52. **DR ANGUS FRITH AND ASSOCIATE PROFESSOR MAUREEN TEHAN**

AUSTRALIAN LAW REFORM COMMISSION DISCUSSION PAPER (DP 82)

REVIEW OF THE *NATIVE TITLE ACT 1993*

DR ANGUS FRITH AND ASSOCIATE PROFESSOR MAUREEN TEHAN

SUBMISSION

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1. Angus Frith is a barrister with over 18 years in native title practice across Australia. He has recently completed a PhD titled 'Getting it Right for the Future: Aboriginal Law, Australian Law and Native Title Corporations'. Maureen Tehan is an Associate Professor in the Melbourne Law School, with nearly 30 years' experience in legal practice and teaching property law and native title. With Professor Lee Godden, they are both associated with the Agreements, Treaties and Negotiated Settlements project at the University of Melbourne.
2. This submission addresses some of the proposals and questions raised in the 'Review of the *Native Title Act 1993* – Discussion Paper' (**Discussion Paper**) released by the Australian Law Reform Commission (**ALRC**) in October 2014. It follows from our submission (**Frith and Tehan**) in response to the ALRC's 'Review of the *Native Title Act 1993* – Issues Paper' dated March 2014 (**Issues Paper**).

CHAPTER 2: FRAMEWORK FOR REVIEW OF THE NATIVE TITLE ACT

3. In answer to Question 2–1, any amendments to the *Native Title Act 1993* (Cth) (***NTA***) made as a result of any recommendations by the ALRC should have retrospective application.
4. In answer to Question 2–2, the proposed amendments to s 223 should apply to all determinations, whether made before or after the date of commencement of any amendment.

5. Given the strong policy focus in the *NTA* on achieving just outcomes,[1] such retrospective application is necessary to avoid unfair and unjust discrimination against native title groups merely on the basis that their native title was recognised earlier. The Discussion Paper also recognises the importance of justice in the native title process.[2] Accordingly, the justice inherent in the retrospective application of such amendments should be prioritised over the common law presumption against retrospectivity and arguments regarding certainty.

CHAPTER 5: TRADITIONAL LAWS AND CUSTOMS

6. We agree with Proposal 5–1. Section 223 should explicitly acknowledge that the traditional laws and customs under which native title rights and interests are possessed might adapt, evolve or otherwise develop.

7. As it stands, the law does not cover all of the rights and interests arising under traditional laws and customs. It is unlikely that the law, as currently stated, can support the evolution of rights and interests that might support Indigenous economic, social and cultural aspirations. In this regard, we support the ALRC's view that 'adaptation, evolution and development of laws and customs should be treated as the norm rather than the exception'.[3]

8. We agree with Proposal 5–2. The definition of native title in s 223 should be amended to make it 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.

9. We agree with Proposal 5–3. The definition of native title in s 223 should be amended to make clear that it is not necessary to establish that:

    (a) acknowledgement 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.

10. These concepts are not explicitly identified in the *NTA* as necessary elements of the proof

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1 See, for example, the preamble and the provision in s 13 for varying determinations in the interests of justice.

2 See, eg, Discussion Paper [3.39].

3 Discussion Paper [5.35].

of native title, but have been added as aids to interpretation by the High Court. They require 'claimants to surmount unnecessarily high evidential hurdles to establish native title'.[4] As noted by the ALRC, the promotion of the beneficial purpose of the *NTA* is consistent with clarifying that 'it is not necessary to establish this level of intensity of continuity of acknowledgement and observance of traditional laws and customs'.[5]

11. We agree with Proposal 5–4. The definition of native title in s 223 of the *NTA* 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.

12. The requirement for continuity of a 'society' in order to establish native title has imposed an overly technical approach to statutory construction and proof on native title applicants.[6] Again, the concept does not appear in the *NTA*.

CHAPTER 6: PHYSICAL OCCUPATION

13. We agree with Proposals 6–1 and 6–2.

    (a) Section 62(1)(c) should be amended to remove references to 'traditional physical connection'.

    (b) Section 190B(7) 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 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.

14. These provisions are inconsistent with the jurisprudence that has developed regarding what is required to establish native title. Physical presence is not necessary for proof of connection under s 223(1)(b).[7]

CHAPTER 7: THE TRANSMISSION OF ABORIGINAL AND TORRES STRAIT ISLANDER CULTURE

15. The proposals in Chapter 7, which suggest changes to the text of the definition in s 223, are expressed as alternatives to those in Chapter 5, which suggest adding clarifying

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4 Discussion Paper [5.65].
5 Discussion Paper [5.47].
6 Discussion Paper [5.73].
7 Discussion Paper [6.2].

statements directed to the interpretation of terms in s 223, but retain its existing text. In general terms, we prefer the approach taken in Chapter 5, but are prepared to accept the approach in Chapter 7 as being an approach that would tend to meet the needs of justice.

16. We prefer the approach in Chapter 5 mainly for the reasons identified by Dr David Martin quoted in the Discussion Paper, as follows:

> [I]t is tradition which grounds and legitimates claims to country from the perspective of Indigenous people, not mere connection.
>
> [R]emoving the concept of 'tradition'/'traditional' from s 223, while well intentioned, would actually cause more conflict and confusion within claimant groups. [To do so] ignores the deep significance accorded to traditional connections within Indigenous societies'.[8]

17. In addition, the concept of tradition in the definition of native title is significant for its later governance. It helps to define and identify the common law native title holders on whose behalf the prescribed body corporate (**PBC**) manages native title rights and interests and who it must consult regarding native title decisions that affect those rights and interests.

18. Notwithstanding our view regarding the value of the concept of 'tradition', the following discussion is premised on the basis that the ALRC prefers the Chapter 7 approach to that in Chapter 5.

19. Subject to the above, if the approach of amending the text of the definition of native title in s 223 is taken, we agree with Proposal 7–1. The definition of native title in a 223(1)(a) should be amended to remove the word 'traditional'.

20. As we stated at [47] of Frith and Tehan:

> [R]emoving the word 'traditional' from s 223(1)(a), with the aim of limiting the Court's consideration of the native title claim group's laws and customs to those currently acknowledged and observed, would potentially also have the effect that consideration of the group's society would be limited to its contemporary definition as 'a body of persons united in and by its acknowledgement and observance of a body of laws and customs',[9] and would render the native title determination process much less backward looking.

21. In answer to Question 7–1, if the word 'traditional' is removed from s 223, a definition related to native title claim group identification and composition should not be included

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8 Discussion Paper [7.21].

9 *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 244 [49].

in the *NTA* in order to perform the definitional role in native title governance.

22. As noted above, the concept of 'tradition' plays an important role in identifying and defining the group of native title holders on whose behalf the PBC is to manage native title rights and interests. However, it would not appropriate to develop a statutory definition for the identity and composition of the native title group. The focus in such matters should be on the laws and customs of the group, whether 'traditional' or not, rather than on a statutory definition. Reference to those laws and customs would still be retained in s 223, even if 'traditional' were removed. Laws and customs would still provide the best mechanism for identifying the group of native title holders.

23. Again, subject to our preference for the approach described in Chapter 5, we agree with Proposal 7–2. The definition of native title in s 223 should be further amended to state in s 223(1)(b) that there must be proof that the native title claimants have, by their laws and customs 'a relationship with country that is expressed by their present connection with the land or waters', instead of proof that they have a 'connection' with the land or waters.

24. The main reason for our support for Proposal 7–2 is the notion that its focus is 'to emphasise that the starting point in determining connection is the "present relationship with country" that the claimant group has with the relevant land and waters' by their traditional laws and customs.[10]

25. However, the addition of new terms to the definition should be limited as much as possible. We would need to be further convinced of the need to include 'relationship with country that is expressed by' in s 223(1)(b). Each of the words and phrases 'relationship', 'country' and 'expressed by' may add to the confusion and opacity that the proposal seeks to avoid. Further, there should be no reference to a 'holistic relationship' in regard to connection.

26. In answer to Question 7–2, a distinction between 'revival' and 'revitalisation' may be useful. However, it should not be central to the definition of native title in s 223.

27. In answer to Questions 7–3 to 7–5, if 'traditional' and 'connection' are defined in the ways described in Chapter 5 and/or in Proposals 7–1 and 7–2, so that the focus of the native title inquiry is the group's contemporary laws and customs and their current connection, having regard to questions of substantial interruption and change in continuity will not be necessary. Therefore, displacement of the native title claim group would cause any loss of the relevant connection.

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[10] Discussion Paper [7.39].

28. Inquiries based on these questions will introduce new issues into the proof of native title, which will potentially add substantially to the costs of and time required for native title proceedings, delaying justice further and focussing attention once more on the past rather than the future aspirations of native title groups.

CHAPTER 8: THE NATURE AND CONTENT OF NATIVE TITLE

29. We agree with Proposal 8–1. Section 223(2) 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.

30. This amendment would ensure that native title rights and interests may include 'rights in relation to any purpose', including commercial purposes, and rights regarding 'commercial activities and trade', consistently with the High Court's decision in *Akiba v Commonwealth*.[11]

31. Amending the *NTA* in a manner that enables native title rights and interests to include a right to trade and other commercial rights would provide an important mechanism to secure future economic development for native title holders.

32. We agree with Proposal 8–2. The terms 'commercial activities' and 'trade' should not be defined in the *NTA*.

33. Defining these terms in the Act would limit their flexibility.

34. Further, as we said in our submission regarding the Issues Paper, quoting WEH Stanner, no English words are good enough to give a sense of the links between an Aboriginal group and its homeland. There should be as little legal language as possible mediating between people's rights under their laws and customs and their recognition in Australian law.

35. Defining these terms would inappropriately reduce the significance of the laws and customs acknowledged and observed by the native title holders in determining the nature

[11] (2013) 250 CLR 209.

of the rights and interests recognised.

36. In answer to Question 8–1, the proposed indicative listing in s 223(2)(b) should include the protection or exercise of cultural knowledge.

37. In accordance with native title holders' laws and customs, there are unbreakable links between Indigenous knowledge systems, the land, and its resources.[12] Cultural knowledge is 'intimately linked with the land'.[13] This indivisibility of cultural knowledge, land, and laws and customs indicates that the protection or exercise of cultural knowledge should be included among the native title rights and interests that might be recognised.

38. The term 'cultural knowledge' should not be defined in the *NTA*.

CHAPTER 9: PROMOTING CLAIMS RESOLUTION

39. In answer to Question 9–2, dealing appropriately with archival material being generated though the native title connection process requires recognising that this 'archival material' has been provided for the purpose of the litigation by individual members of the native title group and/or the group itself. Further, some of it comprises information that is culturally sensitive and/or refers to personal and family matters. In addition, Federal Court confidentiality orders apply to some of this information. Therefore, this archival material should only be dealt with in consultation with the native title group and individuals within it, as well as with the Court.

40. In addition, the PBC should be consulted about the use to be made of this archival material in particular cases, given its statutory function of consulting with, and obtaining the consent of, common law holders whose native title rights or interests would be affected by a proposed native title decision.[14] This archival material will play an important role in the performance of the PBC's functions.

41. In answer to Question 9–3, the Federal Court should address the sequence between the bringing of evidence to establish connection and tenure searches conducted by governments on a case by case basis.

42. In answer to Questions 9–4 and 9–5, there may be some value in the Australian

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12 Discussion Paper [8.84].

13 *Western Australia v Ward* (2000) 99 FCR 316 [865].

14 *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth), reg 8(5) (***PBC Regulations***). See also reg 3(2).

Government developing:

(a) a connection policy setting out the Commonwealth's responsibilities and interests in relation to consent determinations; and

(b) nationally-consistent, best practice principles to guide the assessment of connection in respect of consent determinations.

43. In answer to Question 9–6, 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.

44. In answer to Questions 9–7 to 9–11 regarding native title application inquiries by the NNTT, we support any proposals that make such inquiries more effective and efficient.

CHAPTER 10: AUTHORISATION

45. We agree with Proposal 10–1. Section 251B should be amended to allow native title claim groups, when authorising an application, to use a decision-making process agreed on and adopted by the group. Native title claim groups should be able to determine their own decision making processes. We agree with the analysis in [10.10]–[10.16] of the Discussion Paper.

46. We agree with Proposal 10–2. The Australian Government should consider amending s 251A to similar effect. The decision making processes set out in the *NTA* should be consistent with each other.

47. For this reason, the Australian Government should also consider amending regs 8(3) and 8(4) of the *PBC Regulations* to similar effect. These regulations deal with decision making by a native title group regarding its consent to proposed native title decisions by a PBC.

48. We agree with Proposal 10–3. The *NTA* should be amended to clarify that the claim group may define the scope of the authority of the applicant. Native title claim groups should be able to determine their own decision making processes.

49. In answer to Question 10–1, the *NTA* should include a non-exhaustive list of ways in which the native title claim group might define the scope of the authority of the applicant.

50. In answer to Question 10–2, we consider that the *NTA* might contain remedies for a

breach of condition of authorisation apart from replacement of the applicant under s 66B. As we noted, in Frith and Tehan at [84] and [85], s 66B provides a fairly blunt tool for dispute resolution. Other less cumbersome remedies in the *NTA* might be better suited to effective and efficient dispute resolution and ensuring the applicant acts within the scope of its authority.

51. Such remedies might include legal representatives or the Court declining to act if not satisfied that the applicant has the appropriate authority. However, care should be taken to avoid the process becoming more 'complex, adversarial and ... expensive to administer'.[15]

52. We do not agree with Proposal 10–4. The *NTA* should not 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. In our view, any benefit achieved would not outweigh the potential costs to the system incurred, meaning the native title process would become more 'complex, adversarial and ... expensive to administer'.

53. We agree with Proposal 10–5. The *NTA* should be amended to provide that the applicant may act by majority unless the terms of the authorisation provide otherwise. We agree with the analysis set out in [10.39]–[10.41] of the Discussion Paper. Native title claim groups should be able to determine their own decision making processes.

54. We agree with Proposal 10–6. Section 66B of the *NTA* 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.

55. We agree with Proposal 10–7. Section 66B of the *NTA* should provide that 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.

56. In each of the cases addressed in Proposals 10–6 and 10–7, where removal or replacement of a member of the applicant is not controversial or disputed, a straightforward removal or replacement procedure should be available.

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15 Discussion Paper [10.30].

CHAPTER 11: JOINDER

57. In answer to Question 11–1, s 84(3)(a)(iii) of the *NTA* should 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).

58. We agree with Proposal 11–1. The *NTA* 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. This would limit the involvement in the litigation of such parties only to matters affecting their interests. They would not be involved in the connection inquiry, which potentially would help limit the cost and time of the proceedings.

59. This proposal should be extended to expressly give the Court the ability to limit a party's involvement in proceedings to participating in them only in respect of s 225(c) and (d).[16]

60. We agree with Proposal 11–2. Section 84(5) 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 could demonstrate a clear and legitimate objective to be achieved by joinder to the proceedings.

61. Requiring the Federal Court to consider whether the claimant or potential claimant has a clear and legitimate objective in joining is likely to reduce the number of parties involved in, and the cost and time of, native title proceedings.

62. We agree with Proposal 11–3. The *NTA* should be amended to allow representative 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).

63. Again, this proposal should tend to reduce the number of parties involved in proceedings, and reduce the cost and time involved.

64. The amendment should expressly state that a PBC can become a party or be joined in order to represent the interests under traditional laws and customs of the native title holders whose native title it manages outside the area subject to a previous determination

[16] See *Watson v Western Australia (No 3)* [2014] FCA 127.

of native title. Determinations do not necessarily recognise all of the potential native title rights and interests of a particular group.

65. We agree with Proposal 11–4. The *NTA* 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).

66. This proposal merely clarifies that the Court's discretion to dismiss a party from native title proceedings can be based on reasons other than those described in s 84(9).

67. We agree with Proposals 11–5 and 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 join, or not to join, a party under s 84(5) or (5A), or a decision to dismiss, or not to dismiss, a party under s 84(8) of the *NTA*.

68. The *in rem* nature of native title proceedings means that it is important to ensure that all persons are given an adequate opportunity to represent their interests.

69. We agree with 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.