



14 January 2015

Ms Sabina Wynn
The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

Email: nativetitle@alrc.gov.au

Dear Ms Wynn,

Discussion Paper: Review of the *Native Title Act 1993* – NTSV Submission

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

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

NTSV welcomes the opportunity to contribute to the development of the proposed amendments and is committed to working with government to develop policy and legislative reforms targeted at improving the operation of the Native Title Act.

I would welcome the opportunity to engage in further consultations with the Commonwealth to discuss this matter and any questions arising from NTSV's submission. Please contact my Executive Assistant, Debbie Heeney, on 03 9321 5305 or dheeney@ntsv.com.au.

Yours sincerely

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Encl. NTSV Submission on Discussion Paper, Review of the Native Title Act 1993

Native Title Services Victoria's Submission on the ALRC Discussion Paper, Review of the Native Title Act 1993

1. Native Title Services Victoria (**NTSV**) has made a number of submissions in relation to previous bills and papers addressing some of the topics discussed in the Discussion Paper, Review of the Native Title Act 1993 (**Discussion Paper**).
2. While this submission seeks to address all of the questions and proposals in the Discussion Paper it is noted that particular focus is given to questions and proposals relating to the promotion of claims resolution and those relating to clarification and interpretation of section 223 of the *Native Title Act 1993* (**Native Title Act**).
3. The approach of this submission must be understood within the context of NTSV's ongoing support for the implementation of a national land settlement framework, in which native title is one part of a broader legislative and administrative strategy to assist in the recognition of Traditional Owners, while providing opportunity for their social and economic inclusion and advancement.
4. In this regard, we refer the ALRC to the Victorian *Traditional Owner Settlement Act 2010* (**Settlement Act**) which has been in operation for the past four years and is considered to reflect best practice standards in relation to claims resolution in Australia. The Settlement Act not only allows for voluntary, out-of-court settlement of native title claims, but includes a suite of agreements which assist in the inclusion of Traditional Owners in decisions relating to their land, and provide Traditional Owners with economic development and natural resource management opportunities (**Settlement Framework**).
5. Of importance to this submission, are the "Threshold Guidelines" issued by the Victorian Department of Justice, which set out the process for how traditional owner groups can seek entry into negotiations with the State under the Settlement Act. In particular, we highlight the flexible approach outlined in the Threshold Guidelines to the concept of traditional connection to country which we see as consistent with proposals 5.1-5.4 of the Discussion Paper, and the collaborative and negotiated approach to the provision and acceptance of expert evidence.
6. A central narrative of this submission is that focus should be given to an appropriate definition for the term "traditional" in order to remove the injustices extant in native title law. A multiplicity of difficulties has arisen as a result of overly restrictive jurisprudence where interpretation of the term "traditional" has given rise to concepts such as "continuity", "society" and "substantially uninterrupted" none of which appear in the Native Title Act and that are opaque and inequitable in their application.
7. NTSV notes the following comments in relation to the proposals and questions raised in the Discussion Paper.

Retrospective application of proposed amendments (Questions 2.1-2.2)

8. NTSV submits that the proposed amendments should have retrospective application, particularly with regard to the amendment of s 223(2) so that native title rights and interests:
 - a) comprise rights in relation to any purpose; and
 - b) may include, but are not limited to, hunting, gathering, fishing, commercial activities and trade.
9. NTSV submits that to do otherwise would disenfranchise Traditional Owner groups who were in a position to pursue their native title claims at an earlier point in time.
10. While NTSV acknowledges that this proposal will result in difficulties in its practical application, we submit that mechanisms could be developed to assist manage the practical effect of its implementation.

Traditional laws and customs

11. **NTSV supports proposals 5.1-5.4**, all of which deal with the clarification and amendment of section 223(1)(a).
12. **NTSV supports proposal 5.1.** NTSV agrees that section 223(1)(a) should be amended to make clear that traditional laws and customs may adapt, evolve or otherwise develop. The current law falls short of recognising the breadth of rights and interests held by contemporary Aboriginal people, and impedes the development of new or extended rights and interests which underpin social and economic development.
13. **NTSV supports proposal 5.2.** NTSV agrees that section 223(1)(a) should be amended to make clear 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. The transfer of rights and interests between sub-sets of a society or between different groups is an accepted practise with a traditional basis within Victoria.
14. **NTSV supports proposal 5.3.** NTSV supports amendments to section 223(1)(a), which would clarify that traditional laws and customs or connections to land and waters do not have to be observed, acknowledged or maintained continuously or proved on a generation by generation basis. NTSV would also welcome removal of the “substantially uninterrupted” test, as this test is unconscionable in the face of the devastating effects of European settlement on traditional owner societies. The State of Victoria declined to include continuity of connection as one of the requirements traditional owners are required to establish for a settlement under the Settlement Framework.
15. **NTSV supports proposal 5.4.** As with the concept of continuity, the concept of society is not one that appears in the Native Title Act. NTSV agrees with the suggestion that the concept of society is merely a conceptual tool to assist in answering the central question of whether a particular traditional owner group acknowledges and observes traditional laws and customs.
16. **NTSV does not support Proposal 7.1**, which suggests removal of the term “traditional”. This is expanded upon at paragraphs 19-22.

Removal of references to “traditional physical connection”

17. **NTSV supports proposals 6.1 and 6.2** which propose that sections 62(1)(c) and 190B(7) of the Native Title Act be amended to remove references to “traditional physical connection”. Section 62(1)(c) deals with affidavits in support of a native title claim, and section 190B(7) provides that the National Native Title Registrar must be satisfied that at least one member of the native title claim group has or previously had a traditional physical connection with any part of the land or waters.
18. These two sections in their current form are inconsistent with section 223 and the jurisprudence, which does not require physical connection with the land claimed and recognises the myriad of other ways in which Aboriginal people connect to land.

Removal of the word “traditional” from section 223(1)(a)

19. **NTSV does not support proposal 7.1.** NTSV submits that the term “traditional” is one of importance to Aboriginal people, denoting their unique relationship with particular land and waters through the concept of traditional ownership. *Traditional* ownership connotes a longstanding relationship with an area that takes precedence over other more recent connections with that area that could be described as historic.
20. NTSV submits that it is not the word “traditional” but its interpretation that is at issue. For this reason, NTSV supports the proposals in Chapter 5 of the Discussion Paper, over the alternative amendment suggested in Chapter 7.
21. NTSV is of the view that removal of the word “traditional” would create a number of issues, such as the need to include a definition of the native title claim group identification and composition. This issue does not arise if “traditional” is not removed from the Native Title Act.
22. **NTSV does not support proposal 7.2.** While NTSV agrees with the idea that any inquiry into traditional rights and interests of Aboriginal or Torres Strait Islander People should commence with a focus on their **present connection** to land and waters, we do not support the suggested amendment to section 223(1)(a). In the alternative, we submit that the focus on present connection would be better articulated in a clear definition of “traditional”.

Revitalisation for traditional law and custom

23. It is NTSV’s view that retaining the word “traditional” at section 223, and acknowledging that tradition can evolve and adapt, may make it unnecessary to contemplate whether the concept of “revitalisation of law and custom” should be incorporated into the Native Title Act. In NTSV’s view, the word “tradition” can include a variety of ways by which knowledge can be transmitted, including through ethnographic, anthropological and biographical texts.

Regard for the history of displacement of Aboriginal people

24. NTSV submits that, with a suitably flexible and equitable interpretation of the term “traditional”, an inquiry into the extent and effect of historical displacement of Aboriginal people need not be

pursued. A definition of “traditional” should allow for change and adaptation, including whether such changes and adaptations are made in response to the forces of colonisation or by choice.

25. NTSV submits that consideration of the reasons for displacement of Aboriginal peoples or Torres Strait Islanders, and therefore adaptive change, would be difficult in practice and inequitable. A debate about the difference between Traditional Owners forced off country by European colonisation, and Traditional Owners leaving “voluntarily” to be closer to education and services, should not be fostered.

Amend section 223(2) so that *native title rights and interests* includes “rights in relation to any purpose” and “may include.... hunting, gathering, fishing, commercial activities and trade”.

26. **NTSV supports proposal 8.1.** NTSV considers that such a measure would greatly assist in unlocking the economic potential of native title. This would be consistent with a number of judicial authorities that have established the legitimacy of commercial native title rights and interests. This would also be consistent with the Settlement Act, which was amended in 2013 to enable Traditional Owners under a settlement to harvest flora and forest produce for commercial purposes (see sections 82(1)(b) and 84(1)).
27. NTSV does not consider that the “bundle of rights” doctrine in any way prevents the inclusion of this proposal in the Native Title Act. NTSV also submits that if the States and Territories are concerned that amending the Native Title Act in this way would “open the floodgates”, there are means by which potential overuse of particular resources could be addressed (ie. legislative amendment).
28. **NTSV supports proposal 8.2** that the terms ‘commercial activities’ and ‘trade’ should not be defined in the Native Title Act. In previous submissions to the ALRC on this point, NTSV has submitted that the Native Title Act need not prescribe the rights that are commercial in nature, as these will necessarily flow from the traditional laws and customs of particular groups. When linked to a ‘not frozen in time’ definition of ‘traditional’, rights that are commercial in nature would not be limited to a consideration of the content of the right at settlement.

Protection or exercise of cultural knowledge

29. Question 8.1 asks whether native title rights and interests should also be amended to include “protection or exercise of cultural knowledge”.
30. NTSV queries the interpretation by the High Court of Australia in *Western Australia v Ward* [2002] HCA 28, that section 223(1) cannot protect a “right to maintain, protect and prevent misuse of cultural knowledge” unless it relates to denial or control of access to land. The case draws dubious distinctions between the different forms of cultural knowledge. NTSV agrees with the ARLC’s observation that, for Indigenous people, there are unbreakable links between their knowledge systems and land and waters. Knowledge can be intimately linked with land without having a physical connection to it.
31. NTSV is generally supportive of the principle of the protection of cultural knowledge being made explicit in the Native Title Act; however, NTSV submits that this issue requires further consideration.

Promoting Claims Resolution

32. In relation to question 9.1, NTSV submits that the model represented by the Victorian Settlement Act makes litigious processes, such as the procedures for ascertaining expert reports, unnecessary. In Victoria, the exchange of information between the State and Traditional Owner groups is a cooperative undertaking, where information and outcomes are refined over the course of negotiations and meetings. NTSV believes that this method of ascertaining expert advice is preferable to the current adversarial nature of native title proceedings.
33. In relation to question 9.2, NTSV believes that the development of procedures for the handling of archival material is a current and relevant issue within the native title sector, but does not arise under the Native Title Act, and is therefore out of the scope of the Discussion Paper and this submission.
34. In answer to question 9.3, the Victorian settlement framework, by and large, makes redundant the development of processes to sequence the bringing of evidence to establish connection and tenure searches conducted by governments. This is because tenure analysis of Crown land parcels becomes obsolete when the question of whether native title is extinguished or not is no longer relevant (the future acts regime substitute, a 'land use activity agreement', applies to all Crown land, irrespective of the status of native title).
35. In relation to questions 9.4 and 9.5, NTSV is supportive of nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations. NTSV believes that the Settlement Act and the Threshold Guidelines would provide a best practice example of how this could be achieved.
36. In answer to question 9.6, NTSV is supportive of the introduction of a system for the training and certification of legal professionals who act in native title matters. NTSV believes this would assist in limiting the impact and operation of "rogue" native title lawyers.
37. In answer to question 9.7, NTSV believes there are some benefits to the native title application inquiries process. The inquiries system would potentially be of use in respect of the Settlement Framework. For example, the inquiries system might be a more focused way of progressing settlement negotiations under the Settlement Act, rather than relying on State Government representatives with other responsibilities to manage. This process may also be useful when it comes to resolving differences between two Traditional Owner groups. Use of the inquiries process in this way may add more validity to any resolutions between two groups.
38. In relation to question 9.8, NTSV submits that the requirement for the applicant to agree to participate in a native title application inquiry should be removed.
39. In answer to question 9.9, NTSV submits that the National Native Title Tribunal should have the power to summon a person to appear before it.
40. In relation to question 9.10, NTSV submits that potential claimants who are not parties to proceedings should not be able to request the Court to direct the National Native Title Tribunal to hold a native title application inquiry.

Authorisation

41. **NTSV supports proposals 10.1 and 10.2.** A claim group should be able to use a decision-making process agreed to and adopted by the group. The ultimate authority of the claim group should be respected and it should be the group's decision if it wishes to use its traditional decision-making process, or if it prefers to use another process, for example, by providing one vote for each family group or requiring that decisions be made by consensus.
42. **NTSV supports proposal 10.3.** A claim group should be able to define and limit the scope of the applicant's authority. NTSV agrees that a non-exhaustive list of ways in which the applicant's authority could be defined and limited would be useful.
43. **NTSV supports proposal 10.4** for a simplified procedure for replacing a named applicant if they are unable or unwilling to act in accordance with the wishes of the claim group. NTSV does not support the idea that a remedy other than replacement of the applicant should exist for breach of authorisation.
44. **NTSV supports proposal 10.4.** Named applicants should be able to act by a majority, instead of jointly, where the authorisation of the claim group is silent on this point.

Joinder

45. In relation to question 11.1, NTSV supports the amendment of section 84(3) of the Native Title Act so that only those persons with legal or equitable estate or interest in the land or waters claimed can be joined as parties to a proceeding. NTSV further submits that third party respondents whose interests derive from Crown grant should not be joined in proceedings on the basis that their interests are adequately represented by the State.
46. **NTSV supports proposal 11.1** to allow a person who becomes a party to native title proceedings under s 84(3) to elect to join proceedings after the Federal Court has considered and made a determination on the native title group and connection (section 225(a) and (b) of the Native Title Act). Third party respondents would then join when proceedings turned to matters affecting the party's interests under s 225(c) and (d), that is when consideration was being given to the nature and extent of any non-native title interests in relation to the determination area, and the relationship between native title and non-native title rights and interests.
47. NTSV submits that this proposal could go one step further, and amendments should be considered whereby third party respondents are not permitted to join until after the Court has considered and made a determination on the native title group and connection. Proposal 11.1 suggests that third party respondents be permitted to choose when to join.
48. **NTSV supports proposal 11.2** and submits that section 84(5) of the Native Title Act should be amended to clarify that a claimant or potential claimant should only be joined when they have an interest that may be affected by the determination in the proceedings, and when they have a clear and legitimate objective in joining.
49. **NTSV supports proposal 11.3** that the Native Title Act be amended to allow representative organisations (such as peak bodies) which may themselves have no interest, proprietary or otherwise, in the claim area to become parties under s 84(3) or to be joined under s 84(5) or (5A) when they represent persons, whose 'interest may be affected by the determination' in relation

to land or waters in the claim area. The purpose of this being to limit the number of third party respondents when their interests can be represented through the peak body.

50. **NTSV supports proposal 11.4** that 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) which is where a party's interests in the proceedings are already sufficiently represented or because their interest is merely a public right of access. The section could clarify that the Federal Court has a power to dismiss a party when it is in the interests of justice to do so.
51. **In relation to proposals 11.5 and 11.6**, NTSV considers that if the *Federal Court of Australia Act 1976* (Cth) were to be amended to allow appeal from decisions to join or not join a party, or to dismiss or not dismiss a party in native title proceedings, this should be subject to the leave of the Court.
52. **NTSV supports proposal 11.7**, that the Australian Government should develop principles governing the circumstances in which the Commonwealth should become a party or seek intervener status in a native title proceeding.