems in the way the term 'traditional' in s 223 of the *Native Title Act* has been interpreted and applied. Academic commentators and traditional owners (including those excluded from native title by the traditionality requirement) have long drawn attention to the unfairness of having to demonstrate the continuity of cultural practice and social cohesion in the face of a history of dispossession, cultural disruption, forced assimilation and geographical dispersal. Others have objected to the indignity and absurdity of a system that ties land rights to the performance of some idealised 'authentic' culture. There are concerns too about the propensity for native title's focus on tradition to ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur.[7]

For all of these reasons, the requirement to prove ongoing 'traditional' law and custom in native title claims is both unjust and, in policy terms, perverse. However, short of a wholesale reform of native title's jurisprudential foundations GLSC considers that the presumption of continuity provides the best way forward in ameliorating these problems.

[7] See L Strelein (ed.), *Dialogue about land justice: papers from the National Native Title Conferences*, Aboriginal Studies Press, Canberra, 2010; L Strelein, *Compromised jurisprudence: native title cases since Mabo*, 2nd edn, Aboriginal Studies Press, Canberra, 2009; T Bauman (ed.), *Dilemmas in applied native title anthropology,* Australian Institute of Aboriginal and Torres Strait Islanders Studies, Canberra, 2010; T Bauman & G McDonald (eds), *Unsettling anthropology*: *the demands of native title on worn concepts and changing lives*, Australian Institute of Aboriginal and Torres Strait Islanders Studies, Canberra, 2011; DL Ritter, *Contesting native title: from controversy to consensus in the struggle over Indigenous land rights*, Allen & Unwin, Sydney, 2009; DL Ritter, 'The judgement of the world: the Yorta Yorta case and the "tide of history"', *Australian Historical Studies* 35:106–21, 2004; S Young, *The trouble with tradition: native title and cultural change*, Federation Press, Sydney, 2008.

Society

There have been cases in which the attempt to define and delineate a particular 'society' underpinning the claim has taken up significant time, resources and thought. The society issue is a prime example of the unfortunate development of quite unnecessary technicality and legalism in native title, as noted by previous federal Ministers.[8] Debates about the extent or basis for a given model of society are common in both litigated claims and negotiations towards consent determinations. As with the broader concept of 'tradition', no useful policy purpose is served by all of this investment.

There is strong support in the case law for the view that the firm delineation of a single 'society' for the purposes of a native title claim is largely unnecessary, so long as the necessary continuity of acknowledgement and observance is established. The term 'society' does not relevantly appear in the Act nor in the *Mabo (No 2)* judgment, but rather was introduced by the joint judgment in *Yorta Yorta* to flesh out what it means for laws and customs to be 'traditional' under s 223(1).[9] It is not an independent element of proof, 'does not require arcane construction' and is merely a 'conceptual tool' used in interpreting the requirement of traditionality and the consequent requirement of continuity.[10] The relevant legal question is whether the claimants hold rights and interests under a normative system with substantially continuous vitality and existence since the assertion of sovereignty.[11] This does not logically entail an inquiry into the precise boundaries of that system, nor a requirement that there be just one societal grouping relevant for all purposes.[12] Unambiguous demarcation and unitary internal structure are not group attributes that are logically necessary to the function for which the term 'society' was introduced; namely, to serve as the (apparently) vital conduit between the pre-colonial Indigenous legal system and the contemporary Indigenous legal system. That function is just as well served by complex and diffuse normative systems as it is by explicitly bounded unitary systems. Accordingly the question of 'society' is merely instrumental in answering the main question of whether the relevant laws and customs are 'traditional'.[13]

Judges have in the past commented on the artificiality or arbitrariness of identifying a single society whose laws and customs support the claimed rights and interests. French J in *Sampi* noted that the society question is 'evaluative in character' and 'could conceivably have more than one correct answer'.[14] Finn J in *Akiba* said that '[t]he issue of authorisation apart, the answers to the question of native title rights and interests—which is, after all, the concern of the [Native Title] Act — would in all

[8] See eg The Hon Robert McClelland MP, speech presented at the Negotiating Native Title Forum, Brisbane, 29 February 2008, online at http://pandora.nla.gov.au/pan/21248/20111214-1249/www.attorneygeneral.gov.au/Speeches/Pages/ArchivedSpeeches20072008.html; The Hon Jenny Macklin MP and The Hon Robert McClelland MP, 'Additional $50 million for native title system' Media release, 12 May 2009, online at http://www.ag.gov.au/Publications/Budgets/Budget2009-10/Pages/Additional50millionforNativeTitleSystem.aspxhttp://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_Budgets_Budget2009_MediaReleases_Additional$50millionforNativeTitleSystem.

[9] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [49].

[10] *Northern Territory of Australia v Alyawarr, Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [78].

[11] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422; [2002] HCA 58 at [47]-[48].

[12] See *Moses v Western Australia* [2007] FCAFC 78 at [349].

[13] *Northern Territory v Alyawarr* [2005] FCAFC 135 at [78]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* [2010] FCA 643 at [162].

[14] *Sampi v Western Australia* [2005] FCA 777 at [970].

probability be the same whether my conclusion had been one, or four, or thirteen societies'.[15] And in *Wongatha* Lindgren J put the matter as follows:

> Perhaps the present issue is, after all, academic. No-one has suggested that the laws and customs under which rights and interests in land are held vary from one region to another within the Western Desert […] Their content is the same, whether they are seen as depending on a regional society or on the larger WDCB.[16]

Some of the cases where the society issue has loomed large related to questions of migration, succession or extinction. In these cases, respondent parties have asserted that the geographical extent of the original pre-colonial society did not cover all of the area now claimed.[17] But once the unrealistic and legally unnecessary assumption of a single bounded society is dropped, it becomes apparent that neighbouring Indigenous groups are capable of belonging to broad normative societies for some purposes and smaller or overlapping societies for other purposes. Accordingly in many cases it will be possible for claimants to demonstrate a sufficient body of shared norms between them and the pre-colonial traditional owners, even if in some sense they may be said to belong to different societies.[18] Whether this is characterised as an overarching society or as succession of rights between societies is immaterial, and should not consume precious time and resources in native title matters.

Despite the case law demonstrating that society is at best a marginal issue, if not an outright distraction, it continues to pose problems for claimants in negotiations with government respondents. Clarification in the law would assist parties to move beyond academic debates about society in order to tackle the more substantive issues of native title.

GLSC recommends that s 223 *Native Title Act* be amended as follows:

(2A) For the avoidance of doubt, nothing in subsection (1) requires the identification of a single society encompassing:

(a) all of the Aboriginal peoples or Torres Strait Islanders who possess rights and interests in relation to the land or waters; or

(b) all of the land or waters in relation to which the Aboriginal peoples or Torres Strait Islanders possess rights and interests.

(2B) A claim to possess rights and interests in relation to land or waters will not fail solely because the land or waters were, at the time when Crown sovereignty was first asserted, subject to rights and interests of Aboriginal peoples or Torres Strait Islanders who belonged to a different society to that of the persons who now claim those rights and interests.

[15] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* [2010] FCA 643 at [492].
[16] *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 at [1287].
[17] Eg *Sampi v Western Australia* [2005] FCA 777.
[18] *Sampi on behalf of the Bardi and Jawi People v Western Australia* [2010] FCAFC 26 at [79]; *Western Australia v Sebastian* [2008] FCAFC 65 at [90]; *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v Queensland (No 2)* [2010] FCA 643.

Commercial rights and interests

GLSC does not make any suggestions for changes to the *Native Title Act* around the recognition of commercial rights and interests.

Physical occupation

GLSC does not make any suggestion for changes to the *Native Title Act* in relation to the proof of physical occupation or continued or recent use. The case law clearly and consistently holds that these matters are not necessary elements of proof for establishing native title under s 223.[19] For example in *Ward,* native title was recognised over areas flooded by dams and also islands that were rarely or even never visited.[20] As French J stated in *Sampi*:

> …the connection requirement involves the continuing internal and external assertion by the group of its traditional relationship to the country defined by its laws and customs and which may be expressed by its physical presence there or otherwise.[21]

Substantial interruption

For the reasons outlined above ('Presumption of continuity') GLSC does not consider that 'substantially uninterrupted' acknowledgement and observance of traditional law and custom should be a legal requirement for the proof of native title.

Additionally or alternatively to a presumption of continuity, GLSC would support an amendment to the *Native Title Act* empowering courts to disregard a substantial interruption in acknowledgement and observance where it is in the interests of justice to do so.

Authorisation

GLSC does not make any suggestions for change to the authorisation provisions of the *Native Title Act*.

Joinder

GLSC does not make any suggestions for change to the joinder provisions of the *Native Title Act*. GLSC considers that the existing legal tests combined with judicial discretion are sufficient to ensure an appropriate balance between access to justice and the efficient administration of justice.

———————

[19] *Neowarra v Western Australia* [2003] FCA 1402 at [347]–[358]; *De Rose v South Australia* [2003] FCAFC 286 at [303]–[328]; *Sampi v Western Australia* [2005] FCA 777 at [1079]; *Northern Territory of Australia v Alyawarr , Kaytetye, Warumungu, Wakaya Native Title Claim Group* [2005] FCAFC 135 at [92], [111]; *Western Australia v Ward* [2000] FCA 191 at [243] (not dissented from in the High Court on appeal).

[20] *Western Australia v Ward* [2000] FCA 191 at [252]-[253]. Not disturbed on appeal in High Court.

[21] *Sampi v Western Australia* [2005] FCA 777 at [1079], not challenged by the Full Court on appeal. See also *Neowarra* at [353].