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The Executive Director
The Australian Law Reform Commission
GPO Box 3708
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Dear Madam

Review of the Native Title Act 1993

I refer to the ALRC Inquiry into the operation of the Native Title Act 1993 and to ALRC Issues Paper 45 published in March 2014. I thank you for the opportunity to make comment on the issues raised.

I am pleased to attach a submission made on behalf of the South Australian Government in response to the issues paper and look forward to receiving the Commission's Discussion Paper later this year.

Yours sincerely

John Rau
Deputy Premier
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Attachment: Submission of the Government of South Australia in response to ALRC Native Title Inquiry Issues Paper

Submissions of the Government of South Australia in Response to the ALRC Native Title Inquiry Issues Paper

May 2014

General Comments

The State of South Australia (State) has long been aware of the special nature of claims for recognition of native title and has had a clear policy since 2004 of resolving claims by consent wherever possible[1]. There have been only two contested native title hearings in South Australia.[2]

In comparison, eleven claims have been resolved by consent determination (involving 20 orders) and, of these, six have involved comprehensive settlement agreements that address broader issues including compensation, sustainability of the Prescribed Body Corporate, and future act issues. There are a number of other determinations and ILUAs expected to be finalised this year.

Delays in claim resolution
The State accepts that a number of these claims have taken many years to resolve, and there remain a number of long-standing claims still to be resolved. However this is in large part reflective of the comparative newness of native title within the Australian legal system at the time the claims were lodged, the developing jurisprudence in this area, and the size and complexity of many of the claims.

The *Native Title Act 1993* (NTA) originally encouraged attempts to agree resolutions outside the court process and only envisaged claims being referred to the Court if mediation failed. This scheme had to be altered due to the consequences of the decision of *Brandy v HREOC*[3] meaning the Federal Court received a mass of claims in September 1998. In South Australia, one claim was chosen by the Native Title Representative Body (now South Australian Native Title Services (SANTS)) to be a test case and there was therefore no substantive progress on most other claims until the final decision in *De Rose v South Australia* in 2005.[4]

At about that time, a combined effort by SANTS and the National Native Title Tribunal managed to resolve almost all overlaps that then existed between claims, meaning attention could be focussed on settlements, not only recognising native title rights and interests, but dealing with the practical and financial effects flowing from such recognition.

As the law on the recognition of native title became clearer, the State Government and other parties could more confidently proceed with negotiations to resolve claims by consent. This is demonstrated in the number of claims which have been resolved by consent in South Australia over the last five years, compared with the ten years prior. This is also reflected by results across Australia where over 70 of the 251 determinations made by 31 December 2013 occurred in the last eighteen months.

Some cases are still delayed by the need to perform detailed tenure analysis to determine areas of extinguishment and areas where native title may be revived.[5]

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[1] *Consent Determinations in South Australia: A Guide to Preparing Native Title Reports*
[2] *De Rose v South Australia & Ors* [2002] FCA 1342 and Barngarla Native Title Claim (SAD 6011 of 1998)
[3] (1995) 183 CLR 245
[4] *De Rose v South Australia (No.2)* (2005) 145 FCR 290 (The High Court subsequently refused special leave to appeal)
[5] Sections 47, 47A and 47B, NTA

While there is no doubt scope for improvement in the native title system, South Australia is concerned that significant changes to native title law will actually slow down and complicate the State's current program for resolving native title claims. A new body of jurisprudence may be required before parties are comfortable with the new regime. Depending on the nature of any changes made, it may also re-open existing settlements, giving rise to applications to vary determinations under section 13, NTA. This, in turn, may affect acts performed in reliance on the original decision.

Changes to "Connection" requirements including Presumptions
The ALRC Review is canvassing views on changing the requirements for connection, including a possible presumption of continuous connection such as that postulated by Justice French (as he then was) in 2008.

The State considers there are a number of reasons it is important that there remains some informed rigour in the assessment of native title claims under the NTA, particularly in areas where there are overlapping or conflicting claims or significant third party interests.

Consequences of a determination
Recognition of native title is significant for the individual native title holders, the native title holding body and the broader Australian community. It will usually also give rise to an entitlement to compensation for some past extinguishment, to exclusive rights in some areas, and to statutory procedural rights, including the 'right to negotiate'. Depending on the circumstances of the area concerned, the value of some of those entitlements can be very large.

The current lack of clarity on the principles for the assessment of compensation adds to the uncertainty. Where some commentators suggest compensation ought to be directly linked to the number of native title holders, the State is reluctant to simply leave the make-up of the native title holding group and the content of its rights and interests to those bringing claims without testing their assertions against the objective evidence.

French J foresaw this concern when putting his proposal forward, stating "*And if there were concerns on the part of States about expanding the scope of compensation claims in respect of historical extinguishment, it may be that the presumption would not be applied to such cases.*"[6] Virtually all determinations of native title are followed by negotiations or claims for significant compensation for historical extinguishment.

Availability of evidence
When making determinations of native title by consent, the Federal Court has always emphasised the reliance placed by it on the State acting as *parens patriae* in assessing the material in support of the order. As so much of native title is based on oral tradition, claimants are uniquely placed to provide evidence on the composition of the native title holding group, the nature of their traditional laws and customs, and the contemporary exercise of those traditional laws and customs which gives rise to their connection to country.

This State has built up a good relationship with SANTS so that claimants are prepared to release their information knowing it will be handled sensitively and on the basis that it will not be disclosed further without their consent. In that way, evidence of the matters required to establish recognisable native title can be viewed in a manner akin to an inquisitorial (rather than adversarial) process, with State officers and experts discussing frankly with claimants representatives whether (and where) evidence may exist to support a determination or whether inferences are appropriate. On occasion, State representatives have gone on

[6] "*Lifting the burden of native title some modest proposals for improvement*" (FCA) [2008] FedJSchol 18

country with claimants and their representatives to fill gaps in the material. It is unlikely that this collaboration would be offered if it were for the State to disprove presumptions of continuity.

Current System is working
Groups that have maintained their laws and customs and their connection to the claimed area have, in the State's experience, little difficulty in showing enough for the State to be prepared to make inferences to cover gaps in the evidence regarding continuity and the traditional nature of laws and customs currently practiced. The Federal Court has encouraged such an approach since it took on the closer case management of matters in 2009.

The Courts have also applied increasing flexibility to assessing many of the matters raised in section 223 of the NTA. Many of the elements of a strict interpretation of the High Court's judgment in *Yorta Yorta*[7] have been read down in practice. The Federal Court takes into account that extensive loss or modification of traditional law and custom was almost inevitable in the face of colonisation and has, on occasion, found in favour of groups that have long been absent from their lands or whose culturally active membership has, at various times in history, numbered very few individuals.

The Court and respondent parties rely on the State's assessment of the evidentiary material without requiring it to be tested in Court. The assessment is, as encouraged by the Court, made at a lower level of proof than would be required at trial. In the State's view, the current balance maintained by the Court and the parties is appropriate and reflects the intentions expressed in the Preamble to the NTA.

The purpose of native title
The NTA was the Commonwealth's response to the *Mabo (No.2)*[8] decision. With regard to the recognition of native title, it attempted to set out the requirements as described by the High Court and then create a process whereby claims could be made and resolved. The Preamble acknowledged that not all groups would be able to meet the requirements for recognition and created alternative beneficial arrangements for those people.

It is difficult, with over 250 determinations of native title having been made at an ever-increasing rate since, to argue that the NTA is not delivering on its promises. The vast majority of the cost of native title lies with the State and Territory governments. The financial assistance package promised by the Commonwealth at the time of the NTA[9] and since is still yet to come to fruition, leaving the bulk of the cost of native title recognition with the States and Territories.

Other changes to the NTA

Authorisation
As set out under the relevant questions below, the State does see some room to improve the authorisation process by allowing groups to determine how applicants should be authorised, irrespective of the existence of any traditional method as postulated by section 251B(a) of the NTA. The idea of a traditional method for authorising something as contemporary as a native title claim has always been slightly problematic. Likewise, the State would not object to a clarification to the authorisation provisions making it clear that claim groups can limit the

[7] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422
[8] *Mabo and others v. Queensland (no. 2)* (1992) 175 CLR 1
[9] See section 200, NTA

scope of named applicants' authorisation.[10] However, it is the State's view that the case law already provides for that outcome.

Commercial rights

In the State's view, there is no need to confirm that native title may include commercial rights as the Federal Court can already recognise such rights where there is sufficient evidence.[11] Any commercial rights will depend on the evidence of the group concerned. The evidence in *Akiba* was very strong.

The current jurisprudence permits the recognition of the rights that are shown to exist.

Joinder of parties

This State has seen an increased incidence of parties seeking to be joined to native title claims late in the proceeding. Often this occurs as the negotiations towards a determination by consent are reaching their conclusion. Those seeking to be joined may be Aboriginal people who have been omitted from the claim group, who consider they have a better right to the area or who are part of the claim group but consider their interests are not being met by the Applicant. They can also be other interest holders concerned that their interests will not be sufficiently protected with one group rather than another. Given the variety of parties and of reasons for late joinder, the State considers the current powers of the Federal Court to be adequate whereby the interests of justice can be taken into account. The jurisprudence that has developed in this area over the last ten years should not be undermined by making changes to the underlying provisions.

Responses to particular questions

Comments on the particular questions raised in the Issues Paper follow.

Defining the scope of the Inquiry

Question 1. The Preamble and Objects of the *Native Title Act 1993* (Cth) provide guidance for the Inquiry. The ALRC has identified five other guiding principles to inform this review of native title law.
(a) Will these guiding principles best inform the review process?
(b) Are there any other principles that should be included?

a) The five guiding principles are appropriate but should include the following:

- Principle 3 should also include the aim of providing certainty for future land use in the areas of determined native title;
- Principle 5 should be expanded to include the sustainable future of local interest holders, particularly in regional areas.

b) Any changes to improve the operation of the NTA with regard to the making of determinations of native title ought to acknowledge the consequences of those determinations, being compensation from State and Territory governments and the requirement into the future for any persons carrying out activities to comply with procedural steps (including the right to negotiate).

[10] For example by amending s 62A NTA to note that the applicants' power is subject to the scope of the authorisation.

[11] *Akiba on behalf of the Torres Strait Islanders of the Regional Seas Claim Group v State of Queensland (No 2)* [2010] FCA 643 (Akiba)

Question 2. The ALRC is interested in understanding trends in the native title system. What are the general changes and trends affecting native title over the last five years?
(a) How are they relevant to connection requirements for the recognition and scope of native title rights and interests?
(b) How are they relevant to the authorisation and joinder provisions of the *Native Title Act*?

(a) The general trend in recent years is that the apparently strict requirements for native title as established by the High Court in *Yorta Yorta* have become increasingly flexible. This has had a number of consequences:

- More claims have been filed (including by groups that had previously indicated they would not pursue a determination in return for a package of ILUAs);
- More overlapping claims (or attempts to become respondent claimants) are occurring;
- More intra-Indigenous disputes over the direction of the claim or negotiations over benefits;
- Long-standing claims are being resolved;
- All State and Territory governments have become more open to consent determinations;
- Compensation and the funding of Native Title Registered Bodies Corporate is becoming more important.

(b) See the comments in relation to questions on authorisation, below.

Question 3. What variations are there in the operation of the *Native Title Act* across Australia? What are the consequences for connection requirements, authorisation, and joinder?

This State concentrates on its own area but is aware of some differences in approach across the country. This is influenced by a number of factors in each jurisdiction, including:

- how the Federal Court manages each case list;
- the number and practises of Native Title Representative Bodies;
- policy differences.

Given the link between determinations of native title and consequences of compensation and future acts, South Australia now operates a policy of endeavouring to settle all aspects of native title at the same time. Victoria has adopted a different *method* but also seeks to deal with matters as a whole.

The variance between jurisdictions has reduced over the years. The main variations in the native title system occur depending on the nature and history of the particular land over which native title is being considered. Some areas of Australia suffered far more disturbance (whether active or passive) than others, meaning there are quite different levels of continuity that can be demonstrated. The final result for a group (in terms of sustainable outcomes) also depends greatly on the potential for the area to be developed and, particularly, whether it is prospective from a mineral or petroleum point of view. In some areas groups receive native title related payments of millions of dollars per year whereas others have difficulty accessing enough funds to hold their AGM.

Question 4. The ALRC is interested in learning from comparative jurisdictions.
(a) What models from other countries in relation to connection requirements, authorisation and joinder may be relevant to the Inquiry?
(b) Within Australia, what law and practice from Australian states and territories in relation to connection requirements, authorisation, and joinder, may be relevant to the Inquiry?

(a) No comment - The NTA and its application is based on Australian jurisprudence and on the particular history of Australia.

(b) South Australia's Consent Determination policy and a flexible approach to carrying it out has proved very successful. More claimants are also seeing the benefit of resolving all native title issues at the same time via a consent determination coupled with a whole-of-claim ILUA.

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?

Native title rights and interests, being based on mostly unwritten traditional laws and customs that alter greatly over the country, are difficult to define. Section 223 can only be seen as a guide and it is therefore appropriate for it to be drafted in its current broad terms. The facts underlying any particular native title claim will necessarily vary according to the tradition specific to each claimant group, but the NTA needs to fix an objective standard within which claims must fall.

The definition originally came from the *Mabo (No.2)* decision and any change to it is likely to cause an increase in new claims, including overlaps, and also prompt those whose claims have already been resolved through the current system to seek to reopen their issues.

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?

No presumption is required or desirable. In the process currently undertaken by parties in negotiating native title outcomes, it is rare that matters proceed to a contested hearing.[12] Under South Australia's Consent Determination policy, the State, when interpreting native title reports in conjunction with the Applicants, is often called upon and is willing to draw inferences where appropriate to do so. Those inferences relate to information that is:

- genealogical - many asserted relationships are accepted by the State without detailed analysis;
- historical - the State often relies on historical assertions made by applicants where there is no other evidence;
- anthropological - the State often accepts that contemporary differences from the historical descriptions of a group's traditional law and custom at sovereignty reflect an adaptation rather than break in those traditions.

[12] South Australia has only contested one native title matter since the resolution of *De Rose*, and that was set down for trial without going through its CD process. All other determinations have been by consent.

In short, the process currently guiding resolution of native title matters in South Australia operates fairly towards all parties, including claimants. The consequence of reversing the onus (which is what the presumption would effectively do) is that the State would be unable to explore much of the evidence without the co-operation of the Applicants. In these circumstances, co-operation is less likely to be given.

If, contrary to the above, a presumption were to be considered, it should be an evidential (not legal) presumption, able to be rebutted by showing sufficient evidence to raise a serious issue as to the existence or non-existence of the relevant fact. Much of the real (and, as the courts have stated, most persuasive) evidence on matters related to native title comes from Aboriginal people themselves and is not available to respondents without co-operation.

It should also not extend to the content of the rights and interests held by those claiming native title. While many groups currently accept a fairly standard description of their native title rights and interests and the courts are tending towards a more generalised formulation, there are a number that exhibit a novel approach contrary to established jurisprudence.

Any presumption would be problematic where there are overlapping claims and probably could not apply.

Question 7. If a presumption of continuity were introduced, what, if any, effect would there be on the practices of parties to native title proceedings? The ALRC is interested in examples of anticipated changes to the approach of parties to both contested and consent determinations.

A broad presumption would potentially have a number of undesirable consequences. Very careful attention would need to be paid to the level at which any presumption became effective. In a worst case scenario, claims may be reduced to little more than a description of descent from a named apical ancestor with a list of rights and interests reasonably believed to be held. The need for detailed anthropological work would be less and claims may be presented without proper research and by multiple groups over the same area. Native Title Reports under the State's consent determination policy set out the basis for connection. These reports are of great assistance to Applicants in clarifying claim group membership and providing historical context for the traditional laws and customs of the group. They also assist the group in managing their interests into the future. That rigour needs to be retained.

Expert material interpreting the claim group dynamics can also be particularly useful when there are intramural disputes.[13] Overlapping claims or challenges to Applicants are now often brought late in the process of negotiated settlement of claims. Were a presumption to drop away upon an overlapping claim being filed, this would be likely to encourage overlaps. Without independent anthropological expert reports, the State would be unable to judge whether or not the apparently aggrieved claim group members had an apparent basis for their grievances. Even with extra funding to perform that work, States would have difficulty, as claimant groups are reluctant to speak to anthropologists not known to the group.

In contested matters, the Court would not be in receipt of anthropological and historical material explaining the basis of the rights sought and the structure of the native tile group asserting native title. Such a situation does not seem appropriate to deliver just decisions (for either the applicants or the respondents).

[13] The Far West Coast claim in South Australia used a number of reports to clarify and define the ultimate native title holding group.

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?

See answer to question 6. The presumption should not apply. Expert reports are particularly useful in the resolution of overlaps. There have been occasions in South Australia where different groups claiming overlapping rights in the area under consideration have provided reports. The combined material in conjunction with a joint conference of experts has then provided a solution to the overlap fairly rapidly (particularly in the face of impending litigation).[14] Claimant groups are inclined to accept the analysis of their own anthropological experts in such matters. Were a broad presumption to exist, it is difficult to see how material would be adduced.

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

See answers to questions 6, 7 and 8.

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?

(a) This is a fundamental basis for native title. In practice, the apparently difficult test proposed by the High Court in *Yorta-Yorta* has not proved onerous. For example the cultural differences between native title holding groups in *Akiba* did not prevent the Court describing the group as a single normative society.[15] The Court has repeatedly demonstrated its flexibility in such matters and the State has also done so with combined groups.[16]

(b) Evolution of traditional law and custom tends to be accepted in most circumstances but the evolved laws must be in some way referable to those in existence at sovereignty. That limit will depend on the facts of each case. The difference between traditions exercised by determined native title holders in South Australia and those described by early ethnographers is often quite significant but that has not prevented the State successfully negotiating 20 consent determinations.

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?

The traditions differ between each native title claimant group and therefore any statutory codification would be unhelpful. The broad provisions allow the Courts the flexibility necessary to accommodate differences in the way each group relates to its land.

[14] Barngarla/Nukunu Overlap trial
[15] *Akiba* at [488]
[16] e.g. the Adnyamathanha, Gawler Ranges and Far West Coast claims all involved combinations of different language groups

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?

Native Title can only be based in traditional law and custom. If that traditional law and custom included rights of a commercial nature and those practices have survived since Sovereignty, then the common law will recognise those rights. See for example, *Akiba* at [528].

Were the NTA to be amended to make commercial rights easier to establish, this would change the basis on which native title has been approached for 20 years and would most probably result in a number of groups seeking to re-open existing determinations.

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?

Refer to question 12 above. If there are not traditional commercial rights, there are no rights of a commercial nature for the common law to recognise. Some respondent interest holders are particularly concerned at the prospect of there being commercial native title rights over their area of 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?

The definition cannot be comprehensively codified, as each example of any ongoing traditional commerce will turn on its own facts.

Question 15. What models or other approaches from comparative jurisdictions or international law may be useful in clarifying whether native title rights and interests can include rights and interests of a commercial nature?

No comment

Physical occupation, continued or recent use

Question 16. What issues, if any, arise concerning physical occupation, or continued or recent use, in native title law and practice? What changes, if any, should be made to native title laws and legal frameworks to address these issues?

The Court has drawn inferences in relation to occupation from the very beginning of native title case law. It is comparatively rare for all of a claim group to occupy the claim area. In remote areas the majority often live outside the area.

As set out in response to question 6, the State often draws inferences including in relation to occupation. With many claim areas reaching more than 70,000 km^2, the evidence of occupation is, of necessity, limited but five such claims in South Australia have achieved determinations by consent.

There appears on the cases to be no issue with physical occupation, continued use or recent use with respect to finding native title[17].

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?

No. See answer to question 16. Changing the NTA in this way will only encourage further claims, the reopening of claims already resolved, and significant uncertainty for other land users.

'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 concept of substantial interruption is a flexible doctrine that in recent years has generally been interpreted by the Courts (and in the State's consent determination process) in favour of claimant groups. The argument has been raised by some respondent parties in contested matters, but rarely successfully[18].

In the State's consent determination process, inferences tend to be drawn based on genealogical and anthropological information that link 'snapshots' in time periods. The question of interruption is rarely raised without some other (usually historical) evidence suggesting that interruption may be relevant and it is then discussed with the applicant.

Question 19. Should there be definition of 'substantial interruption' in the *Native Title Act*? If so, what should this definition contain? Should any such definition be exhaustive?

No, on the basis that it would be impractical. It is a question of fact and degree. No definition can be comprehensive and it should be left to the law, as developed by the Courts on a case by case basis.

Such concepts are ill suited to exhaustive definition. Common law courts are regularly applying the law to the circumstances without a definition and lawyers and negotiators do so when negotiating settlements.

Question 20. Should the *Native Title Act* be amended to address difficulties in establishing the recognition of native title rights and interests where there has been a 'substantial interruption' to, or change in continuity of acknowledgment and observance of traditional laws and customs?
If so, how?

No. It is only appropriate to recognise native title in circumstances where the rights and interests have been uninterrupted (to at least some degree) since sovereignty. Recognising

[17] *Bodney v Bennell* [2008] FCAFC 63 at [172] - [173] and *Banjima v State of Western Australia (No 2)* [2013] FCA 868 at [399]

[18] *De Rose v South Australia* (No 2) [2005] 145 FCR 290 at [105] and [110], *Bodney v Bennell* [2008] FCAFC at [74] and [120], *Banjima People v State of Western Australia* (No 2) [2013] FCA 868 at [510]

revived or other rights is better left to other policy devices on a local jurisdictional basis, such as the Victorian Traditional Owner scheme[19].

There may be room for an Australia-wide, non-native title regime that recognises traditional ownership without the more rigorous criteria associated with proving native title. For example, the mission systems have left many Aboriginal groups with historical connections to country that could not be said to have been part of their ancestors' native title country, however, their feelings about that country are still genuine. Such a regime might allow for a form of reconciliation in urban areas where loss of Aboriginal culture has been more pronounced for historical reasons, but this is a matter outside the scope of this inquiry.

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 existence or non-existence of native title has serious repercussions for respondent parties, in particular the States, where a positive determination of native title will inevitably be followed by a claim for compensation. Where there has been a substantial interruption of traditional law and custom, that should preclude a finding that native title exists. It is difficult to conceive of a situation where an injustice could be wrought upon a party seeking native title where a substantial interruption had occurred, if only because it suggests that the basis for any positive native title finding does not exist.

(b) 'The interests of justice' is usually utilised to provide a court or decision maker with a discretion to act if the particular facts of the matter justify it. It provides flexibility but is to be applied in a judicial manner. However, were it to be included in the NTA as suggested here, there would need to be clear guidance on appropriate use. As the State considers it would not be appropriate (see comment above) it does not suggest any draft wording.

Other changes?

Question 22. What, if any, other changes to the law and legal frameworks relating to connection requirements for the recognition and scope of native title should be made?

The law should be allowed to continue to be developed by the courts. It should be borne in mind that any substantive change to the law of connection may see many matters already dealt with by the courts subject to review (under section 13(5) NTA). It could certainly lead to the perception that matters decided under different statutory terms would now be decided differently. In a context where the key participants' resources are already stretched, it is difficult to see how such a change could assist the process.

[19] *Traditional Owner Settlement Act 2010* (Vic)

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?

Some potential claimants still appear to experience difficulties in authorising claims. Many of these relate to giving sufficient notice of the matters to be decided and in dealing with the tensions that some authorisation meetings operate under. The most important thing for the State and other respondents is that the Applicant is strongly and properly authorised to deal with negotiations to settle the claim.

In relation to compensation applications, it is unfortunate that the bodies that hold any determined native title, namely, the Prescribed Bodies Corporate cannot then proceed to make a claim to the areas of extinguishment for which its membership would be entitled to compensation. An extension of the authorisation process to allow a claim group to instruct its PBC as applicant in compensation claims would streamline the process. See also answer to question 24 below.

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?

Yes. South Australia's experience to date is that, in most cases, claimant groups do not have (or, at least cannot agree about having) a process of decision-making under their traditional laws and customs as set out in 251B(a). Section 251B(a) of the NTA could simply be removed from the NTA.

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?

This is a matter for the applicants' representatives. Note that the difficulties associated with these tasks would be exacerbated if the role of claimant experts was reduced by the introduction of presumptions.

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 matter is already catered for (to some degree) by the Court's assisted mediation process. There remain problems associated with the logistics and cost of organising the claim group meetings necessary to provide instructions and agree resolutions inherent in the mediation process.

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?

Many of these issues could be avoided by careful wording of the original authorisation resolutions.

The provision should be clarified to ensure that a full authorisation meeting is not required to remove the names of dead applicants from native title claims (thus changing the composition of the Applicant). See the tension between the decision of Siopsis J in *Sambo v Western Australia*[20] and Mansfield J in *Lennon v South Australia*[21]. The latter is to be preferred.

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?

The provision appears effective. Some dissentient claimants have tried to use the general order provision in section 84D(4)(b) to seek inappropriate orders directing Applicants to act in certain ways. The Court has dealt with such applications appropriately.

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 State is aware of large costs being spent on community meetings and of the Aboriginal traditions for decision making but is not aware of particular issues. The costs can, in some instances, be prohibitive. By way of general comment, it would be useful if ways could be found of facilitating decision making within groups that does not entail such costly and time-consuming meetings. A project to develop alternate, culturally appropriate methods of participation could be undertaken in close consultation with, for example, a couple of selected groups.

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?

This has been reflected in recent authorisations and discussed in cases such as *Anderson v Western Australia*[22] and the cases that have followed in relation to scope of authorisation. It is certainly clear that applicants can act by majority (if the authorisation so contemplates). While it appears that the law is developing to allow groups to define the scope of the applicant in certain limited ways, a minor amendment to section 62A NTA allowing the scope of an applicant's authority to be limited by the claim group at the time of the authorisation would render the position certain.

[20] [2008] FCA 1575
[21] [2010] FCA 743
[22] (2003) 204 ALR 522

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?

Case law on joinder in native title matters is now well established with a strong line of authority dating back to *Byron Environment Centre v Arakwal.*[23] In the State's experience each joinder application, particularly those made by disenchanted claim group members, is given ample hearing time.

Question 32. How might late joinder of parties constitute a barrier to access to justice? Who is affected, and in what ways?

The communal nature of native title often leads to late joinder applications from disenchanted members of the claim group. In South Australia's experience most late applications for joinder have come from indigenous parties. Each matter must be determined on its merits. The Court has always dealt with matters as fairly and as expeditiously as possible. The applications do cause delays and expense at the end of the consent determination process.

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

The established law is sufficient.

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 established law is sufficient.

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

No other suggestions.

[23] (1997) 78 FCR 1

The Hon John Rau MP

Government of South Australia

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31 May 2014

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

Dear Madam

Review of the Native Title Act 1993

I refer to the ALRC Inquiry into the operation of the Native Title Act 1993 and to ALRC Issues Paper 45 published in March 2014. I thank you for the opportunity to make comment on the issues raised.

I am pleased to attach a submission made on behalf of the South Australian Government in response to the issues paper and look forward to receiving the Commission's Discussion Paper later this year.

Yours sincerely

John Rau
Deputy Premier
Attorney-General

Attachment: Submission of the Government of South Australia in response to ALRC Native Title Inquiry Issues Paper