Submission

The Law Society
OF WESTERN AUSTRALIA
The voice of the legal profession in Western Australia

Australian Law Reform Commission Discussion Paper 82

Review of the Native Title Act 1993

To
The Executive Director
Australian Law Reform Commission
Email: nativetitle@alrc.gov.au

Society Contact
Joanna Blackley
Policy Lawyer
Telephone: (08) 9324 8647
Email: jblackley@lawsocietywa.asn.au

Date
18 December 2014

Table of Contents

Introduction

2. Framework for review of the *Native Title Act*;

5. Traditional laws and customs;

6. Physical occupation;

7. The transmission of Aboriginal and Torres Strait Islander culture;

8. The nature and content of native title;

9. Promoting claims resolution;

10. Authorisation; and

11. Joinder provisions.

Introduction

The Law Society of Western Australia appreciates the opportunity to respond to the Australian Law Reform Commission's Discussion Paper 82 Review of the *Native Title Act 1993*.

The Society is the peak professional association for lawyers in Western Australia and is widely acknowledged by the legal profession, government and community as the "Voice" of the legal profession in Western Australia. The Society has a number of sub-committees dealing with specialist legal issues, including native title.

2. Framework for Review of the Native Title Act

Question 2–1: Should the proposed amendments to the Native Title Act have prospective operation only?

Question 2–2: Should the proposed amendments to s 223 of the Native Title Act only apply to determinations made after the date of commencement of any amendment?

In response to both questions 2-1 and 2-2, as a general principle, retrospectivity is not to be encouraged in respect of amendments to legislation. For this reason, the amendments should not apply to claims already determined. However, many of the proposed amendments are in fact not retrospective; that is, they apply to clarify and confirm the law of native title which is to be applied in proceedings that are on foot. Also many are procedural amendments which apply when the relevant procedures are taken. To avoid doubt on these, it is probably best to provide that all the amendments apply to any current proceedings but not to determinations already made.

5. Traditional Laws and Customs

Proposal 5–1: The definition of native title in s 223 of the Native Title Act should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop.

The Society is of the view that the allowance for adaptation of traditional law and custom set out in the judgment of Gaudron and Kirby JJ in *Yorta Yorta*,[1] i.e. –

> What is necessary for laws and customs to be identified as traditional is that they should have their origins in the past and, to the extent that they differ from past practices, the differences should constitute adaptations, alterations, modifications or extensions made in accordance with the shared values or the customs and practices of the people who acknowledge and observe those laws and customs.

ought to be sufficient to avoid the approach of laws and customs being 'frozen in time'.[2] The requirement for adaptation from an original source does not require that adaptation to have occurred without the outside influence of European interaction.[3]

---

[1] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 at [114]. See also *Bodney v Bennell* (2008) 167 FCR 84, [74].

[2] Contra Jumbunna Indigenous House of Learning Research Unit, UTS, Submission No 17 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, July 2011.

[3] Cp Simon Young, *Trouble with Tradition: Native Title and Cultural Change* (Federation Press, 2008) 361–362.

The amendment proposed by the Native Title Amendment (Reform) Bill 2014 cl 18 is to insert:

> (1A) Without limiting subsection (1), ***traditional laws acknowledged*** in that subsection includes such laws as remain identifiable through time, regardless of whether there is a change in those laws or in the manner in which they are acknowledged.
> (1B) Without limiting subsection (1), ***traditional customs observed*** in that subsection includes such customs as remain identifiable through time, regardless of whether there is a change in those customs or in the manner in which they are observed,

does not comprise a material addition to the position of the High Court in *Yorta Yorta.*

However, in light of the decision of the Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63, which might be relied upon to limit the extent to which changes in traditional laws and customs may be considered not to constitute a 'substantial interruption', the Society considers the above clarification may provide useful guidance to courts in this area.

Proposal 5–2: The definition of native title in s 223 of the Native Title Act should be amended to make clear that rights and interests may be possessed under traditional laws and customs where they have been transmitted between groups in accordance with traditional laws and customs.

A transmission of rights could only occur in accordance with a normative system of laws of a society which was found to continue to apply in relation to the area in question. There cannot be a transmission from one society to another by a process which is newly invented. It must be in accordance with a normative rule of one or both of the existing societies having a rule which allows it. The concept of discrete societies existing alongside one another (rather than native tile holding groups existing alongside one another) is probably an entirely fictional notion. Where there is interaction between neighbours they will almost certainly be part of a broader society with normative rules to govern that interaction.

Room needs to be left for the analysis of normative systems referable to an existence which preceded colonisation which is fully comprehensive of the reality of how Aboriginal and Torres Strait Islander peoples' normative systems have evolved. It is by no means clear that the courts or the expert witnesses who have informed them in matters of ethnography have developed an entirely satisfactory set of models with which to analyse the range of normative systems which may exist in Australia. An example of the complexity of the process is to be observed in the analysis of arguments concerning society in *AB v Western Australia (No 4)* [2012] FCA 1268 at [159]-[236].

Further to the comments in response to proposal 5-1, the Society would support a provision to clarify the ability to transmit rights and interests between native title holding groups, even if it does not have the effect of making a change to the law. It might be necessary, however, to clarify as to whether the reference to "traditional laws and customs" only applies where both groups share the traditional laws and customs about transmission and are part of the same society (which reflects the current law) or is intended to go further. In other words, it begs the question "whose traditional laws and customs" otherwise. The Society's view is that it would at least be necessary to provide that this can occur when traditional laws and customs of **both** groups would allow for such a transmission, so even if they are not found to be part of the same society, the transmission would be allowed if both sets of laws and customs provide that it has occurred.

Proposal 5–3: The definition of native title in s 223 of the Native Title Act should be amended to make clear that it is not necessary to establish that:

- **(a) acknowledgment and observance of laws and customs has continued substantially uninterrupted since sovereignty; and**
- **(b) laws and customs have been acknowledged and observed by each generation since sovereignty.**

The Society supports proposal 5-3, with the following qualifications.

The Society considers that there is no reason why a temporary failure to observe laws and customs should automatically disqualify a native title claim. The introduction of a test of 'substantially uninterrupted' continuity will raise issues of the meaning and application of the test. What is and is not 'substantial'.

The Courts have made it clear since the first court determination of native title under the *Native Title Act 1993* (the NTA) that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use. [4]

There is, in the view of the Society, no need for any change to the law in this regard. The comments provided elsewhere in this submission concerning 'substantial interruption', 'traditional' and 'evolution' are also relevant in relation to this issue.

Substantial interruption

It is difficult to take issue with the ultimate conclusion from the High Court's decision in *Yorta Yorta* that if the normative society from which the native title is derived has ceased to exist, then the native title must also be incapable of recognition. It is only really a normative society deriving from pre-sovereignty which could be the source of native title.

If the fact that a normative society has ceased to exist leads to a conclusion that native title no longer exists, some have argued that it was a matter contemplated by the Government when the NTA was first introduced, and the solution to the prospect that some native title claims would not succeed was the Aboriginal and Torres Strait Islander Land Account and the Social Justice Package. The Society's comments concerning the efficacy of those other 'compensating' measures were made in relation to Issues Paper 45.

Whether a substantial interruption has occurred, without causing the normative society to cease to exist entirely, raises the prospect of, for example, traditional laws and customs being revived by descendants of such a society at a later date. It would appear reasonable for the courts to disregard such interruption if, as a matter of evidence, there is a relationship or commonality between the practices exercised before and after that interruption. It would also be consistent with the notion of a society and its traditional laws and customs as being dynamic and evolving, rather than frozen in time, and the notion of connection as being exercised through a variety of means, which may or may not be physical and which may or may not be the same form of connection as was exercised at sovereignty.

It would be most surprising if a society currently existing could not be found to have evolved from the antecedent members of that society. It is arguable that the cases, such as *Yorta*

[4] *Western Australia v Ward* (2000) 99 FCR 316; *Western Australia v Ward* (2002) 213 CLR 1, [14], [65]; see also *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [62].

Yorta and *Risk v Northern Territory*[5] reflect either a disproportionate focus on some evidence over other available evidence,[6] or a gap in the **evidence** of observable acknowledgement and observance of laws and customs, rather than an abandonment of that acknowledgment and observance.[7]

The suggested amendment, to empower courts 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', is consistent with the beneficial purposes for which the NTA was enacted, particularly where the interruption is caused by circumstances outside the control or intent of the relevant members of the relevant society. The Full Federal Court in *Bodney v Bennell* [2008] FCAFC 63, which rejected arguments that white settlement mitigated the existence of substantial interruption is not consistent with the beneficial objects of the NTA, and highlights the need for the NTA to require consideration of why the interruption has occurred and the broader interests of justice in the matter.

Having regard to the above, the Society supports the alternative to section 61AB(2) of the NTA advanced by the Law Council, with minor additions emphasised, as follows:

"A court may determine that the requirements of s 223(1) of the NTA have been satisfied, notwithstanding that it finds that there has been:

1. A substantial interruption in the acknowledgment of traditional laws and customs;
2. A significant change to traditional laws acknowledged or traditional customs observed,

including where the primary reason for such substantial interruption or significant change is the action of a State or Territory or a person who is not an Aboriginal person or a Torres Strait Islander, or where it is otherwise in the interests of justice to do so."

What this discussion illustrates, however, is that adding a test of "substantial interruption" in order to arrive at a conclusion as to whether continuing connection has been established is likely to be productive of a significant amount of case law interpreting the concept introduced before the Courts arrive at a settled meaning or application of the concept.

Proposal 5–4: The definition of native title in s 223 of the Native Title Act should be amended to make clear that it is not necessary to establish that a society united in and by its acknowledgment and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.

The Society agrees with proposal 5-4 and reiterates its response to proposal 5-3.

6. Physical Occupation

Proposal 6–1: Section 62(1)(c) of the Native Title Act should be amended to remove references to 'traditional physical connection'.

Proposal 6–2: Section 190B(7) of the Native Title Act should be amended to remove the requirement that the Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection

[5] *Risk v Northern Territory* [2006] FCA 404 (29 August 2006) [840].
[6] Such as historical documentary evidence over oral evidence, in the *Yorta Yorta* case.
[7] As in the *Risk* case.

with any part of the land or waters, or would have had such a connection if not for things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

The Society agrees with proposals 6-1 and 6-2.

A physical connection is not required for connection or a finding of native title. It should not be required for the registration test.

As noted earlier in this submission, the Courts have made it clear since the first court determination of native title under the NTA that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use.[8]

7. The Transmission of Aboriginal and Torres Strait Islander Culture

Proposal 7–1: The definition of native title in s 223(1)(a) of the Native Title Act should be amended to remove the word 'traditional'.

The proposed re-wording, removing traditional, would provide that:

> **The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:**
>
> **(a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and;**
>
> **(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and**
>
> **(c) the rights and interests are recognised by the common law of Australia.**

The Society is of the view that it would not assist the process of developing the meanings of 'traditional' and 'society', for the legislature to attempt to intervene and add words to the NTA, which in turn would need to be interpreted by the courts in future cases. These concepts have been developing in the case law on native title, based upon the myriad of fact situations which arise with the particular cases and a fixed interpretation by the legislature would be more likely to constrain, rather than assist in the development of those concepts.

A court applying the common law is not likely to recognise a right arising during the period of sovereignty of the British Crown. It goes against the basic precept of sovereignty. Once British sovereignty was asserted in 1788 (NSW) or 1829 (WA), it has not been possible for a new entity to arise with sufficient sovereignty to accord its members rights and interests. That cannot be changed by removing the term 'traditional' from section 223 of the NTA.

Other concerns with the possible misreading or restricted interpretation of 'traditional' which has arisen from time to time may also be ameliorated by other proposed changes to the NTA concerning physical connection, evolution, substantial interruption, and others as noted above.

---

[8] *Western Australia v Ward* (2000) 99 FCR 316; *Western Australia v Ward* (2002) 213 CLR 1, [14], [65]; see also *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [62].

To the extent that the reference to 'tradition' imports some reference to connection being held over a longer period of time establishes a basis for prioritising those with enduring connections to land and their associated laws and customs over those with more recent connections to the same land who hold different laws and customs.

Question 7–1: Should a definition related to native title claim group identification and composition be included in the Native Title Act?

The Society considers that the definition of native title claim group in the NTA is currently circular and could be better expressed, but the meaning appears to have been reasonably well established through case law and changing it now may cause greater confusion.

It is not desirable to narrow, by a statutory definition, the manner in which a native title group may be identified or composed. It should continue to be possible for a group to be defined in accordance with whatever the relevant normative system sets as the criteria for that identification and composition. It is noteworthy, for example, that, while it is not uncommon for some native title claimants to claim title where a connection to an ancestor with a connection to the area is an ingredient of the claim, that is not universal. In the Western Desert cultural bloc descent is not an essential and birth or a collection of other factors may support a claim to connection to the area.

A more significant concern is the requirements for certainty in the claim group description for the purposes of the registration test in section 190B(3) of the NTA. There has been a practice of providing that the group consists of the descendants of a list of ancestors due to the National Native Title Tribunal's insistence on an objectively ascertainable test when the traditional laws and customs are more likely to have less clear-cut criteria, such as the need for a person to identify as a member of that group and for a person to be accepted in accordance with traditional laws and customs of the group as a member.

The Society considers that it would assist and be more in keeping with the reality of group membership if section 190B(3) of the NTA is removed or at least amended to clarify that there is no requirement that anyone external to the group would be able to objectively ascertain whether a person is in the group or not.

Proposal 7–2: The definition of native title in s 223 of the Native Title Act should be further amended to provide that:

> **The expression native title or native title rights and interests means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:**
>
> **(a) the rights and interests are possessed under the laws acknowledged, and the customs observed, by the Aboriginal peoples or Torres Strait Islanders; and**
>
> **(b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a relationship with country that is expressed by their present connection with the land or waters; and**
>
> **(c) the rights and interests are recognised by the common law of Australia.**

The Society reiterates its comments in response to proposal 7-1. It is difficult to see that this proposed addition of words adds anything useful to the current definition.

Question 7–2: Should the Native Title Act be amended to provide that revitalisation of law and custom may be considered in establishing whether 'Aboriginal peoples and Torres Strait Islanders, by those laws and customs, have a connection with land and waters' under s 223(1)(b)?

As noted earlier in this submission, the Courts have made it clear since the first court determination of native title under the NTA that a connection in accordance with traditional laws and customs did not need to be a physical connection or a continued or recent use. [9]

There is, in the view of the Society, no need for any change to the law in this regard. The comments provided elsewhere in this submission concerning 'substantial interruption', 'traditional' and 'evolution' are also relevant in relation to this issue.

The Society reiterates its comments on 'substantial interruption' in response to proposal 5-3.

Question 7–3: Should the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b)?

The Society reiterates its comments in response to question 7-2.

Question 7–4: If the reasons for any displacement of Aboriginal peoples or Torres Strait Islanders are to be considered in the assessment of whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b), what should be their relevance to a decision as to whether such connection has been maintained?

The Society reiterates its comments in response to question 7-2.

Question 7–5: Should the Native Title Act be amended to include a statement in the following terms:

> **Unless it would not be in the interests of justice to do so, in determining whether 'Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters' under s 223(1)(b):**
>
> **(a) regard may be given to any reasons related to European settlement that preceded any displacement of Aboriginal peoples or Torres Strait Islanders from the traditional land or waters of those people; and**
>
> **(b) undue weight should not be given to historical circumstances adverse to those Aboriginal peoples or Torres Strait Islanders.**

The Society prefers its proposal set out in response to question 7-2 and proposal 5-3 concerning issues substantial interruption, namely, the alternative to section 61AB(2) of the NTA advanced by the Law Council, with minor additions emphasised, as follows:

"A court may determine that the requirements of s 223(1) of the NTA have been satisfied, notwithstanding that it finds that there has been:

[9] *Western Australia v Ward* (2000) 99 FCR 316; *Western Australia v Ward* (2002) 213 CLR 1, [14], [65]; see also *De Rose v South Australia (No 2)* (2005) 145 FCR 290, [62].

1. A substantial interruption in the acknowledgment of traditional laws and customs;
2. A significant change to traditional laws acknowledged or traditional customs observed,

including where the primary reason for such substantial interruption or significant change is the action of a State or Territory or a person who is not an Aboriginal person or a Torres Strait Islander, or where it is otherwise in the interests of justice to do so."

Further, the Society considers that the proposal set out in question 7-5 raises concerns in that:

a. The clause is limited considering European settlement preceding displacement, which is an unwarranted limitation. Displacement often does not occur at any clear date and takes place over time. The cause of the displacement should not be limited and should more generally refer to 'anything causing or contributing to displacement;
b. It would always be in the interests of justice to have regard to the impact of European settlement and not give undue weight to historical circumstances adverse to Aboriginal peoples or Torres Strait Islanders; and
c. It is hardly likely that a judicial officer would ever consciously apply a test which gave 'undue weight' to any circumstances in arriving at a conclusion, and it is not possible to determine what might be identified as 'historical circumstances adverse to Aboriginal peoples or Torres Strait Islanders', or the weight which could be described as 'undue' which should not be given to them.

8. The Nature and Content of Native Title

Proposal 8–1: Section 223(2) of the Native Title Act should be repealed and substituted with a provision that provides:

> **Without limiting subsection (1) but to avoid doubt, native title rights and interests in that subsection:**
>
> **(a) comprise rights in relation to any purpose; and**
>
> **(b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.**

In the view of the Society, the High Court in in *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* ('*Akiba*')[10] that native title rights and interests could comprise a right to access resources and take for any purpose resources in the native title claim area; and that the right could be exercised for commercial or non-commercial purposes, provides a sufficient statement of the law to deal with the issue of the possibility of native title rights comprising commercial interests, and suggests that there is no need for the legislature to amend the NTA to achieve that purpose.

However, the Society considers that in light of proposal 8-1 being for clarification purposes only and not a limitation on the characterisation of the nature and purpose of native title rights, it may not unduly limit the interpretation of those rights by future courts.

Proposal 8–2: The terms 'commercial activities' and 'trade' should not be defined in the Native Title Act.

[10] *Akiba on behalf of the Torres Strait Regional Seas Claim Group v Commonwealth* (2013) 300 ALR 1.

The Society is of the view that the NTA should not seek to define 'native title rights and interests of a commercial nature' including commercial activities and trade.

Question 8–1: Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include the protection or exercise of cultural knowledge?

The Society would support the reference to the protection or exercise of cultural knowledge where it concerns, arises out of or is connected with, the relevant land or waters which are the subject of the claim. If protection of cultural knowledge is to be recognised in relation to native title it must be in relation to land and waters in order to comprise native title. However, there is no reason why the common law could not recognise the existence of cultural knowledge as a species of right protected by the common law in addition to native title and other forms of intellectual property.

Question 8–2: Should the indicative listing in the revised s 223(2)(b), as set out in Proposal 8–1, include anything else?

The Society does not consider that the indicative listing ought to include any further matters, other than those noted above.

9. Promoting Claims Resolution

Question 9–1: Are current procedures for ascertaining expert evidence in native title proceedings and for connection reports, appropriate and effective? If not, what improvements might be suggested?

One of the issues which *Harrington-Smith on behalf of the Wongatha People v Western Australia (No 9)* [2007] FCA 31 illustrates is the paucity of availability of Anthropological experts to assist in the preparation of claims and the presentation of the necessary ethnographic evidence to engage with the State in arriving at a consent determination or to present a case at trial. The Wongatha case effectively engaged all available Anthropological experts in the country. During the trial the expert for the State of Western Australia passed away and was unable to be replaced. Typically today (as has been the case since 1994), if an Anthropological expert is required, then long time periods need to be allowed to await the availability of the small number of experts who are available to perform the task.

Another example of a long-running complex case is the recently determined *Banjima People v State of Western Australia (No 3)* [2014] FCA 201. The determination was the culmination of an application first lodged with the National Native Title Tribunal (the NNTT) on 4 June 1996. An overlapping claim was lodged on 29 September 1998. The overlapping claimant groups were separately represented and cross-examined each other's witnesses in more than one session of preservation evidence, before the claims were combined in an application filed on 1 June 2011. The process of arriving at that point involved years of mediation by the NNTT and included reaching an agreement to jointly engage an Anthropological expert to provide a report addressing the issues which gave rise to the overlapping of the two claims. A contributing factor to the length of time which it took to resolve this claim was the high level of demand placed on the Native Title Representative Body (the NTRB) in giving sufficient priority to this claim in competition with the numerous other claims its limited resources were expected to resource. The claim was only able to be resolved in the time it was because the claim groups were in the fortunate position where they had access to funds obtained by way of benefits from agreements negotiated with major iron ore companies in the region, and were able to make substantial contributions towards the cost of engaging legal counsel and otherwise paying for the substantial costs in pursuing the matter to a trial.

The modifications proposed to the NTA earlier in this submission concerning continuity, physical connection, interruption, and evolution may, in part, ameliorate some of the above issues indirectly by reducing or offering alternative ways of presenting evidence. Anecdotal evidence suggests that the above concerns are not solely a function of court processes, but also a function of the position of respondent parties in respect of the evidence presented by native title parties, and the capacity and willingness of all parties to seek to swiftly resolve native title claims by consent. The increased use of alternative dispute resolution processes by the courts (e.g. mediation, expert conferences, cultural liaison/facilitation for overlapping claims), the active participation of parties in these processes in good faith, and ongoing compliance by government parties with model litigant practices, may also present opportunities for some of the above issues to be resolved more swiftly.

Question 9–2: What procedures, if any, are required to deal appropriately with the archival material being generated through the native title connection process?

In *Banjima Peoples v Western Australia (No 2)* [2013] FCA 868 the native title claim group sought an order for confidentiality of information about family relationships that may not be common knowledge and cultural information that is held and controlled by a few members of the group, which was the subject of evidence at the hearing of the case. Justice Barker, at [2041-3], declined to make an order for confidentiality of that evidence, on the basis that he was not satisfied on the evidence that it was necessary to prevent prejudice to the proper administration of justice or to protect the safety of any person, taking into account that there had been discussion in open court of much of the information which was sought to be protected by a confidentiality order.

The Society considers that there ought to be provision made in the NTA to ensure that the use of genealogies, connection and expert reports should be restricted from publication or use by respondent parties except in the context of the proceedings, or any appeal in respect of those proceedings or the determination of an overlapping claim in combination with those proceedings, unless otherwise ordered by the court because it is in the interests of justice to do so, or the native title party affected consents. This would establish a presumption in favour of the protection of this information. The information also ought to be returned to the custody of the native title party upon the conclusion of any proceedings (or any associated appeals).

Question 9–3: What processes, if any, should be introduced to encourage concurrence in the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments?

The Society wishes to draw the ALRC's attention to its concern about the policy position taken by the State of Western Australia of adopting a 'whole of government approach to native title processes and negotiations'.[11] As part of the whole-of-government approach to native title and Aboriginal heritage, the Department of the Premier and Cabinet's Land Approvals and Native Title Unit and the Department of Aboriginal Affairs (DAA) sponsor the Inter-Agency Reference Group on Native Title and Aboriginal Heritage. Group membership is from across Government, specifically agencies with a focus on land or resource management.[12] There are currently 21 members of the Group. This approach by the State has resulted a substantial slowing of the progress towards arriving at consent determinations of native title. The effect has been that each government agency has sought to resolve all issues it may have with native title in advance of consenting to any determination of native title. Many of those issues relate to potential future acts which may affect the native title.

[11] http://www.dpc.wa.gov.au/lantu/WholeOfGovernment/Pages/Default.aspx.

[12] http://www.dpc.wa.gov.au/lantu/WholeOfGovernment/Pages/ReferenceGrouponNativeTitleandAboriginalHeritage.aspx

Those are matters which can and should properly be dealt with as and when they arise, and should not be contributing to delays in addressing the possibility of consenting to a determination that native title exists. The delays which have been caused by this approach are leading to claims being progressed to a contested hearing which could have been the subject of a consent determination.

Similarly, the State's unwillingness to undertake a tenure analysis until it has reviewed connection material and determined that it is willing to proceed to a consent determination unreasonably delays consideration of tenure issues. The open and early dissemination of information by the State would promote the early resolution of claims and a consideration by native title parties of the impact of extinguishment issues on their claims and negotiation position. It would be within the scope of the court's jurisdiction to make programming orders to this effect.

Presumption of continuity

The argument against a presumption of continuity appears to boil down to the state and territory governments resisting it. In other words, if it is forced upon them, they will focus their attention upon rebutting the presumption, and the process will become more adversarial. They have also expressed resistance to the possibility that native title determinations could be resolved by consent without proof. That suggests that consent determinations will not be reached if a presumption is introduced. The prospects of a presumption of continuity expediting determinations of native title appear hopeless.

For example, the Western Australian Government has argued that it could produce a 'counter-productive' effect, by requiring 'State and Territory Governments to place renewed emphasis on identifying the flaws in connection evidence'.[13] However, in some cases it could have been a distinct advantage to have had the State with at least the primary obligation of identifying the areas of the claim in contention and focussing on what native title had survived extinguishment, and to what extent it was reasonable to contest the claim. For example in the Single Noongar Claim,[14] if an early step had been for the State to conduct the tenure identification process and ascertain what land, within the external boundaries of the claim had survived extinguishment, the expected conclusion being very little, then the concern of the State (and the broader community) about a successful claim would have been much reduced, and the degree to which the State may have seen a need to oppose the claim may have been significantly reduced.

The facts required for the passage of the registration test by a claim are more than adequate as a basis upon which the presumption could be applied. The NTA now effectively applies such a presumption in according all the same procedural rights to registered claims as apply to determined claims.

It should also be noted in relation to the proposal for a presumption of continuity that it is not clear how it could be applied in circumstances where there are competing native title claimant groups.

Question 9–4: Should the Australian Government develop a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations?

---

[13] Western Australian Government, Submission No 18 to Senate Committee on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Native Title Amendment (Reform) Bill 2011*, August 2011.
[14] *Bennell v Western Australia* [2006] FCA 1243; *Bodney v Bennell* [2008] FCAFC 63.

The Society supports the notion of the Australian Government developing a 'best-practice' model connection policy and advocating its adoption by states and territories, and reiterates its comments in response to questions 9-1 and 9-3.

Question 9–5: Should the Australian Government, in consultation with state and territory governments and Aboriginal and Torres Strait Islander representative bodies, develop nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations?

The Society supports this proposal and reiterates its comments in response to questions 9-1, 9-3 and 9-4. Consultation should also be with any claim groups not represented by representative bodies, and prescribed bodies corporate who can equally reflect on their experiences of the determination process.

Question 9–6: Should a system for the training and certification of legal professionals who act in native title matters be developed, in consultation with relevant organisations such as the Law Council of Australia and Aboriginal and Torres Strait Islander representative bodies?

The Society does not support a separate certification as a requirement for legal professionals to practice in native title matters. There are sufficient regulations in place to prevent practitioners from practising in areas that are beyond their competence, if this is the concern which is sought to be addressed in this question.

Similarly, bodies established to regulate legal services, such as the Legal Practice Board of Western Australia, have the authority to consider circumstances of non-legal practitioners giving legal advice or holding themselves out as having legal expertise, and can take appropriate action against such persons.

The Society would support, however, recognition of particular expertise in an area, and the undertaking of advanced training in the area (e.g. cross-cultural practice, short courses in native title law and anthropology) similar to the approach of recognising specialists in criminal law and family law. This would not prevent other legal practitioners from practising in the area, would enhance the practice and recognition of current practitioners in this field, and would not unduly limit the options of native title parties to access legal assistance.

Non-legal practitioners working in native title (who do not provide legal advice) are not otherwise regulated or accountable and there may be some basis for establishing a process of registering and accrediting these persons for work in this area. This would, however, require the establishment of a supervisory body funded and administered so that it was effective and any poor practices could be addressed, including through de-registration.

Question 9–7: Would increased use of native title application inquiries be beneficial and appropriate?

The Society considers that the increased use of inquiries would be useful in overlapping claim disputes or claim group description disputes. This is particularly useful where the courts have been constrained from setting matters down as preliminary issues due to parties being unwilling to agree other facts.

The National Native Title Tribunal has been reluctant to undertake inquiries in the past. This may have been exacerbated by funding constraints, and the transfer of the resources and funding associated with mediations to the Federal Court of Australia.

Question 9–8: Section 138B(2)(b) of the Native Title Act requires that the applicant in relation to any application that is affected by a proposed native title application inquiry must agree to participate in the inquiry. Should the requirement for the applicant to agree to participate be removed?

The Society considers that the requirement for the applicant to agree should not be removed. No effective consequence could be achieved by making the process non-consensual, because, following the decision in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1, any decision arrived at by the process of inquiry could not bind the parties, so there is no point in compelling them to participate.

Question 9–9: In a native title application inquiry, should the National Native Title Tribunal have the power to summon a person to appear before it?

The Society considers that the Tribunal should have the power to summon a person to appear before it, and the power to draw inferences against any party who does not participate. There may however be resourcing issues and the NNTT should be able to take these into account together with any other reasonable excuse (e.g. cultural obligations).

Question 9–10: Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry? If so, how could this occur?

The Society does not see any logic in the concept of a so-called non-party having a capacity to apply to the Federal Court to direct an inquiry by the NNTT. At the point when such an application would be made the applicant is, by reason of the application, party to the proceedings. The suggested reason for a 'non-party' not applying to become a respondent party is a concern about a delay in the proceedings caused by such an application. Surely the potential claimant in contemporaneous applications would apply to become a party and seek a direction for NNTT inquiry, so no delay would be occasioned by the application to be become a respondent. The application for the NNTT inquiry and the reason for that inquiry would be the reason expressed for the application to become a party.

Question 9–11: What other reforms, if any, would lead to increased use of the native title application inquiry process?

The Society has no further comment.

10. Authorisation

Proposal 10–1: Section 251B of the Native Title Act should be amended to allow the claim group, when authorising an application, to use a decision-making process agreed on and adopted by the group.

Proposal 10–2: The Australian Government should consider amending s 251A of the Native Title Act to similar effect.

In response to proposals 10-1 and 10-2, it is arguable that it is most unlikely that there is in reality any traditional law or custom which **compels** compliance with a particular process of decision-making in relation authorising a person to make an application under the NTA. However, it would be useful for a claim group, regardless of whether there is a traditional decision making process, to adopt a decision making process of its choice. While traditional decision making processes may remain in place, its adaptation or use for the purpose of authorising a native title claim and applicants under the section 251B of the NTA (or, for that matter, any Indigenous Land Use Agreement (ILUA) under section 251A of the NTA) is

highly complex, and can be time consuming, costly and open to debate, particularly where issues of the interruption and evolution of decision making process may be in issue, thus creating a barrier to claim groups arriving at necessary decisions expeditiously.

While defects in authorisation may be disregarded under section 84D of the NTA, it:

a. compromises a claim group's ability to become registered, and receive the benefit of the attendant rights including the right to negotiate; and
b. leaves the claim group open to attempts by respondent parties to have the claim dismissed under section 190F(6) of the NTA.

The Society therefore supports modifications to authorisation procedures in sections 251A and 251B of the NTA so that claim group or native title holders can adopt a decision making process of their choice. While section 251A is outside the scope of the ALRC's review, the Society agrees that sections 251A and 251B are frequently interpreted consistently by the courts. Equally, the approach to authorisation under the NTA influences the rule book provisions adopted by registered native title bodies corporate (RNTBCs) concerning the making of native title decisions. The flexibility which this modification to the authorisation procedures affords claim groups or native title holders in meeting authorisation requirements, maintains the ultimate authority of the claim group or native title holders, and thus would not compromise the decision-making outcome.

In the event that changes to s251A are also made to mirror changes to s251B, the Society also considers that the processes set out in the current *Native Title (Prescribed Body Corporate) Regulations 1999* ought to be modified to mirror these changes. Further consideration could also be given to giving prescribed bodies corporate greater autonomy generally in native title decision making, particularly given they are already independently regulated through their rule book and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, have been authorised by the holders of native title to hold their native title rights and interest on trust or as agent, and are accountable to those common law holders. The current level of regulation imposed on prescribed bodies corporate significantly increases their overall compliance costs.

A preferable and more autonomous approach could, for example, involve removing the requirement to consult with the native title representative body in respect of native title decisions, and agreeing upon a more efficient and cost effective way to approach decision making in relation to native title decisions including circumstances in which decision making can be solely dealt with by the Board, given the, at times, prohibitive costs to native title parties (which also causes increased costs and delay to grantee parties) of undertaking broader consultation and consent processes. When coupled with the strict timeframes associated with future act processes, the delay and cost can force native title parties to abandon objections that they might otherwise pursue, and hamper the swift resolution of agreements with grantee parties.

Proposal 10–3: The Native Title Act should be amended to clarify that the claim group may define the scope of the authority of the applicant.

The Society considers that the NTA should be amended to confirm that the claim group has authority to define the scope of the authority of the applicant and the process by which those comprising the applicant may make decisions, whether by a majority, unanimously or otherwise. In other words, the ultimate authority of the claim group should be maintained, but it should have the capacity and flexibility to determine the process by which the applicant will act on its behalf.

Question 10–1 Should the Native Title Act include a non-exhaustive list of ways in which the claim group might define the scope of the authority of the applicant? For example:

(a) requiring the applicant to seek claim group approval before doing certain acts (discontinuing a claim, changing legal representation, entering into an agreement with a third party, appointing an agent);

(b) requiring the applicant to account for all monies received and to deposit them in a specified account; and

(c) appointing an agent (other than the applicant) to negotiate agreements with third parties.

The Society does not consider that the above is necessary. If a list is to be included, it should be clearly noted that it is not exhaustive and not indicative of the types of issues that can be considered.

Question 10–2: What remedy, if any, should the Native Title Act contain, apart from replacement of the applicant, for a breach of a condition of authorisation?

The Society does not consider that there should be any other form of remedy.

Proposal 10–4: The Native Title Act should provide that, if the claim group limits the authority of the applicant with regard to entering agreements with third parties, those limits must be placed on a public register.

The Society agrees that this would be desirable. It would provide an important piece of information to any party wishing to engage with the native title claim group as to the limits of the manner in which that may apply to engagement with the Applicant, and the circumstances in which there would need to be consultations with the native title claim group as a whole, so that the strategy and budget for consultations could be planned accordingly.

Proposal 10–5: The Native Title Act should be amended to provide that the applicant may act by majority, unless the terms of the authorisation provide otherwise.

The Society considers that the default position should be that all living members of the applicant have to agree, unless otherwise expressly stated. Majorities have the disadvantage of potentially causing divisions among applicants, and should be approached carefully in any case.

Proposal 10–6: Section 66B of the Native Title Act should provide that, where a member of the applicant is no longer willing or able to act, the remaining members of the applicant may continue to act without reauthorisation, unless the terms of the authorisation provide otherwise. The person may be removed as a member of the applicant by filing a notice with the court.

Proposal 10–7: Section 66B of the Native Title Act should provide that a person may be authorised on the basis that, if that person becomes unwilling or unable to act, a designated person may take their place. The designated person may take their place by filing a notice with the court.

In relation to both proposals 10-6 and 10-7, it would be desirable to amend the NTA to allow any member of the applicant group or any member of the claim group, where there is no remaining applicant alive or willing to act, to file a notice with the court indicating that an

applicant or member of the applicant group has died or is no longer willing to act, and the person or persons agreed by the native title claim group to take the place of that person. The Society therefore agrees with proposal 10-6, providing the notice filed is by the representative on the record and with the written consent of the person to such removal or an affidavit showing that the person is deceased.

The Society also considers that a claim group ought to be able to appoint a corporation to represent the claim group or any other designated person in the event of another applicant being removed. However, it should only apply where there is evidence that the designated person or entity was duly authorised or was already on the register. The appointment should not be effective until the court makes an order under section 66B of the NTA, based on a review of the required documents. It should be possible, in the absence of an objection, to determine such a matter on the papers.

11. Joinder

Question 11–1 Should s 84(3)(a)(iii) of the Native Title Act be amended to allow only those persons with a legal or equitable estate or interest in the land or waters claimed, to become parties to a proceeding under s 84(3)?

The Society considers that the above proposal is reasonable save that those who come within the scope of section 84(3)(a)(iii) should only automatically be parties in respect of s 225(c) or (d), with leave to apply to the court to become a party in respect of s 225(a) or (b).

Question 11–2 Should ss 66(3) and 84(3) of the Native Title Act be amended to provide that Local Aboriginal Land Councils under the Aboriginal Land Rights Act 1983 (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3)?

The Society has no further comment.

Proposal 11–1: The Native Title Act should be amended to allow persons who are notified under s 66(3) and who fulfil notification requirements to elect to become parties under s 84(3) in respect of s 225(c) and (d) only.

The Society prefers the default position it has set out in response to question 11-1, rather than this being a matter for election by the respondent.

If the Society's proposal is not acceptable, then the Society would accept proposal 11-1.

Proposal 11–2: Section 84(5) of the Native Title Act should be amended to clarify that:

(a) a claimant or potential claimant has an interest that may be affected by the determination in the proceedings; and

(b) when determining if it is in the interests of justice to join a claimant or potential claimant, the Federal Court should consider whether they can demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

The Society notes that where a claimant or potential claimant already forms part of the claim group description, proposal 11-2(a) ought not to apply. The effect of a determination on a claimant would also still need to be established rather than being assumed.

The Society supports 11-2(b) in respect of respondents seeking joinder.

Proposal 11–3: The Native Title Act should be amended to allow organisations that represent persons, whose 'interest may be affected by the determination' in relation to land or waters in the claim area, to become parties under s 84(3) or to be joined under s 84(5) or (5A).

The Society does not support this as a general rule but notes that this should be permitted if the persons whom they represent have a relevant interest, and the organisation's participation in the proceedings is in substitution for those persons whom they represent.

Proposal 11–4: The Native Title Act should be amended to clarify that the Federal Court's power to dismiss a party (other than the applicant) under s 84(8) is not limited to the circumstances contained in s 84(9).

The Society considers that this is already clear, by reason of the generally expressed power in section 84(8) of the NTA, but does not consider that the addition of this clarification would cause any concerns.

Proposal 11–5: Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to join, or not to join, a party under s 84(5) or (5A) of the Native Title Act.

The Society agrees with the above proposal, particularly if the appeal is only with the leave of the Court, as is usually the requirement for appeals in relation to interlocutory orders.

Proposal 11–6: Section 24(1AA) of the Federal Court of Australia Act 1976 (Cth) should be amended to allow an appeal, with the leave of the Court, from a decision of the Federal Court to dismiss, or not to dismiss, a party under s 84(8) of the Native Title Act.

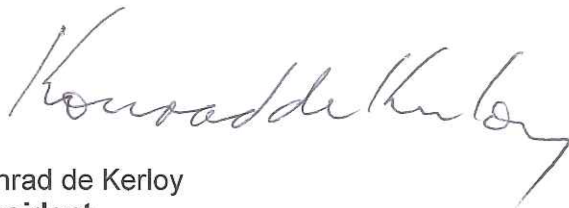
The Society agrees with the above proposal.

Proposal 11–7: The Australian Government should consider developing principles governing the circumstances in which the Commonwealth should either:

(a) become a party to a native title proceeding under s 84; or

(b) seek intervener status under s 84A.

The Society agrees with the above proposal.



Konrad de Kerloy
President