Kimberley Land Council

Submission to the Australian Law Reform Commission

Inquiry into the Native Title Act: Issues Paper 45

General comment

The Kimberley Land Council (**KLC**) is the native title representative body for the Kimberley region of Western Australia. The KLC is also a grass roots community organisation which has represented the interests of Kimberley Traditional Owners in their struggle for recognition of ownership of country since 1978. The KLC is cognisant of the limitations of the Native Title Act (**NTA**) in addressing the wrongs of the past and providing a clear pathway to economic, social and cultural independence for Aboriginal people in the future. The KLC strongly supports the review of the NTA by the Australian Law Reform Commission (**Review**) in the hope that it might provide an increased capacity for the NTA to address both past wrongs and the future needs and aspirations of Aboriginal and Torres Strait Islander people.

The dispossession of country which occurred as a result of colonisation has had a profound and long lasting impact on Aboriginal and Torres Strait Islander people. Country (land and sea) is centrally important to the cultural, social and familial lives of Aboriginal people, and its dispossession has had profound and continuing intergenerational effects. However, interests in land (and waters) is also a primary economic asset and its dispossession from Traditional Owners has prevented them from enjoying the benefits of its utilisation for economic purposes, and bestowed those benefits on others (in particular, in the Kimberley, pastoral, mining and tourism interests).

The role of the NTA is to provide one mechanism for the original dispossession of country to be addressed, albeit imperfectly and subject to competing interests. However, it cannot address all of the economic, social and community consequences that flow from past dispossession. It is important to recognise this limitation, as otherwise the NTA might be blamed for a failure to address economic and other inequalities when in fact such matters are, to a large extent, beyond its capacity to resolve.

Submission in response to questions raised in IP 45

The KLC makes the following submissions in relation to the specific questions identified in IP 45.

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.

(a) Will these guiding principles best inform the review process?

(b) Are there any other principles that should be included?

The KLC supports the five guiding principles identified in IP 45. Further to principle 4 (consistency with international law), the KLC supports the identification of the United Nations Declaration on the Rights of Indigenous People (**UNDRIP**) as a matter which should guide the interpretation and application of the NTA through:

(a) an amendment to the Preamble to the NTA to insert reference to the UNDRIP; and / or
(b) the insertion of a new object to the NTA as was proposed by Schedule 1, clause 1 of the *Native Title Amendment (Reform) Bill 2011*.

Inclusion of a reference to the UNDRIP, either in the Preamble or through a new object to the NTA, is consistent with the original drafting in the Preamble and would affect an updating of Australia's obligations and commitments under international law as recorded in the NTA.

The KLC also strongly supports principle 5, but notes that the NTA cannot by itself achieve "sustainable, long term social, economic and cultural development for Aboriginal and Torres Strait Islander people". The NTA is limited in its scope, operation, and application and provides the best opportunity for economic, social and cultural development to those Aboriginal and Torres Strait Islander people who:

- are least impacted by colonisation, and whose native title rights and interests are most likely to have survived extinguishing acts by the Crown; and
- in relation to future acts and associated agreements, have traditional country which happens to have development potential or value, and so provides an opportunity for negotiation of an ILUA or other agreement that will provide benefits to the native title parties.

It is important to recognise that the NTA is not a panacea for all of the wrongs of dispossession and colonisation, but is one important device in addressing these wrongs.

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?

A fundamental deficiency in the operation of section 223 relates to the understanding of what is meant by a connection to *land and waters*. Native title is sui generis and should not be inappropriately constrained by the application of principles relevant to common law interests in land. This issue has been identified by French CJ, writing extra-curially, as follows:

> "To the extent that the word 'title' suggests a land law analogue, it is 'artificial and capable of misleading'. The *sui generis* nature of common law native title is a consequence of a range of traditional indigenous relationships to country that may be the subject of recognition."[1]

This "range of traditional indigenous relationships to country" are not adequately comprehended by common law native title nor, relevantly for the purposes of the Inquiry, section 223. For example, images of country and spirit beings connected to country are afforded no protection whatsoever by the NTA notwithstanding the fact that, from the perspective of the authorised custodians of those images, they are inherently connected to, and part of, country (land and waters). While common law native title is fundamentally tied to common law understandings of interests in land, the NTA should be able to more appropriately recognise Indigenous relationships with country which would not be understood as land-based interests in the Australian legal system. An obvious example of this, as already mentioned, is an interest in the protection of images of country and spirit beings associated with country.

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?

[1] Chief Justice Robert French, 'Native Title – A Constitutional Shift?" Speech delivered at the JD Lecture Series, The University of Melbourne, 24 March 2009.

Firstly, the KLC notes that the requirement of continuity is not found in the words of the NTA and arises as a consequence of statutory interpretation[2].

The KLC supports the introduction of a rebuttable presumption of continuity or, alternatively, the shifting of the burden of proof in relation to continuity to the primary respondent (the Crown parties) once certain basic facts are proved by the applicant. Those basic facts should include:

- the identification of the native title claim group (the basis of membership);
- the traditional laws and customs by which the native title claim group asserts interests in the lands and waters claimed; and
- the rights and interests which arise from that system of traditional laws and customs.

It is important to recognise that the process by which these matters are identified and proven (whether in a contested or consent process) provides important consequential information which is relevant to post-determination governance of native title. For example, the identification of the native title claim group, the relevant system of traditional laws and customs, and the traditional rights and interests which arise under that system can assist in:

- resolving competing claims within and between a claim group;
- clarifying, for the benefit of the native title claim group members, the grounds of membership or non-membership; and
- providing guidance for how traditional rights and interests might be translated into post-determination governance structures.

In relation to the rebuttal of the presumption, any rebuttal should only be undertaken by Crown parties (states, territories, and the Commonwealth). The recognition of native title rights and interests is an imposition on sovereign or Crown interests and not on interests which exist only through those sovereign interests. As a matter of principle, and as a matter of good procedure, the role of rebutting any presumption of continuity should be confined to Crown parties and should not extend to non-Crown respondents.

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

[2] *Members of the Yorta Yorta Aboriginal Community v Victoria* [2002] HCA 58. Finn, P., '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 5.

examples of anticipated changes to the approach of parties to both contested and consent determinations.

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?

If the presumption relates only to continuity, and not to the proving of facts that the claimants are the correct people to make the claim under traditional law and custom (connection), the presumption should have no, or a very limited, impact on the procedure for dealing with overlapping claims. That is, the contest between overlapping claims usually relates to which group has traditional rights and interests that predate sovereignty in relation to the area of land and waters claimed, and not in relation to continuity.

The exception to this might be if the competing interests relate to circumstances where one group claims succession from the group which occupied the lands and waters at the time of sovereignty, while the other group contests that succession. These limited circumstances could be dealt with by specific provisions in the NTA.

Question 9. Are there circumstances where a presumption of continuity should not operate? If so, what are they?

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:

(a) the need to demonstrate the existence of a normative society 'united in and by its acknowledgment and observance' of traditional laws and customs?

(b) the extent to which evolution and adaptation of traditional laws and customs can occur?

How could these problems be addressed?

The issues identified in this question relate more to the application and interpretation of the concept of 'society' rather than the concept of 'traditional'. A 'traditional' law or custom has been interpreted as one which gains its character as 'traditional' from the manner in which it

is transmitted from generation to generation[3]. By contrast, question 10(a) centres on the existence of a normative society. As noted by Finn J, the boundaries of the particular system of (traditional) laws and customs (society) may not be at all determinative once those (traditional) laws and customs are identified[4].

The KLC supports changes to the NTA which confirm that the relevant matter is the normative system of traditional laws and customs rather than the identification of the society or the boundaries of that society.

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?

On the basis of the information in IP 45, the KLC does not support the insertion of a definition of 'traditional' in the NTA. Notwithstanding the significant and recognised diversity across Aboriginal and Torres Strait Islander 'societies', there is a potential for a statutory definition to fail to recognise some of that diversity and unduly exclude some traditional laws or customs.

Native title and 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?

The KLC supports the recognition of native title rights and interests as incorporating rights and interests of a commercial nature.

As well as having significant social and cultural impacts, dispossession from country (lands and waters) has had a significant economic impact on Aboriginal and Torres Strait Islanders. Proprietary interests in land is a primary economic asset and its dispossession has deprived Aboriginal and Torres Strait Islander people of the benefits of controlling and utilising that asset, and bestowed that benefit on other parties. The impacts of colonisation cannot be properly addressed unless it is recognised that those impacts include *economic* impacts.

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?

[3] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, per Gleeson CJ, Gummow and Hayne JJ at [46].
[4] Finn, P., '*Mabo* into the Future: Native Title Jurisprudence' (2012) 8 *Indigenous Law Bulletin* 5, 7.

A primary issue arises from the narrow understanding of 'traditional' in non-Indigenous society, which can persist even with the benefit of expert anthropological advice. If traditional laws and customs were to be assessed to determine whether there were any activities, customs, or laws which were analogous to non-Indigenous commercial activity, it is possible that only a few 'commercial' rights or interests would be identified. However, if the relevant indicia of commercial activities were identified broadly, and then considered against the traditional laws and customs of Indigenous communities, a better understanding of 'commercial' activities undertaken by Aboriginal and Torres Strait Islander people could be obtained. For example, if commercial activity is taken to include transactions, transfers, exchanges, and activities undertaken for value or benefit accrued to the parties, where the benefit or value may be tangible or intangible, it would encompass a broad range of activities undertaken 'traditionally' by Indigenous people.

The understanding of commercial activity should also not be unduly limited by its current operation or understanding in modern secular societies. Traditional Indigenous communities were / are not necessarily 'secular', and as such spiritual or religious obligations could infiltrate almost all undertakings, including transactions, transfers, exchanges and activities undertaken for value or benefit. The fact that an activity may have a spiritual or religious component or derivation should not exclude it from being recognised as a 'commercial' activity, right or interest.

Question 14. If the *Native Title Act* were to define 'native title rights and interests of a commercial nature', what should the definition contain?

Further to the submission in response to question 13 above, native title rights and interests of a commercial nature should be broadly inclusive and accommodate:

- activities, trade, exchange and transfer which include or derive from, in whole or in part, non-secular rights, interests or obligations; and
- the current and future commercialisation of previously non-commercial activities such as ecosystem services, carbon farming and bio-banking.

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?

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?

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 KLC supports an amendment to the NTA to confirm that evidence of physical presence on the lands and waters claimed is not necessary to demonstrate connection.

'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?

The primary issue with the requirement to demonstrate "substantially uninterrupted" continuity of acknowledgement and observance of traditional laws and customs since sovereignty is that it establishes an inherently inequitable standard, with those communities or groups who are most impacted by colonisation often least able to meet the criterion.

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?

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?

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?

The KLC supports an amendment to the NTA which requires the courts to disregard substantial interruption to, or change in continuity of, acknowledgement and observance of traditional laws and customs except where:

(a) a Crown party (a state, territory, or the Commonwealth) makes an application to the Court that:

  (i) there has been a substantial interruption or interruptions to the continuity of acknowledgement and observance of traditional laws and customs that are the source of the native title rights and interests claimed; and

  (ii) that substantial interruption or interruptions did not occur as the result of the actions of government, or any individual who benefited from the substantial interruption to continuity; and

  (iii) that substantial interruption or interruptions should not be disregarded; and

(b) the Court determines that it is in the interests of justice for the substantial interruption or interruptions not to be disregarded.

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?

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:

(a) claimants;

(b) potential claimants; and

(c) respondents?

The process for authorisation of a native title claim should ensure certainty for the claim group - that the native title claim will only be dealt with in accordance with their wishes. It should also provide certainty for non-claimant parties - that the actions of the applicant in dealing with the claim reflect the intentions and authority of the claim group. The measures put in place to provide this certainty need to be appropriately balanced with the need for native title claims to be dealt with in an expeditious, cost effective and timely manner.

At present the authorisation process is vulnerable to abuse, particularly in circumstances where there is a large scale future act proposal within the boundaries of a native title claim.

The KLC submits that the following measures may assist in managing the abuse of authorisation processes:

- Requiring all parties and their representatives to act in good faith in relation to native title claims generally, and authorisation processes in particular. A model for this might be section 94P NTA, which imposes an obligation on parties and their representatives to act in good faith in mediations.

- Providing greater guidance, through regulations or otherwise, of the requirements of authorisation meetings, whether or not failure to meet those requirements is fatal to the authorisation process, and the grounds on which decisions made, or authorities given, by the claim group at such meetings can be challenged.

- The use of costs orders, including orders against legal representatives if appropriate in the circumstances.

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?

The KLC supports the amendment of the NTA to allow a claim group to adopt a decision making process of its choice.

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?

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?

The KLC would here like to note that conflict in human interactions is inevitable, and conflict in a native title context should not be viewed as aberrant or somehow indicative of inherent flaws with either a particular claim or the system as a whole. As noted by Sarah Burnside:

> "...conflict is unavoidable in any system of property law, as valuable rights capable of legal recognition will always be the subject of competing claims. It is suggested that the inevitability of conflict needs to be more widely acknowledged in a native title context."[5]

However, having noted this inevitability, the KLC also notes that there are few structural measures in the NTA to manage the process for identifying claim group membership and claim area boundaries if this process escalates into conflict. This is exacerbated by the fact that, contrary to the ordinary position at law, proceedings in relation to a determination of native title may be required to be commenced when the claimants do not presently intend or want to prosecute their claim. For example, if a claim is required to be lodged in response to a future act, the native title claim group may be required to act to commence proceedings before they are ready to do so. This requirement needs to be recognised as a cause of many claims being commenced or progressed when issues regarding claim group membership and claim area boundaries have not been fully resolved.

Question 27. Section 66B of the *Native Title Act* provides that a person who is an applicant can be replaced on the grounds that:

(a) the person consents to his or her replacement or removal;

(b) the person has died or become incapacitated;

(c) the person is no longer authorised by the claim group to make the application; or

(d) the person has exceeded the authority given to him or her by the claim group.

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

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?

[5] Burnside, S. 'Outcomes for all? Overlapping claims and intra-indigenous conflict under the *Native Title Act*' (2012) 16 *Australian Indigenous Land Reporter* 1, p1.

Section 84D is an important corrective for other flaws in the NTA.

As noted above in response to question 26, the NTA contemplates the making of an application for a determination of native title when the applicant may not want, or be ready, to make such an application, such as in response to a future act notice. Section 84D allows any issues with authorisation, including those associated with changes in the manner of identifying the claim group, to be overcome where it is appropriate to do so.

The KLC submits that the NTA should be amended to include a provision that confirms that a determination of native title may be made:

- in favour of a native title claim group which is described differently to the native title claim group that made the original application;
- where the difference in description is supported by evidence, although such evidence need not be put before the Court; and
- notwithstanding any defect in authorisation which might arise as a consequence of a change to the manner in which the native title holding group is described.

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?

The cost of compliance with the authorisation provisions of the NTA can often be disproportionate to the aim of ensuring the effective participation of native title claimants in the decisions that affect them however this will largely depend upon <u>where</u> in the country the claim group is located; remoteness of appropriate meeting venues significantly increases costs of meetings. There is, however, no easy fix to this as it is vitally important to the validity and acceptability of native title processes that claim group members feel fully included in decision making processes (in accordance with traditional laws and customs of each claim group) and the conducting of meetings in appropriate locations for individual claim groups (ie usually at places within their own country) is essential, in the KLC's view.

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?

The KLC supports amendments to the NTA that will allow the relationship between the applicant and the claim group to be more flexible. This would include conditions on authority, defining the limit of the scope of authority, and determining the manner in which the applicant, if more than one natural person, can make decisions. Any such amendments should also identify the consequences of breach of limits or conditions on authority.

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?

The KLC submits that the party provisions of the NTA create significant barriers to justice and require urgent review and amendment. At present there are no parameters on the extent to which non-Crown respondents[6] may participate in proceedings. This creates the potential (and actuality) of significant costs and delays caused by parties extending the time for resolution of proceedings on matters not relevant to their own interests. The recent decision of the Federal Court in *Watson v State of Western Australia (No. 3)* [2014] FCA 127 (**Watson**) dealt with a number of these issues, including the following.

1 At present a non-Crown respondent party's involvement in proceedings is not confined by reference to the extent that its interests may be affected by the proceedings. This includes both the geographic extent of its interests and the relationship of its rights and interests with the determined native title rights and interests[7].

2 In relation to connection issues, there is no requirement for a party challenging expert anthropological evidence on connection to provide their own expert evidence to support their rebuttal of the applicant's expert[8]. This can significantly increase the time and costs associated with a trial on connection.

[6] The term 'non-Crown respondents' is not intended to include other native title parties contesting the claim i.e. overlapping claims.
[7] *Watson v State of Western Australia (No. 3)* [2014] FCA 127 at [32], [34].
[8] *Watson* at [57].

3 It is appropriate to recognise that a non-Crown respondent has the capacity to involve itself in matters outside its own interests, or the manner in which its own interests might be affected, in both litigation and mediation of a claim[9].

As noted above, recognition of connection is a recognition of an imposition on sovereignty. The appropriate parties to address connection are therefore Crown parties. Non-Crown respondent parties' involvement in both mediation and litigation of determinations of native title should be confined to matters that affect their actual rights and interests, and should not include connection.

Question 32. How might late joinder of parties constitute a barrier to access to justice?

Who is affected, and in what ways?

Question 33. What principles should guide whether a person may be joined as a party when 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?

The KLC submits that non-Crown respondents' involvement in a native title determination (mediation and litigation) should:

1 not include connection issues, except in extraordinary circumstances; and
2 be confined to the identification of the nature and extent of their rights and interests, and the relationship between those rights and interests and the native title rights and interests; that is, the matters in section 225(c) and (d) of the NTA.

The exception to this is respondents who claim alternative or overlapping native title rights and interests in the claim area.

Question 35. What, if any, other changes to the party provisions of the *Native Title Act* should be made?

[9] *Watson* at [63]