19 January 2015

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

via email nativetitle@alrc.gov.au

Dear Ms Wynn

Re: Review of the *Native Title Act* 1993– Response to the Discussion Paper

The National Farmers' Federation (NFF) welcomes the opportunity to provide a formal submission in response to the Discussion Paper released by the Australian Law Reform Commission (ALRC) to support the Commission's current review of the *Native Title Act 1993* (The Act).

NFF is the peak national body representing farmers and agriculture across Australia. On issues related to Native Title, NFF represents the views and interests of pastoralists, as respondents to Native Title claims. NFF's member organisations are among those that, with Federal Government Funding, provide information, advice and support to Native Title Respondents.

From a respondent's perspective, we recognise that where native title co-exists with pastoral leases, it does not diminish the rights of the leaseholder. In any reform to the Act, this fundamental principle must be upheld.

The following sections present NFF's response to key proposals and questions put forward in the discussion paper, including those proposals relating to changes to section 223 of the Act, and addressing the issue of overlapping claims.

Presumption of continuity

NFF welcomes the ALRC's proposed position not to recommend a presumption of continuity.

However, NFF is strongly opposed to the ALRC's alternative solution of amending the definition of native title to remove the "traditional requirement" [Proposal 7-1] and proposals to remove the continuity element [Proposals 5-3 and 5-4].

Native title rights and interests are those rights and interests held by Aboriginal people that survived the acquisition of sovereignty. To remove the traditional component and allow for rights and interests to "comprise rights in relation to any purpose" [Proposal 8-1] is unacceptable to the pastoral industry and would radically transform the concept of native title.

Physical occupation & connection

Despite the fact that some commentators have suggested that there are now established principles of law in respect of connection, the NFF's view is that there are avenues to be explored that may provide further clarity. Where matters are determined by consent, pastoralists are often left not understanding how connection has been established over the whole of a claim area when physical occupation cannot be established for many years over their individual properties.

There are two possible, not necessarily mutually exclusive, solutions to this:

1. funding for test cases to ventilate the issues on connection from a pastoralist's perspective;
2. guidelines on connection rules issued by the NNTT specifically for pastoral respondents.

While these avenues may fall outside the direct remit of the Terms of Reference of the ALRC's review of the Act, they are opportunities that in NFF's view require more detailed exploration.

Commercial activities

NFF is concerned with the ALRC's view that changes to section 223 of the Act to provide statutory confirmation of commercial activities would support the unlocking of the "economic potential" of native title [Proposal 8-1]. It is not clear as to the intended benefits or outcomes of "unlocking economic potential" and the implicit assumption that a change to the Act is the best approach to achieve this outcome.

In NFF's view it is difficult to see how commercial rights could be exercised and exploited on pastoral land when the rights of the other interest holders take priority and cannot be diminished by native title holders. In NFF's view, Indigenous people require a proprietary interest in land to derive a real economic benefit. Native title does not and cannot deliver that outcome.

NFF recognises that *Akiba* provides a common law foundation to enable traditional trading or commercial interests to be recognised in appropriate circumstances. The commercial exploitation of activities in accordance with traditional law (for example fishing, hunting and gathering) is one thing, but to expand the range of activities to encompass a broader suite of commercial rights for any purpose is not supported by NFF.

In practice, the premise of the ALRC's argument for statutory confirmation is the unwillingness of state respondents to consistently accept that native title can include rights and interests of a commercial nature.

NFF's view is that the case law provides sufficient guidance on the issue of commercial interests and activities and that statutory confirmation is unwarranted.

Overlapping claims

NFF was pleased to see the Commission recognise the problem of overlapping claims which continues to frustrate the timely resolution of native title claims. The problem of overlapping claims was also recognised in the submission by the Federal Court of Australia, who highlighted that "*late applications for joinder, in particular by indigenous parties who, once joined may not consent to a determination even where all other parties have agreed or who file overlapping claims late in consent determination negotiations or trial preparation, have the capacity to cause significantly delay*".

However, the ALRC has not formulated any proposals to address the problem. The proposals in relation to Traditional Laws and Customs [Proposals 5-1 to 5-4] would in NFF's view only encourage more overlapping claims. Sub-groups [or dissident groups] could easily take advantage of a more relaxed requirement as to the source of their connection to land to lodge overlapping claims.

Joinder provisions

Ultimately, the resolution of a native title claim (whether reached through consent or litigation) results in the formation of a relationship between pastoralists and the native title holders. Both will be responsible for dealing with native title rights and interests in the future, and both should have a role in formulating the determination.

NFF's view is that the current discretion provided to the Federal Court is appropriate and that amendment is not required. The court can only join a person as a party if that party's interests may be affected and it is in the interests of justice to do so. Persons who approach the court late for joinder without an explanation for the delay will on the basis of present case law not be joined.

The age of many of the unresolved claims means that persons who acquired interests post notification may be unaware that proceedings are on foot. If a person has an interest that might be affected, and provided the application for joinder is made promptly after acquisition of the interest, it should not matter that the proceedings are "well advanced".

An option for respondents to limit their participation (Chapter 11)

NFF does not support a limitation of involvement that does not allow pastoralists a right to be involved in proceedings to fully protect their interests.

While Proposal 11-1 suggests making limited participation optional, in NFF's view there is a considerable risk that pastoralists are not fully aware of the implications associated with limited participation.

While NFF supports attempts to make the process more efficient, NFF requires understanding as to how respondent's interests would be protected throughout such a change of involvement in proceedings.

NFF supports Proposal 11-3. Such an amendment would enable farming organisations to become respondents, which would support transition in circumstances such as when pastoral land is transferred. NFF notes that Proposal 11-3 should not limit the opportunity for individual pastoralists to be full party to proceedings.

Retrospective or prospective operation of any changes

NFF does not support any retrospective operation of changes to the Act that would prejudice or provide cause to re-open settled claims. This would result in considerable uncertainty for all parties to settled claims. Indeed, NFF has advocated that changes to the Act are required to preserve determinations where the decisions of the court refine interpretations over time. The provisions in section 13 of the Act are sufficient in the interim to ensure that determinations are dealt with in a manner which is in the interests of justice.

Some recent decisions (for example, the High Court's decision in Western Australia v Brown [2014] HCA 8 (Brown)) have generated a degree of uncertainty for claims that have been resolved by consent determination. Many consent determinations across Australia have been made on the basis that improvements on pastoral leases extinguish Native Title. Generally, a 'buffer zone' around the perimeter of improvements such as bores and fences was included in the schedule to a consent determination as an area where Native Title was extinguished. The decision in Brown effectively removes this 'buffer zone'.

These circumstances may present the opportunity to revisit previous determinations that included extinguishing buffer zones. In NFF's view, the changes to the legislation should be considered to preserve previous consent determinations from the retrospective application of changes to the law.

Retrospective changes would provide incentive to groups who have already obtained determinations to apply for variation thus increasing the number of claims in the system.

Should you wish to discuss NFF's submission further, please do not hesitate to contact Ms Jack Knowles, Manager Natural Resources Policy by telephoning 02 6269 5666 or by email jknowles@nff.org.au.

Yours sincerely

SIMON TALBOT
Chief Executive