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Professor Lee Godden
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Dear Professor Lee Godden

Submission to the Australian Law Reform Commission's Discussion Paper, Review of the Native Title Act 1993

I am pleased to provide a submission on behalf of the National Native Title Tribunal in response to Discussion Paper 82 *Review of the Native Title Act 1993* published on 23 October 2014.

Yours sincerely

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Submission by the National Native Title Tribunal on the Australian Law Reform Commission's October 2014 Discussion Paper, Review of the Native Title Act 1993

21 January 2015

Overview

The National Native Title Tribunal (The Tribunal) welcomes the opportunity to provide comment on the Australian Law Reform Commission's October 2014 Discussion Paper, Review of the *Native Title Act 1993* (the Discussion Paper).

A number of the Discussion Paper's questions and proposals may impact directly or indirectly on the performance or the functions of the Tribunal or the Native Title Registrar (the Registrar) under the *Native Title Act 1993 (Cth)* (the Act).

This submission responds to those proposals and questions.

The Discussion Paper also includes a suggestion that government consider establishing an Indigenous dispute resolution service to address the current lack of appropriate resources available to provide native title related dispute resolution mediation[1]. Reference is made to the representative bodies having a statutory responsibility for dispute resolution, as set out in s 203BF of the Act.

The Tribunal has assistance functions in relation to this dispute resolution, as set out in s 203BK of the Act and is uniquely resourced to provide appropriate mediation support in this area. Indeed, the Discussion Paper notes that the North Queensland Land Council has utilised the assistance of the Tribunal on two occasions and found it to be very useful.

Given the resultant benefits flowing from accessing appropriate mediation support and resources, any barriers discouraging representative bodies requesting assistance from the Tribunal should be removed.

Accordingly the Tribunal recommends that s 203BK(3) of the Act be amended to remove the requirement that the representative body and the Tribunal enter into an agreement about funding whereby the representative body is liable to pay the Commonwealth for the assistance.

Comments on specific proposals and questions

Proposal 5-1 to 5-5 – proposed amendment to s 223(1) of the Act
These proposals are directed toward changing the definition in s 223(1) of the Act of the expression 'native title' or 'native title rights and interests'. The proposals 'address the technicality and complexity of establishing the existence of native title rights and interests'.

These proposals may indirectly impact on the consideration of the Registrar in deciding whether a Native Title Determination Application (an Application) can be accepted for registration pursuant to s 190A of the Act. Registered native title claimants are entitled to be afforded procedural rights. When considering the assertions in s 190B(5)(b)-(c) of the Act, the Registrar

[1] The Discussion Paper acknowledges that the suggestion is outside of the Inquiry's terms of reference.

must have regard to the meaning of 'traditional' as defined by s 223(1) of the Act: *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167. For instance, for the factual basis to be considered sufficient to support these assertions in any particular matter, it must identify a relevant pre-sovereignty society, being 'a society united in and by its acknowledgement and observance of traditional laws and customs has continued in existence since prior to the assertion of sovereignty.' Accordingly, any amendment to s 223(1) of the Act may have a consequential impact on the way in which the Registrar approaches the task at s 190B(5)(b)-(c) of the Act.

Proposal 6-1 – proposed amendment to s 62(1)(c) of the Act
This proposal recommends the removal of the reference to 'traditional physical connection' in the wording of s 62(1)(c) of the Act[2] to ensure consistency with the courts' interpretation of s 223 of the Act.

It is unlikely that the proposed change to s 62(1)(c) would impact on the performance of the Registrar's functions as the Registrar does not test an application against s 62(1)(c) because it is not a mandatory requirement of the registration test, as indicated by the use of the word 'may' in this section.

Proposal 6-2 – proposed amendment to s 190B(7) of the Act
This proposal recommends the removal of the 'traditional physical connection' element of the requirement in s 190B(7) of the Act.

There have been no instances in which an application has been not accepted for registration solely on the basis of failing to meet the conditions of s 190B(7) of the Act[3]. Therefore, in the context of the test for registration, s 190B(7) of itself has not in a practical sense been a bar to achieving registration.

Proposal 7-1 to 7-2 – proposed amendments to s 223(1) of the Act
This proposal removes the word 'traditional' from s 223 of the Act. As noted above, the definition contained in 223(1) of the Act is relevant to the Registrar's considerations at s 190B(5) of the Act. The proposal in 7-1 to 7-2 may therefore indirectly impact on the performance of the Registrar's functions.

If proposal 7-1 to 7-2 were adopted consideration should be given to whether other provisions in the Act should be amended to remove the use of the word 'traditional'. In the context of the Registrar's functions this term is used in the following provisions of the Act:

- Section 61)(1)
- Section 62(2)(c)(i) and s 62(2)(e)(ii)-(iii)
- Section 190B(5)(b)-(c)
- Section 190B(7)
- Section 251A(a) and s 251B(a)

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[2] Paragraph 6.29 of the Discussion Paper incorrectly notes that "s 62(1)(c) provides that the affidavit may contain details of 'any traditional physical connection' with the land and waters...". Section 62(1)(c) provides that the application may contain these details.
[3] According to registration test related data compiled by the Registrar.

It may also follow that the requirement in s 190B(5)(a) of the Act should be considered to ensure consistency with the above proposed amendments, even though this paragraph does not refer to the term 'traditional'. This requirement is that 'the native title claim group have, and the predecessors of those persons had, an association with the area.' This requirement is currently interpreted to mean that the factual basis must support the assertion that the 'predecessors' at sovereignty had an association with the area and that there has been a history or continuity of association since that time (see *Gudjala People #2 v Native Title Registrar* [2007] FCA 1167). However if s 223 of the Act were to be amended, s 190B(5)(a) may be interpreted differently by the courts.

Proposal 8-1 to 8-2 – proposed amendments to s 223(2) of the Act

The Discussion Paper notes that s 223(2) of the Act provides a non-exhaustive list of representative native title rights and interests and the proposals appear to be directed towards expanding the rights and interests which can be recognised in a determination. Such an amendment may in turn expand the rights and interests which are capable of being registered and impact on how the Registrar approaches this task at s 190B(6) of the Act. This section provides that the Registrar must consider that, prima facie, at least some of the native title rights and interests claimed in the Application can be established. In the performance of this task the Registrar will have regard to whether a claimed right or interest is one which is capable of recognition as a native title right or interest.

Questions 9-7 to 9-11 – native title application inquiries

Sections 138A – 138G of the Act provides for the Federal Court, either of its own motion or at the request of a party to a proceeding or a person conducting mediation, to direct the Tribunal to hold an inquiry into a matter or an issue relevant to the determination of native title under s 225.

Section 225 relates to the person(s) who may hold native title rights and the nature and extent of any such rights and interests.

The expectation is that such an inquiry would lead to an agreement on findings of fact, an action that would resolve, progress or amend the relevant application. Currently, s 138B(2)(b) requires that the applicant in relation to the application which is to be the subject of an inquiry must agree to participate in the inquiry.

Native title application inquiries were introduced in the 2007 amendments to the Act as a recommendation of the review undertaken by Hiley & Levy[4] to improve the manner in which the Federal Court and the Tribunal could manage and resolve native title claims.[5] Specifically, the intention was to assist parties to reach agreement about the issue of whether a native title claim group holds native title rights and interest and issues pertaining to the connection of the claim group with the land and waters claimed.[6]

[4] G Hiley and K Levy, Native Title Claims Resolution Review, 31 March 2006.

[5] Native Title Amendment Bill 2006, Explanatory Memorandum

[6] Native Title Amendment Bill 2006, Explanatory Memorandum

To date, the Federal Court has only once directed the Tribunal to conduct an inquiry under s 138B. This inquiry was completed in December 2014 and this experience informs the Tribunal's comments.

Question 9-7 Would increased use of native title application inquiries be beneficial and appropriate?
As noted in the Discussion Paper, the inquiry process has many benefits and can assist in the resolution of an application through mediation. The findings of an inquiry can also be adopted by the Federal Court in litigation if necessary.

The inquiry process is a useful mechanism to assist in investigating an issue which may be an obstacle to parties reaching an agreed resolution. It is generally accepted that many remaining native title determination applications contain complex issues to be resolved, including the extent of territory and rights.[7] The resolution of such applications through mediation would be greatly assisted by a native title application inquiry.

Question 9-8 Should the requirement for the applicant to agree to participate be removed?
As noted above, the complexities of many remaining native title determination applications not only mean such applications would potentially benefit from a native title application inquiry but that there may be reluctance on the part of some applicants to agree to participate in an inquiry. The current requirement that the applicant agrees to participate, limits the circumstances in which the Federal Court could direct the Tribunal to undertake an inquiry and removes a potential mechanism to assist in the resolution of an application through mediation, although, it is noted that an inquiry may be limited if unsupported by the applicant.

If amendments were to be made to the Act whereby the Federal Court did not require the agreement of the applicant to direct the Tribunal to conduct an inquiry, the Tribunal would require the appropriate powers to direct parties to attend hearings, and produce documents etc.

Question 9-9 In a native title application inquiry, should the Tribunal have the power to summon a person to appear before it?
In order for the Tribunal to ensure the findings of an inquiry are as comprehensive as possible, it may be that a specific person(s) is required to appear before the Tribunal. If such a person is unwilling to do so, the Tribunal may require the power to summon a person. Such a power will ensure that any inquiry conducted by the Tribunal will be as meaningful as possible.

Question 9-10 Should potential claimants, who are not parties to proceedings, be able to request the Court to direct the Tribunal to hold a native title application inquiry? If so, how could this occur?
No. It is difficult to conceive of how a "potential claimant" who is not a party to a proceeding would be in a position to request the Court to direct the Tribunal to hold a native title application inquiry and on what basis the Court would consider an application from a person who was not a party.

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[7] This was noted in the Native Title Amendment Bill 2006, Explanatory Memorandum as part of the rationale for the introduction of the function.

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

The current requirement that the applicant agree to participate in the inquiry is an unnecessary hindrance on the use of the inquiry referral mechanism set out in s 138B. Amendments should be made to the Act removing s 138B(2)(b) entirely. It is enough that the Court must be satisfied of the matters set out in s 138B(2)(a), and may take into account the wishes of the applicant in relation to the referral in any event, when necessarily considering whether such referral would be likely to lead to agreement, resolution, amendment or something else occurring in relation to the claim.

Proposal 10-1 to 10.2 – proposed amendments to ss 251A and 251B of the Act

These proposals are directed towards the provisions of the Act that set out the decision-making process for authorising the making of an Indigenous Land Use agreement (see s 251A of the Act) or for authorising an applicant (see s 251B of the Act). Compliance with these provisions are matters the Registrar is required to consider in the performance of certain functions— see ss 24CL(3) and 190C(4)(b) of the Act.

The effect of the proposed amendments is to make these provisions less restrictive when decisions are required to be made for these purposes by a native title claim group. That is; the group need not use a traditional decision making process, even where one exists, if they so choose. The Tribunal notes that considerable resources can be directed to examining the authorisation process; looking at if a traditional decision making process exists and therefore should have been implemented and whether or not it applies in relation to 'authorising things of that kind'. This is particularly where there is disagreement amongst individuals as to the decision making process used.

The Tribunal sees merit in an amendment allowing a group to agree and adopt a process or utilise a traditional process, where the amendment is worded in a manner which assists in clarifying the requirements of authorisation.

Note: Page 190 of the Discussion Paper states that 'a person who authorises the making of an agreement is known as a party'. Section 24CD of Part 2, Division 3 Subdivision 3 of the Act identifies the person/s or body/ies who must or may be a party to an area agreement. The parties to an area agreement need the authority of the persons who hold or may hold native title in the area to make the agreement, but it does not necessarily follow that a person who authorises the making of an agreement must be a party.

Proposal 10-3 – scope of authority

As proposed, clarification of the scope of the applicant's authority and any group imposed conditions would assist the Tribunal when conducting inquiries and making determinations on future act matters.

The Tribunal supports amendments to s 62A of the Act to the effect that the applicant may deal with all matters arising under the Act subject to any conditions imposed by the claim group.

Proposal 10-4 – notice of limitation on authority to enter agreements to appear on Register
The Discussion Paper proposes that where the claim group limits the authority of the applicant in relation to entering into agreements with third parties, those limits must appear on a public register such as the Register of Native Title Claims. Whilst the Tribunal agrees that the Register of Native Title Claims is the most appropriate public register for such information to appear, the Tribunal does not support the proposed amendment.

The Tribunal's experience is that limitations of authority for agreement making are common, varied and fluid. Public notice of such limitations as they exist from time to time, by way of updates to the Register, would be an unnecessary administrative burden on the Tribunal. The Tribunal notes it is the duty of the solicitor on the record to ensure any instructions relating to limitations of authority are complied with.

Further, the Tribunal submits that further consideration is required of the consequential impacts of such notice. For example, must the Tribunal consult the Register on matters of authority before considering a future act determination or expedited procedure inquiry? What impact does notice have on Tribunal inquiries generally? What if the evidence of the parties was contrary to a notice of authority on the Register?

Proposal 10-5 – applicant may act by majority
It is proposed that if the authorisation of the applicant itself is silent on the matter, the applicant may act by majority. The Tribunal supports this proposal and notes this might reduce the number of s 66B applications and resulting changes to the Register, reducing the administrative burden of the Tribunal. The Tribunal also notes that the proposal may assist with the early resolution of future act matters appearing before the Tribunal for determination simply because an individual named applicant refuses to sign an agreement the claim group has authorised.

Proposal 10-6 – named applicant unable or unwilling to act
It is proposed that where a named applicant is unwilling or unable to act then the remaining named applicants may continue to act without reauthorisation (unless the original authorisation provides otherwise), and that there be a simplified process where the removal of a named applicant is not controversial or disputed.

The Tribunal supports clarifying when reauthorisation of an applicant is required as this would assist the Tribunal in its dealings with native title parties, particularly in relation to future act matters.

Question 11-2 – notification of Aboriginal Land Councils
The question is whether ss 66(3) and 84(3) of the Act should be amended so that Local Aboriginal Land Councils (LALCs) under the *Aboriginal Land Rights Act 1983* (NSW) must be notified by the Registrar of a native title application and may become parties to the proceedings if they satisfy the requirements of s 84(3).

The Registrar notes that as a matter of practice LALCs are notified of native title applications which overlap with their council areas.