Yamatji Marlpa
ABORIGINAL CORPORATION

Our Ref: GEN033
Office: Perth

19 January 2015

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

By email: nativetitle@alrc.gov.au

Dear Sabina

SUBMISSION IN RESPONSE TO THE AUSTRALIAN LAW REFORM COMMISSION'S *REVIEW OF THE NATIVE TITLE ACT 1993* DISCUSSION PAPER

Thank you for the opportunity to provide a submission in response to the above Discussion Paper.

Yamatji Marlpa Aboriginal Corporation (YMAC) is the Native Title Representative Body (NTRB) for the Pilbara, and Murchison-Gascoyne (Yamatji), regions of Western Australia.

The organisation has a representative area of almost one million square kilometres and represents over 20 native title claimant groups, each with their own language, culture and traditions.

YMAC is a not-for-profit organisation run by a Board of Directors comprising twelve Traditional Owners; six drawn from the Pilbara region and six from the Yamatji region. YMAC provides a range of services to its members including legal representation throughout the native title claim process and future act negotiations; community and economic development, and natural resource management.

We first provide an Executive Summary of our position regarding this review of the *Native Title Act 1993* (the Act).

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Executive Summary

YMAC accepts the broad thrust of the Australian Law Reform Commission's (ALRC's) investigations, which we see as succinctly captured in the following part of paragraph 2.20 of the Discussion Paper:

> The ALRC does not propose that there should be comprehensive redefinition of native title under the Act as this may exacerbate the uncertainties experienced by all participants in the native title system. Nor does the ALRC suggest removal of the current claims-based process for native title determinations. Instead, the underpinning model of native title and the claims process is retained, while seeking to refocus of the core elements of native title law to facilitate an effective determination process.

That said, we clearly appreciate that this particular review is quite constrained[1]. We agree with the National Congress of Australia's First Peoples that the inquiry in fact addresses 'limited issues'[2], whereas a comprehensive review of the Act is needed. YMAC further endorses the calls by the then Social Justice Commissioner in 2010 and 2011 to look afresh at issues such as extinguishment by prior inconsistent grant, and the future act regime.[3]

We have considered the ALRC's Discussion Paper in full, some draft submissions from other stakeholders in response to it, and a range of other documents relating both to earlier stages of this ALRC process[4] as well as earlier contemplations of similar reforms.[5]

YMAC conducted this preparatory work very much aware of the great potential for common ground between, for example, industry and Aboriginal peoples regarding this reform agenda. As the ALRC set out at paragraph 3.36 of the Discussion Paper:

> Stakeholders representing the minerals sector also emphasised the importance of timely and expeditious resolution of native title claims...

After in some cases extraordinary lengths of time since first lodging claims under the Act, Aboriginal and Torres Strait Islanders, too, crave timely resolution of the extent of their rights. But, with clients who have and continue to be victims of profound injustice, we also underline the ALRC's comment that:

> However the value of timeliness must not be placed ahead of the fundamental requirement of justice.

After a lengthy process of research and consideration, YMAC has in many respects arrived at similar conclusions to the ALRC, although not always by way of similar reasoning.

We agree that any legislative amendments flowing from this review should be prospective in effect, applying only to undetermined claims.

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[1] See the scope of the inquiry at paragraph 1.17 of the Discussion Paper, for example.
[2] See Discussion Paper paragraph 3.113.
[3] See Discussion Paper paragraph 3.114.
[4] Including submissions in response to the ALRC's Issues Paper by Cape York Land Council; the National Native Title Council; the Western Australian Government; the Law Society of WA; Australian Institute of Aboriginal and Torres Strait Islander Studies (AIATSIS).
[5] Including documents relating to Senator Rachel Siewert's draft Private Member's Bill of 2010; her final such Bill [*Native Title Amendment (Reform) Bill 2011*]; the then Australian Government's *Native Title Amendment Bill 2012* Exposure Draft; the final such Bill; the AIATSIS submission in response to the [Deloitte's] Native Title Organisations Review.

Formal proposals and questions in the Discussion Paper

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?

SEE QUESTION 2-2

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?

YES; FOR ALL UNDETERMINED CLAIMS.

Although highly appealing from the point of view of potential social justice outcomes, in the end YMAC's opinion is that the common law presumption – i.e. that legislation does not have a retrospective application – should be applied by the ALRC as part of its final recommendations.

Australia has seen decades of land-rights-related litigation, particularly in the 23 years since *Mabo [No 2]*[6]. There have been over 300 determinations regarding the existence or absence of native title, and countless negotiated outcomes as part of the future acts process. The destabilisation associated with the prospect of re-opening determined claims would be too divisive in the broader community, which would massively reduce or even eliminate the chances of such reforms ever seeing the light of day.

YMAC would, however, strongly support the ALRC's apparent thinking about 'transitional arrangements' for any legislative changes flowing from this process, namely that they should apply to current native title proceedings but not to determinations already made as at the time the new changes become law.[7]

Application to current but undetermined claims would not be truly contrary to a presumption against retrospectivity, particularly as the changes thus far contemplated by this review are mostly to clarify the current law. Further, if the changes were instead only applied to new claims, it may create an incentive for some existing claimants to lodge new applications to pursue the perceived benefits of the amendments.

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.

SUPPORT

[6] *Mabo v Queensland [No 2]* (1992) 175 CLR 1.
[7] Discussion Paper paragraph 2.79.

In previous submissions about proposals to change the Act, YMAC has indicated support for a 'presumption of continuity'. We still support the objectives of that notion but, also as previously set out in those submissions, we view other changes to native title definitions as more pressing and potentially just as effective as a general 'shift in the onus of proof'. In the end therefore, we have arrived at a similar conclusion to that expressed by the ALRC in paragraph 2.64 of the Discussion Paper:

> The ALRC does not propose that there be a presumption of continuity, as it considers that it is not necessary to introduce such a presumption in light of other proposed reforms to the definition of native title in the *Native Title Act*.

Our support for the above is based upon our support for the recommended reforms in Chapter 5 of the Discussion Paper in particular. YMAC supports the ALRC's various recommended clarifications – and in some cases minor extensions – to the definition of native title in section 223, which would clearly allow:

- traditional laws and customs to adapt, evolve and otherwise develop;
- traditional laws and customs to be transferred between groups, in accordance with the traditional laws and customs of both groups relating to such transfers, even if the groups are not part of the same normative society; and
- the courts to disregard even substantial interruptions to the transmission of traditional laws and customs, if the normative society in question has continued to exist from sovereignty to current day, albeit in a form that reflects the substantial interventions of, for example, actions of a State or Territory government.

We respectfully part ways with the ALRC in relation to much of Chapter 7, but primarily because in our view the outcomes sought in that chapter are more effectively achieved with the reforms in Chapter 5 (with which we respectfully agree).

YMAC supports the ALRC's recommendation that the Act be amended to confirm that if a native title claim is demonstrated to include the rights to access or even trade natural resources, then those rights may validly be exercised in modern, commercial ways as well.

We support, in principle at least, many of the ALRC's various proposed ways of accelerating claims resolution, in Chapter 9. In particular, we accept the need for better regulation of lawyers practising in native title, but we would apply any regulatory response to non-lawyers too. YMAC offers for consideration a model for regulation which we have been advocating along with the National Native Title Council (NNTC) for some years.

In the main, YMAC supports the ALRC's recommendations on authorisation of native title claims, and we are similarly broadly supportive of the proposals relating to joinder of parties to claims.

This document concludes with some brief comments about the approach to negotiations and litigation that has been adopted by the Western Australian Government in recent years, given the ALRC's report has extracted a number of quotes from the WA Government submission on the Issues Paper.

We agree with the ALRC that an important statement of the current law in this respect comes from the joint judgement of Gaudron and Kirby JJ in *Yorta Yorta*[8], where their Honours found that laws and customs could be adapted but still be considered traditional in these circumstances:

> 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.[9]

YMAC agrees with stakeholders such as the Goldfields Land and Sea Council however, that the risk of an over-focus on 'tradition' is the potential 'to ingrain and incentivise a cultural conservatism in Indigenous communities, effectively discouraging (even punishing) processes of cultural change and renewal that might otherwise occur'.[10]

We further agree with the Law Society of WA[11] that in light of cases like *Bodney v Bennell*[12], statutory clarification would be helpful to all relevant stakeholders. In terms of a proposed form of words in this regard, see further our comments about Proposal 5-3.

YMAC also supports the ALRC's view, referencing s 13(5) of the *Native Title Act*, that:

> Explicit recognition that traditional laws and customs may evolve, adapt or develop is also appropriate to ensure that further adaptation or evolution of traditional laws and customs following a determination does not provide grounds for variation or revocation of a determination of native title.[13]

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.

SUPPORT

YMAC agrees with the ALRC's arguments in support of the above proposal.

The current law as we understand it[14] is that it is permissible for one group to transfer traditional laws and customs to another group where both the 'giving' and 'receiving' groups:

- have laws and customs that allow the transfer of laws and customs, and they in fact have been transferred in this case; and
- are part of the same normative society (in other words, they are say two sub-groups of what is or will ultimately need to be the one native title claim).

However there is doubt about the ability to transfer from one society to another. There would seem to be no good reason to prevent this being considered an effective transfer if the relevant

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[8] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422.
[9] *Yorta Yorta* at [114].
[10] See Discussion Paper paragraph 5.26.
[11] Law Society of WA's submission in response to the Issues Paper's Question 10(b), this part of which appears at the top of page 9 of that submission.
[12] [2008] FCAFC 63.
[13] Part of paragraph 5.31 of the Discussion Paper.
[14] E.g. *Sampi v Western Australia* [2010] FCAFC 26.

traditional Aboriginal laws and customs allow it and such transfers have in fact taken place. YMAC would therefore support the relatively minor additional step of amending the Act to explicitly allow such a transfer between two groups ultimately found not to be a part of the same normative society, so long as both the 'giving' and 'receiving' groups have laws and customs that would permit – and have in fact permitted – such a transfer.

A proposed section 223(2A) capturing all of the above might read as follows:

(a) Without limiting subsection (1), native title rights and interests may be possessed by an Aboriginal or Torres Strait Islander group under their traditional laws and customs in situations where the relevant native title rights and interests have been transmitted or transferred from other Aboriginal or Torres Strait Islander groups in accordance with the traditional laws and customs of both of the transferring and receiving groups.

(b) Paragraph (a) applies regardless of whether or not the relevant Aboriginal or Torres Strait Islander groups were part of the same society at the time of transfer.

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.

IN PRINCIPLE SUPPORT, but we suggest different wording.

We broadly agree with the analysis that led the ALRC to make this proposal. Often of course the difficulty with the second matter above amounts to what AIATSIS described powerfully as:

> ...a form of evidentiary discrimination against those groups who had little or no interaction with non-Indigenous anthropologists and scientists throughout the 19th and 20th centuries...[15]

YMAC, with great respect, fully adopts the following position of the Law Society of WA on this matter, including their suggested alternative wording to address the issue:

> 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.
>
> If that analysis leads to a conclusion that native 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...
>
> 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

[15] AIATSIS's submission in response to the Issues Paper's Question 18, this part of which appears at the top of page 46 of that submission.

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

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 [Law] 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**."[16]

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.

SUPPORT; see the wording we suggest in response to Proposal 5-3.

Consistently with our position on Proposal 5-3, and for a similar rationale, YMAC supports Proposal 5-4.

[16] Law Society of WA's submission in response to the Issues Paper's Questions 18 to 21, pages 9 and 10 of that submission.

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'.

SUPPORT

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 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 the things done by the Crown, a statutory authority of the Crown, or any holder of a lease.

SUPPORT

YMAC agrees that the situation is very clear for section 223 at least; the section contains no reference to physical occupation, or continued or recent use. The case law is similarly clear that those matters are relevant for native title matters, but not essential criteria. We agree with the ALRC, therefore, that no clarification is required in section 223.

We further agree that the above situation is inconsistent with the wording in two places of the Act, and that therefore those two other sections – sections 62(1)(c) and 190B(7) – need to be amended to delete the references to 'traditional physical connection'.

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.***

RESPECTFULLY, WE OPPOSE; these goals are better achieved with other changes.

While we do not question the motivations behind the ALRC's analysis that leads to the above proposal, with great respect we do not support the proposed deletion.

Throughout the Discussion Paper the ALRC rightly wrestles with the tension between the potential for legislative amendments to improve outcomes, and the potential for those same legislative amendments to introduce new uncertainties and associated bouts of litigation.

YMAC's view is that the problems do not lie with the term 'traditional' as such, which in normal parlance means something handed down from the past. The problems in fact stem from the ways the term has been interpreted, such as to require continuity from sovereignty, which is something not necessarily flowing from the ordinary meaning of 'traditional'. The other amendments proposed as discussed in relation to Proposal 5-3 in particular can deal with these problems.

The danger of removing the word 'traditional', on the other hand, is that it may suggest that native title claims could be supported by mere 'historical' (namely, post-settlement) connection and / or newly invented laws and customs.

The approach we discuss in response to Proposal 5-3 in particular, therefore, would be a much more prudent, but no less effective, approach. Deleting 'traditional' entirely would either leave the Act without that concept, or allow the courts to attempt to replace that existing jurisprudence with one or more other concepts.

We should add that we are not aware of any reservations about the word 'traditional' amongst YMAC's members, and in fact we understand from some other NTRBs (e.g. Cape York Land Council) that there is significant affection for the term.

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

NO

As others have noted, the definition of native title claim group in the Act is circular, but it is also reasonably clearly expressed in the case law, so changing it may cause unreasonable consequences.

The Act should facilitate as much self-determination as possible – and seek to reflect the realities of the diversity of Aboriginal peoples – by continuing to allow for native title claim group identification and composition to be exclusively the preserve of the rules of the relevant normative society.

YMAC would add that the problem with some current interpretations of section 190B(3) is the perceived requirement that it can be objectively ascertained, from the wording of the Form 1 description, whether a particular person is in or out of the claim group. There are suggestions in this context that general descriptive qualifiers such as requirements for self-identification, and acceptance under traditional laws and customs, are too uncertain to achieve compliance with section 190B(3).

Final native title determinations, however, often do include such qualifiers. The effect of those interpretations of section 190B(3), therefore, is that the claim group descriptions of some final determinations would not be considered to pass the current registration test. This troubling anomaly should be corrected by deleting section 190B(3)(b).

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."***

AS PER OUR RESPONSE TO PROPOSAL 7-1.

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)?

SIMILARLY; THESE GOALS ARE BETTER ACHIEVED WITH OTHER CHANGES.

With great respect, our view is that this question and the issues associated with it in the Discussion Paper, are better dealt with by way of the amendment we proposed above 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)?

AS PER OUR 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?

AS PER OUR 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.***

AS PER OUR RESPONSE TO QUESTION 7-2.

In the event the ALRC is minded to recommend a clause like the above in its final report, we would strongly urge the deletion of the words 'Unless it would not be in the interests of justice to do so' because we cannot presently see how it would ever be in the interests of justice to either not have regard to the matters in (a) or to give undue weight to the matters in (b).

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.***

SUPPORT

YMAC agrees with the ALRC that the High Court result in *Akiba*[17] is strong, clear and recent authority for the propositions set out in Proposal 8-1. Apart from this section of the Discussion Paper of course, we note that we found the AIATSIS submission in response to the Issues Paper particularly authoritative in this area.[18]

Elsewhere – such as in Chapter 6, regarding section 223 – the ALRC has rightly found the case law to be clear enough not to warrant further clarification by legislative amendment.[19] But, also rightly in our view, the ALRC has recommended Proposal 8-1 as a 'confirmation'[20] of the law, given the special importance of commercial opportunities for native title claimants.

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[17] *Akiba v Commonwealth* (2013) 250 CLR 209.
[18] See pages 41 – 43, and Attachment 1, of that submission.
[19] Discussion Paper paragraph 6.23.
[20] We note page 157 of the Discussion Paper, and footnote 54 on that page in particular.

We would strongly support paragraph 8.42 of the Discussion Paper, which we set out below for convenience, and in particular the third point (which is very relevant in WA – see further below):

> The ALRC considers that statutory confirmation of the case law in *Akiba* is warranted because it:
>
> - would accord with the Preamble and Objects of the *Native Title Act*;
> - may assist in unlocking the economic potential of native title; and
> - may assist in ensuring that the practice of all parties is in accordance with the stated case law and in accordance with the Preamble of the Act.

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

SUPPORT

In short, YMAC agrees, principally for the reasons expressed by the ALRC as below:

> Statutory definitions of 'commercial activities' and 'trade' may introduce inflexibility which may not be warranted, and may actually be unhelpful, given the fact dependent nature of native title claims.[21]

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?

YES

Although it may be considered an extension of the current law as set out by the ALRC in the Discussion Paper, YMAC prefers that the Act explicitly recognise the potential for native title to include the protection or exercise of cultural knowledge.

We do not, however, argue that the Act create a new form of (for example) intellectual property that is unconnected to the relevant land or waters. In that sense it could perhaps be said we respectfully prefer that Kirby J's (dissenting) approach[22] in *Ward*[23] be adopted, as a matter of policy, in any contemplated amendments to the Act.

Such an approach would effectively mean that the specific mention of cultural knowledge in section 223(2)(b) would be justified on the basis that it would be qualified by the phrase 'in relation to' in the opening words of section 223(1). We would respectfully then assume the courts would be empowered to apply Kirby J's test that any claimed right relating to cultural knowledge would need to have 'a real relationship, or connection, [with] the relevant land or waters'[24] in order to be a part of any ultimate native title determination.

YMAC would add that, similarly to our response to Proposal 8-2, 'cultural knowledge' should not be defined in the Act.

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[21] Part of paragraph 8.74 of the Discussion Paper.
[22] As set out in paragraph 8.87 of the Discussion Paper.
[23] *Western Australia v Ward* (2002) 213 CLR 1.
[24] See again paragraph 8.87 of the Discussion Paper.

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

WE HAVE NO FURTHER SUBMISSIONS at this time.

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?

WE HAVE NO FORMAL SUBMISSIONS at this time.

At this stage however we would suggest the ALRC consider the ways in which the court can facilitate hearings and determinations of specific questions concerning such matters without the requirement of agreement as to all facts in issue, or without requiring any likelihood that such a hearing will resolve all issues in dispute. This is particularly the case for overlaps and claim group issues, given that the NNTT inquiry process discussed below does not appear to be utilised in those areas (presumably because it only results in non-binding decisions).

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

PUBLIC ACCESS SHOULD NOT BE THE 'DEFAULT'.

We would firstly question how much of the material generated through the connection process could properly be described as 'archival material'. In YMAC's experience, such material largely comprises information that has been provided by and belongs to either individual members of the native title group or the group collectively. On the conclusion of the relevant legal proceedings, the material should be returned to its rightful owners.

As the ALRC alludes to in paragraph 9.15 of the Discussion Paper, some information has been provided specifically for use as part of the native title proceedings, in which case it will appropriately be protected by legal professional privilege (until such time as it is used in open court, of course).

Paragraph 9.16 of the Discussion Paper correctly adds that some of the information will be culturally sensitive, or refer to personal or family matters.

YMAC would add that after a successful native title determination, it is likely the Prescribed Body Corporate (PBC) for the relevant lands and waters would require control of or at least exclusive access to this material in order to continue to perform its 'intra-claim' functions.

In short, we would oppose any moves to create laws or procedures that asserted or implied that the 'general' or 'default' position in relation to so-called archival material was to allow full public access. We accept that there would be that the broader Australian community could gain from studying a lot of this material, but access to it must in the first instance respect cultural sensitivities and privacy.

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?

CONSIDERATION SHOULD BE GIVEN TO REQUIRING UP-FRONT TENURE ANALYSIS MORE OFTEN.

The State of Western Australia has a number of approaches to native title negotiations and litigation, about which we will have more to say further below.

For now, it suffices to say that WA's approach to tenure analysis – deferring it until after connection material has been reviewed in order to form a view about progressing to the next stage of potential consent determination negotiations – has the effect of causing unreasonable delays.

Particularly in our Yamatji (Murchison and Gascoyne areas), this approach has the effect of requiring that costly and time-consuming connection work is done over a number of areas of land where native title may ultimately be shown to have been extinguished some years ago, by prior inconsistent grant of, for example, common law lease.

At very least, to save time, such tenure searches should be carried out concurrently with assessment and negotiation over connection issues. We understand however that much of the problem lies with the lack of tenure analysis resources within the State Government, the solution to which of course is either more funding, or a willingness by the State not to seek to prove historical extinguishment.

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

YES, IN PRINCIPLE

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?

YES, IN PRINCIPLE

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?

YES TO REGULATION, BUT NOT JUST FOR LAWYERS.

In YMAC's now 20 years as a NTRB, we have witnessed a disturbing amount of misconduct from third parties, harming our Yamatji and Pilbara members. But our concerns in this regard have been as much about the actions or omissions of (unregulated) non-lawyers as they have been about some of the (mostly generically regulated) members of the legal profession.

For some years, we have worked with the NNTC to develop proposals to regulate private agents (other than NTRBs / Native Title Service Providers) who are involved with native title future act

agreements. Please see Annexure 1[25] for a mid-2012 example of that work – an NNTC Issues Paper – which has been put to various stakeholders (including the Deloitte review) in recent years.

While many of our past concerns have related to future act negotiations, the same problems remain with advice and negotiations related to native title claim matters.

In summary, we advocate for measures that include:

- establishing a register for lawyers and other agents seeking to act on behalf of native title parties, committing those lawyers and agents to best practice standards, demonstration of appropriate expertise and commitment to an enforceable code of conduct; and

- a regulatory limitation on the fees or commissions and the kinds of fees and commission (e.g. share of native title benefits received) that may be imposed by lawyers and agents in the context of future act negotiations.

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

MAY BE BENEFICIAL

It would appear to us that the increased use of inquiries would be useful in overlapping claim disputes or with disputes about claim group descriptions.

YMAC agrees with the ALRC that it appears at least that the NNTT has rarely undertaken inquiries in the past, although we have no information as to why that has been so.

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?

NO

Given the inquiry process does not result in binding decisions, we submit that there would be no point requiring any of the parties to participate in an inquiry against their will.

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?

QUALIFIED YES

Yes, subject to our answer to Question 9-8; and cultural reasons such as sorry time should also be permissible excuses for attending an inquiry. Similarly, at an inquiry, witnesses should not be required to answer questions that would be in breach of the witnesses' 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?

NO. With respect, in our view, potential claimants already have adequate access to the court. They can simply apply for joinder, and then seek an inquiry.

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[25] Minus an 'Attachment 1' referred to therein, which is no longer current.

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

WE HAVE NO FURTHER SUBMISSIONS at this time.

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.

SUPPORT BOTH PROPOSALS

We respectfully agree with the ALRC's articulation of the practical complexities associated with the current section 251B, and their suggested solution to the problem. YMAC also agrees that although strictly beyond the scope of this particular inquiry, section 215A (authorisation of Indigenous Land Use Agreements) should be amended too, to keep the two sections consistent.

YMAC, with great respect, fully adopts the following comments of the Law Society of WA on this matter, from their submission in response to the Issues Paper:[26]

> It would, however, 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.
>
> 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 [Law] 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 as noted in paragraphs [247-8] of the Issues Paper. 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.

[26] Page 11.

YMAC would go further and recommend that changes such as the above are further mirrored in the *Native Title (Prescribed Body Corporate) Regulations 1999*.

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.

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.***

SUPPORT PROPOSAL 10-3

YES TO QUESTION 10-1, but only if non-exhaustive.

We agree that the Act should be amended to adopt the approach of French J in *Daniel* [27], which is a view that has yet to be confirmed in the Full Court of the Federal Court or the High Court.

In answer to Question 10-1 in particular though, YMAC is not particularly supportive of the idea of listing ways in which the claim group might limit the authority of the applicant. In the event the ALRC is minded to recommend a clause like the above in its final report, we would strongly urge that it be very clearly drafted as a non-exhaustive clause.

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?

WE CAN SEE NO NEED FOR A FURTHER 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.

SUPPORT, and we agree that the Register of native title claims would be an appropriate place.

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.

RESPECTFULLY, WE DO NOT SUPPORT. Where the terms of authorisation are silent, the applicant should be required to act jointly.

YMAC understands the above to reflect the current law, and the advantage of this approach is that potentially divisive majority decisions are avoided unless specifically authorised by the process that set up the scope of the applicant's authority.

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[27] *Daniel v Western Australia* [2002] FCA 1147 (13 September 2002).

We appreciate the position that having majority decisions as a default will often make decisions faster, but having the need for consensus decisions as the default instead incentivises the relevant claim group to arrive at stronger, more lasting, decisions.

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.

SUPPORT, with further recommendations.

YMAC supports amending the Act to given the remaining members of the applicant the capacity to continue to act, unless the terms of the authorisation provide otherwise.

YMAC would also support amending the Act to facilitate a subsequent process whereby any remaining member of the applicant group (or any member of the claim group, where no members of the applicant group are alive and willing to act) files a notice with the court removing those unwilling/unable members of the applicant, and if desired nominating a replacement person or persons who have been put forward by the claim group as the result of an appropriate process for nominating such persons.

The notice with the court should be filed by the applicant's representative, and accompanied by the written consent of the person/s being removed, or an affidavit relating to their death if relevant.

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.

QUALIFIED SUPPORT

YMAC supports this proposal, but the court would need to consider whether there was evidence that the designated person had previously been duly authorised to contingently act in this way. The court should have to make an order adding the designated person as a member of the applicant, but presumably it would normally be possible 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)?

QUALIFIED SUPPORT

YMAC agrees that the current section 84(3)(a)(iii) is too broad, and essentially agrees that it should be amended to be limited as expressed in the above proposal. We would prefer, however, that those who fit within section 84(3)(a)(iii) should only automatically become parties under section 225(c) or (d) [i.e. only as far is needed to represent their interests in the land or water in question], but that leave should be required in relation to section 225(a) or (b) [where they then would have the capacity to challenge issues like connection claimed by native title claimants etc.].

We would also suggest the Act be further amended so that third party respondents whose interest derives from Crown grant should generally not be joined to such proceedings at all. Absent exceptional circumstances, such parties should be satisfied that their interests are fully represented by the state or territory respondent.

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)?

NO COMMENT on this NSW-specific matter.

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.

OUR RESPONSE TO QUESTION 11-1 IS SUBMITTED AS THE PREFERRED APPROACH, but as an alternative we would agree to 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.***

QUALIFIED SUPPORT

YMAC would suggest that (a) above be improved with the addition of a requirement that an existing member of the applicant, or existing member of the claim group, be required to demonstrate a clear and legitimate objective before being joined to proceedings.

We support (b) as originally expressed in the proposal above.

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).

QUALIFIED SUPPORT

In the ALRC's discussion of this proposal it is clear that their motivation is to encourage representative organisations to participate in proceedings instead of their affected members, but the proposal as expressed above does not capture that important intention.

At this stage, in YMAC's view, Proposal 11-3 should only be supported if the relevant representative bodies would have to be joined in substitution for all relevant individual members within the claim boundary. Or at least, that should be the case in the absence of exceptional circumstances i.e. at the discretion of the court.

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).

SUPPORT

YMAC believes this situation is already quite clear, but does not oppose making it explicit.

***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.**

***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.**

SUPPORT IN BOTH CASES

Yes, provided that leave is required, as is usually the case with appeals against interlocutory orders.

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.***

SUPPORT

Western Australian Government's recent approach to native title

As we have flagged a number of times above, we must comment on the impact on our operations – and in particular the efficiency of advancing claims – of the Western Australian Government's approach to native title negotiations and litigation in recent years.

We are compelled to do so partly because the ALRC has reproduced, in the Discussion Paper, a number of assertions from the WA Government's submission in response to the Issues Paper. In our view, without challenge, there is a risk those statements will be treated as fact.

Key WA Government quotes and contentions referenced in the Discussion Paper include the following:

- the WA Government argued that connection requirements no longer constituted a significant difficulty for claim resolution (paragraph 2.47; and see also paragraphs 3.41 and 3.47 below);
- [The WA Government reports that] "There is a continuing trend towards determinations by consent, with five consent determinations and one litigated determination so far in 2013-14. The Government expects a further 11 consent determinations in 2014-15." (from paragraph 3.24);

- "... [I]n 2012, John Catlin, Executive Director, Native Title Unit, West Australian Department of the Premier and Cabinet, noted that 'the failure of the Act to deliver timely and effective outcomes is undeniable'." (paragraph 3.31);

- "The Western Australian Government has suggested that connection requirements 'are not a significant contributor to delays in the resolution of native title claims'." (paragraph 3.41); and

- "The Attorney General of Western Australia, the Hon Michael Mischin indicated in 2013 that 'there could be a hiatus in consent determinations if the rate of research is not increased and connection deadlines adhered to'... which suggests that the preparation of connection reports may be a bottleneck in the process in that state." (paragraph 3.47).

YMAC is disappointed to see the slowing of claims resolution as a result of the WA State Government's 'State Land Management Strategy'. The burden on Traditional Owners to provide their connection to Country remains high, and tragically elders continue to pass away before their claim can be resolved.

The State takes an overly legalistic approach to its assessment of connection reports, resulting in a lengthy process of legal submissions and/or supplementary reports before it will consider (on a without prejudice and private basis) entering into discussion for a possible consent determination. This often leaves other respondents unsure about their position, and results in requests for connection material and other information from these respondents rather than being able to rely on a more open and transparent approach (as was previously the case in Western Australia).

Often in recent years, the State has required that claim groups enter into a state ILUA, the draft of which undermined the native title rights that are typically recognised in a native title determination, and in all cases has indicated that a consent determination was only offered on the basis that the parties agree to non exclusive native title.

Prior to the High Court decision of *Brown*[28], the State also maintained an unreasonable position as regards extinguishment of native title for improvements, and continues to insist on historical tenure analyses to extinguish wholly or partly the native title rights of claim groups. This differs from the policy position of other states and territories, which rely solely upon current tenure to determine what rights are extinguished.

This current State approach puts our claim groups in the difficult position, after years of waiting, of being asked to consider compromising their native title rights in order to secure a consent determination rather than proceeding to a lengthy and expensive trial process. Even after YMAC achieves successful native title determinations (as in the case of Banjima), the state nevertheless appeals such decisions based on its policy of combating the rights of traditional owners to enjoy exclusive possession.

The State's litigious approach has meant significant funding requirements for trials such as the Banjima and the Ngarla Mount Goldsworthy decisions. YMAC considers that both of these trials should have been unnecessary, that positive outcomes could have been achieved through negotiation, and that the money spent on them could have been better used elsewhere. Even with our record of successful litigation, negotiated outcomes are always preferred. In order to avoid these trials that are costly in so many ways, YMAC seeks to maintain dialogue with the State Government wherever possible, in the best interest of our clients.

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[28] *Western Australia v Brown* [2014] HCA 8.

Ultimately the approach of the State undermines the ability of Aboriginal Western Australians to maximise economic and other opportunities from native title, and thereby contribute to 'closing the gap'. This short sighted approach ultimately places a burden back on all levels of government and, ultimately, the taxpayer.

Should you have any questions about this submission, please contact Cameron Poustie on cpoustie@ymac.org.au or 08 9268 7006.

Yours faithfully

MICHAEL MEEGAN
PRINCIPAL LEGAL OFFICER

National Native Title Council

spirit of Change

Issues Paper

Measures to Address Unprofessional Conduct by Native Title Agents

Introduction

Members of the National Native Title Council (NNTC) are reporting an increasing prevalence of predatory behaviour by agents other than recognised Native Title Representative Bodies/Service Providers (NTRBs/NTSPs) seeking to represent Native Title Parties in the negotiation of future act agreements, Indigenous Land Use Agreements and other settlements contributing to the resolution of native title claims. This is particularly the case in resource-rich regions of Australia. For the purposes of this Issues Paper, we will refer to such agents as 'native title agents'.

A clear trend has emerged in terms of this behaviour which involves two scenarios.

Scenario 1

An agent will approach a member of a native title claim group that has had notice of a significant future act proposal. The agent will suggest that the relevant NTRB/NTSP is not securing for the claim group that quantum of benefits that the agent could secure (and) or that these benefits could be secured more quickly by the agent.

The agent will then facilitate a meeting of the Native Title Party (often of dubious legitimacy) to appoint them to undertake the future act negotiations. The negotiations conducted by the agent will not result in any overall higher level of benefits or more expeditious outcomes. However the agent will secure for themselves a proportion of the benefits; the balance is paid to the Native Title Party without regard for the structuring of these benefits to deliver long term economic development outcomes to the native title party.

Scenario 2

The second scenario involves the NTRB/NTSP representing the native title claim group in relation to the substantive native title claim proceedings in the Federal Court but a private law firm representing the same group in relation to future act negotiations and other cultural heritage matters. What is happening is that the NTRB/NTSP, in compliance with court orders, will prepare a connection report based on credible anthropological and other expert evidence to prosecute the claim to final resolution. Invariably, these reports will require the change group description to be amended to ensure the claim accords with the evidence and as such Applicants might be at risk of being replaced under s66B NTA.

In this scenario, NTRB/NTSPs are reporting that the agent (which in this context will be a private law firm) is prepared to ignore the connection report and advise the Applicant to change claim solicitors to ensure that the private law firm continues to receive instructions (and hence fee payments) from the extant Applicant in the non-court matters. In this scenario, the NTRB/NTSP will not fund the private law firm with the only consequence being that the money obtained in mining agreements on behalf of the broader native title claim group is then being transferred to the same agent to fund the claim that does not accord with credible evidence. Effectively, the agent is getting paid twice out of monies that should be for the benefit of the native title claim group; once, for undertaking the future act negotiation and, twice, to a maintain a claim that might not even accord with the evidence.

In this scenario, the gravest travesty of justice can occur as the Applicant may not even be members of the native title claim group according to the connection report; a clear abuse of process with the agent facilitating that outcome. There are at least three examples currently before the Queensland Division of the Federal Court of Australia where these issues have been or are currently being ventilated. A number of case studies illustrating this behaviour are set out at **Attachment A**.

Impact of Unprofessional Conduct

This behaviour is already generating significant negative legal, social and economic impacts for Native Title Parties. Driving these impacts is the divisive and disruptive effect of the behaviour.

Legal impact

NNTC members are seeing new fractures and disputes arising within Native Title Parties, which in turn are leading to further complexities and delays on significant decisions pertaining to claim business and the authorisation of agreements. This creates new challenges and pressures for NTRB/NTSP legal representatives and inevitably slows down any progress toward claim resolution.

Social impact

These new divisions are also creating real distress for community members, many of whom are senior Traditional Owners and have been waiting over a decade for recognition of their native title rights and interests. NTRBs/NTSPs have drawn on their expertise and experience to establish tailored governance arrangements appropriate to the native title context in order to prevent such confusion, handle disputes and ensure transparent and legitimate decision-making processes.

The unprofessional conduct by third party agents intervening mid-way through negotiation processes and native title claim work is only serving to undermine these efforts to strengthen governance and build leadership within Native Title Parties.

Economic impact

The predatory behaviour of third parties is jeopardising the capacity of groups to leverage their rights and interests for economic development. Any benefits that flow from native title agreements need to be managed collectively, for the benefit of the whole community. The new divisions and confusion described above will create uncertainty for industry parties looking for guarantees that financial benefits will be managed effectively and lead to sustained employment and business development opportunities.

Again, NTRBs/NTSPs have worked intensively with industry and government over the last decade have worked collectively to identify best practice and build the capacity of Native Title Parties in this area. The disruptive and divisive behaviour of third parties is undermining these achievements and threatening to significantly reduce the potential for native title to deliver real, practical economic outcomes for future generations of native title holders.

Current regulatory arrangements

Under s 203B(1)(a) and (e) NTRBs have functions in relation to their defined area to represent native title holders and claimants (collectively "Native Title Parties") in pursuing native title determination applications, compensation applications, future act agreements and Indigenous Land Use Agreements (ILUAs). In general these functions can only be performed at the request of the native title parties.

In performing these functions NTRBs are bound by the extensive regulatory regime contained in Part 11 of the NTA. In addition, the legal practitioners employed by NTRBs to undertake these functions are bound by the legislative and ethical standards applicable to the broader legal profession under the relevant professional conduct rules. Under s 203FE, Native Title Service Providers (NTSPs) are subject to essentially the same regulatory regimes, as are their employed legal practitioners.

Further, both NTRBs and NTSPs are subject to the prescriptive terms of their Program Funding Agreements (PFAs). The current PFAs include requirements going to (*inter alia*) consultation with FAHCSIA regarding key personnel appointments and accounting for "program generated funds" which would include fees or commissions arising from future act negotiations). The ability of FaHCSIA to withdraw funding from an NTRB/NTSP operates effectively as a further regulatory mechanism. Finally, decisions made under 203BB by NTRB/NTSPs are subject to external review pursuant to s203FB.

There is nothing in the NTA that requires native title parties to utilise the services of NTRB/NTSPs in pursuing native title determination applications, compensation applications, future act agreements and ILUAs. In addition, while a party can be represented in the Federal Court by a person other than a legal practitioner only by leave of the Court (s 85), there is no such limitation in relation to future act proceedings before the National Native Title Tribunal (NNTT). In practice the funding provided to NTRB/NTSPs to pursue native title determination applications and the "no costs" provision contained in s 85A ensures that, with few exceptions, only NTRB/NTSPs (or legal practices funded by NTRB/NTSPs) represent native title claimants in determination application and compensation application proceedings. The same is not true in relation to future act negotiations and agreements.

The current scheme of the NTA allows native title parties to appoint an "agent" (not being an NTRB/NTSP) in relation to future act negotiations and for that agent to secure for themselves a proportion of any benefits arising from those future act negotiations. In the case of future acts involving mining projects even a small percentage of the benefits arising from the proposals can represent a significant amount that would otherwise be available for the native title parties. In the event that these agents are a legal practice the only regulatory regime is that applicable under the relevant professional conduct rules. In the event an agent is an entity that is not a legal practice, even one that employs legally qualified staff, there is no regulatory regime.

IMPLICATIONS FOR THE COMMONWEALTH GOVERNMENT

On a simple analysis the situation described could be characterised as one of contestability or freedom to contract. On this analysis the native title party should be able to appoint any entity they chose as their agents in future act negotiations. However a number of factors militate against such a simple analysis. The unprofessional conduct NNTT members are observing currently has a number of serious policy implications for the Commonwealth Government and suggest that the area may be one appropriate for some level of regulation.

Major policy implications include:

- the costs of administration of the future act regime are a cost borne predominantly by Commonwealth and States/Territory Governments[1] and industry;

[1] Jurisdiction over land and resource management is vested in the State and Territories. Paramount

- the future act regime was established by the Commonwealth to reflect its perception of the concept of equality before the law under the *Racial Discrimination Act 1975* (Cth) and facilitated the delivery of benefits to native title parties;
- the extensive regulation regime of NTRB/NTSP was established (in part) to ensure best practice in future act negotiations;
- many native title parties may be yet to develop the governance capacity to make informed decisions as to the appointment of agents;
- Commonwealth broader policy objectives, including its commitments to reaching the Closing the Gap targets, are best served by ensuring thoughtful structuring of future act benefits;
- existing legal professional conduct rules are ill-suited to regulate relations "in the field" in the context of taking instructions from native title parties; ,
- the involvement of agents may delay the overriding imperative to expeditiously resolve determination applications; and

a lacuna in the NTA is being exploited whereby these agents are receiving financial reward from native title claim group monies but are only accountable to a proportionally miniscule group of people being those who make up the applicant (s61) or registered native title claimants (s253) whereas NTRB/NTSP do not charge the claim group for the same services and are accountable to all the people who hold or may hold native title (who, depending on the evidence, may or may not include the Applicant/registered native title claimants).These factors suggest that some form of regulation of the activities of agents in their involvement in future act negotiations may be appropriate. The question then becomes one of identifying an appropriate model for regulation.

POTENTIAL REGULATORY REFORMS

In broad terms, four models of regulation present themselves:

a) A prohibition on entities other than NTRB/NTSPs representing native title parties in future act negotiations;
b) Establishment of a system of registration of future act agents with registration dependent upon fitness and propriety tests (the 'fit and proper person' test) and satisfying prescribed requirements such as the demonstration of appropriate expertise, commitment to an enforceable code of conduct and Commonwealth scrutiny;
c) Regulatory limitation on the fees or commissions that may be imposed by agents arising from future act negotiations; or,

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jurisdiction with respect to 'people of any race' is vested in the Commonwealth. The NTA sought to give effect to State and Territory jurisdiction whilst securing a 'nationally consistent approach to the recognition and protection of native title': NTA 1993 s 207A(2).

d) A composite model involving elements of each of the above.

CONSIDERATION OF THE OPTIONS

Option a) – Prohibition

This option has the advantage of ease of implementation and also of utilising to best effect the previous investment of the Commonwealth in establishing the system of NTRB/NTSPs currently in place. Moreover, s203BB (5) permits the "briefing out" by NTRB/NTSPs to other persons which ensures adequate, ethical representation and assistance is given to native title parties where a conflict of duty and duty might arise. The disadvantages are that it may be perceived as an unnecessary reduction in contestability and may, due to the current funding constraints on NTRB/NTSPs and their limited ability to manage program generated funds, place excessive resource burdens on the current capacity of NTRB/NTSPs leading to delays in proposal finalisation.

Option b) – Registration

This option has the advantage of preserving contestability and expanding potential resources available to native title parties in future act negotiations. It has the disadvantage of requiring the allocation of resources in the establishment and maintenance of the register including those involved in developing appropriate standards for registration, enforcement of the code of conduct. In part these costs could be offset by the imposition of a registration fee. It should be noted that a similar model is utilised in the context of "migration agents", however the "market" in this context is considerably larger than in the context of native title future acts.

Option c) – Regulatory limitation on fees and commissions

This option also has the advantage of preserving contestability and expanding potential resources available to native title parties in future act negotiations. A similar approach is adopted in the context of fees charged by registered native title bodies corporate under ss 60AB and 60AC. It would though require identification (and enforcement) of the appropriate regulatory limit (what is a "reasonable fee"? Should a "scale of costs" approach be adopted?). Enforcement would require the development of an effective "audit" mechanism.

Option d) – Composite Model

While various elements of the foregoing options could be utilised to construct this model the following is illustrative. The model could include a prohibition on agents acting in future act negotiations unless the agent entity is registered with the relevant NTO. Registration

would be dependent upon whether an applicant is a 'fit and proper person'[2], demonstration of appropriate expertise and commitment to an enforceable code of conduct. The NTA could also impose civil penalties (differential amounts for individuals and bodies corporate) and/or injunctions for misconduct by an unregistered entity if that entity provides a service for a fee or reward that it knows, or ought reasonably to know, can only be offered under a registered status. Fees or commissions would be subject to a regulatory limit and could be audited as part of the NTO (re)registration system. Registration decisions made by NTRB/NTSPs could be subject to the existing processes of internal and external review. Effectively therefore the costs of regulation under this model are shifted to NTRB/NTSPs. Similarly to option b), some of these costs could be offset by the imposition of a (Commonwealth determined) registration fee.

Each of the foregoing options are feasible responses to the issue. Each option would require some level of legislative (or potentially regulatory) amendment. On balance it is considered that option d) minimises the resource implications to the Commonwealth while maintaining a desirable level of contestability and facilitating the maximum achievement of broader Commonwealth policy objectives.

Risk management

The main affected stakeholder group (outside of the native title community) is the legal profession represented by the Law Council of Australia (LCA). The LCA may see any system of registration as a limitation on legal practitioners' "right" to practise in a similar fashion to that organisations' objection to the requirement for legal practitioners to gain registration as migration agents. The NNTC is currently in discussion with the LCA in an effort to gain the LCA's support for proposals for regulation in this area.

Given the interests of resource companies in future act negotiations, it will be essential to bring the Minerals Council of Australia, and where appropriate State and Territory peak industry associations, into discussions on any regulatory and policy reforms. It is vital to ensure that any reforms are consistent with the cooperative approaches that NTRB/NTSPs have built up over the last decade and that industry understands the full implications of the unprofessional conduct we are observing on the successful implementation of native title agreements into the future.

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[2] Having regard to such considerations as whether an applicant is a person of good fame, integrity and character (the broad principles of integrity, competence, diligence and professionalism have already been spelt out by the High Court and full Federal Court in a number of cases), and whether any of the following events has occurred to them in the previous, say, five (5) years such as they have had the status of undischarged bankruptcy, served a term of imprisonment (whole or part), or convicted of an offence involving fraud or dishonesty.